



Drug detection dogs: the legal position in New South Wales

by Gareth Griffith

1 Introduction

On 19 September 2012 the Attorney General, Greg Smith, introduced into the Legislative Assembly a Bill to extend the scope of the use of drug detection or "sniffer" dogs without warrant in Kings Cross and on CityRail lines - the [Law Enforcement \(Powers and Responsibilities\) Amendment \(Kings Cross and Railway Drug Detection\) Bill 2012](#) [the 2012 Bill]. As explained in the [explanatory note](#), the object of the Bill:

is to authorise the use by police officers of dogs for general drug detection (without warrant) on the streets and other public places in the Kings Cross precinct. The Bill also adds additional train lines on which police officers may use dogs for that purpose so that all suburban train lines on which CityRail operates train services are covered

The 2012 Bill would insert new subsection 148(1)(d) into the *Law Enforcement (Powers and Responsibilities) Act 2002* [LEPRA], to extend the use of sniffer dogs for general drug detection in authorised places (without warrant) to include "persons at any public place in the Kings Cross precinct". It would also amend the *Law Enforcement (Powers*

and Responsibilities) Regulation 2005 to extend the use of drug detection dogs to all CityRail suburban train lines.

On one view, the 2012 Bill does not involve the introduction of any new principle or practice into the criminal law. Rather, it can be said to extend the geographical fields of operation for defined police powers under s 148 of LEPRA. On the other hand, the 2012 Bill applies to an entire neighbourhood, which is partly residential in nature. In this respect its scope of operation can be said to be quite different to the current law, which is targeted to particular premises and events, as well to specified train lines.

The purpose of this e-brief is to set out the background to this proposed legislation, looking at the development of the relevant statutory law, along with the debate about the use of drug sniffer dogs.

2 The current legislative context

In 2001 the use by police of drug detection or "sniffer" dogs in public places was the subject of legislation, in the form of the *Police Powers (Drug Detection Dogs) Act 2001*. This Act commenced in February 2002 and, in

the same year, it was incorporated into the consolidated police powers statute, as Part 11, Division 2 of the *Law Enforcement (Powers and Responsibilities) Act 2002* [LEPRA]. The 2001 Act was repealed by Schedule 3 of LEPRA, which commenced on 1 December 2005.

The 2001 Act has a number of components. First, it provided police with an express and general statutory power to use a dog for the purpose of detecting a drug offence, but only if the police officer is already "authorised" to do under the law.

The Act also expressly provided for the use of a dog by police in what is called "general drug detection". This involves the detection of drugs before a police officer reasonably suspects that a person has committed a drug offence. The dog's response may provide the officer with grounds reasonably to suspect that a person is committing a drug offence, and so conduct a search of that person.

General drug detection using dogs can be used in two circumstances:

(a) with a warrant where a police officer has reasonable grounds to suspect that some persons (but not any particular individual) in any public place may be committing drug offences; and

(b) without a warrant in certain authorised public places, including where persons are entering or leaving: liquor outlets; sporting events, concerts and other artistic performances; and public passenger vehicles, stations or platforms on designated routes. This power was extended by the *Tattoo Parlours Act 2012* to include any premises police are authorised to enter under that Act.

The 2001 Act required police officers when carrying out general drug detection to "take all reasonable precautions to prevent the dog touching the person".

In the second reading speech for the 2001 Act, the Minister for Police, Michael Costa, explained:

Police will be able to target well-known drug dealing areas and break up the trade in prohibited drugs. One situation the bill contemplates is where a drug detection dog touches a person while searching. This might currently render a search unlawful because the trespass on the person is not justified at the time the dog touches the person. The police officer may not yet have formed a reasonable suspicion when the dog touches the person but does so only after the touching. The touching is potentially an unjustified trespass and therefore unlawful.

The bill indicates that all reasonable precautions should be taken by a police officer conducting a general drug search to stop the dog from touching a person. However, if despite the best efforts of the police officer handling the dog an inadvertent or incidental touching takes place then the touching by the dog does not constitute an unlawful search by the police officer. Police appreciate that the safety of all persons involved and of the dog is best served if the dog cannot touch the suspect at all, and intentional touching is not authorised by this bill.¹

3 Police search powers

The language used in the second reading speech for the 2001 Act raises the question whether the use of dogs for general drug detection can be said to constitute a search, and more specifically whether the touching of a

person by a sniffer dog in these circumstances can be said to constitute a search and a trespass against the person amounting to a battery.

Prior to the 2001 Act there was no common law or statutory provision expressly permitting the use of police sniffer dogs, either in the random patrolling of public places or in such designated public places as sporting or entertainment venues.

There is no common law power to search a person before arrest, or to search a person in order to see if there is any evidence of a possible offence.²

As for statute law, the provisions existing before 2001 only empowered police searches where an officer had formed a reasonable suspicion that a person was in possession of a prohibited drug, stolen property or anything that might be used in the commission of an indictable offence. The specific provisions were s 37(4) of the *Drug Misuse and Trafficking Act 1985* and s 357E(a) of the *Crimes Act 1900*.

The weight of judicial opinion seems to favour the view that the 2001 Act did not alter the legal position in respect to the requirement for reasonable suspicion prior to the conducting of a search. This is because the use of drug detection dogs does not, as a rule at least, constitute a search. As NSW Ombudsman [explained](#) in 2006:

Rather, drug detection dogs are engaged in a process of identification that police use as a tool to assist in the formation of a reasonable suspicion that a person is in possession or control of a prohibited drug.

The general power to search persons, based on reasonable suspicion and without a warrant, is currently found in s 21 of LEPR.

(1) A police officer may, without a warrant, stop, search and detain a person, and anything in the possession of or under the control of the person, if the police officer suspects on reasonable grounds that any of the following circumstances exists:

(a) the person has in his or her possession or under his or her control anything stolen or otherwise unlawfully obtained,

(b) the person has in his or her possession or under his or her control anything used or intended to be used in or in connection with the commission of a relevant offence,

(c) the person has in his or her possession or under his or her control in a public place a dangerous article that is being or was used in or in connection with the commission of a relevant offence,

(d) the person has in his or her possession or under his or her control, in contravention of the [Drug Misuse and Trafficking Act 1985](#), a prohibited plant or a prohibited drug.

4 The Darby case

The 2001 Act was the result of a ruling by a magistrate in the case of *Police v Glen Paul Darby*³ to the effect that the searching of a person who had been drawn to police attention by a sniffer dogs was illegal. In that case, Mr Darby had been standing outside a nightclub on Oxford Street when he was detected by a sniffer dog. He was subsequently searched by police officers and charged with possession of prohibited drugs.

The crux of the case related to the requirement that the police officer form a reasonable suspicion that the

defendant was in possession of a prohibited drug before conducting the search. But it was also the case that the police dog in question, Rocky, had touched the defendant by placing his nose on Mr Darby's pocket to indicate to his handler the presence of a prohibited drug. Rocky was said to have made contact with Mr Darby a number of times by "nudging", "bunting" and "ferreting" his pocket.⁴

In the event, Magistrate Mary Jerram made no finding on the trespass to the person point but, rather, excluded the evidence on the grounds of unlawful search. Magistrate Jerram made reference to a "breach of personal rights", notably the right of privacy under Article 17 of the [International Covenant of Civil and Political Rights](#).

This finding was later overturned in the NSW Supreme Court, in [DPP v Darby](#)⁵, where O'Keefe J held that the magistrate had erred in law by determining that the actions of the drug detection dog amounted to a search.

The decision of O'Keefe J was further appealed to the NSW Court of Appeal. In [Darby v DPP](#)⁶ the majority (Ipp JA and McColl JA) held that none of the actions of the drug detection dog Rocky amounted to a search. It was said that:

"Search"...when applied to a person, involves examining the person for the purpose of finding out whether any prohibited drugs are in his or her clothing or body. On the evidence, none of Rocky's actions were performed for this purpose. All his actions, in relation to the appellant, were performed for the purpose of identifying to the police officers present which person in the crowd of people was the person who possessed the drug, the smell of

which the dog had detected...The dog was not looking for the drug. He knew where it was...Rocky was merely completing the identification of the person who was in possession of the drug. By doing that the dog was not carrying out a search. [paras 121-123]

The Court of Appeal held unanimously that using a dog to *sniff in the vicinity* of a person for the purpose of drug detection does not constitute a search.

One comment on this finding, from Dan Meagher, is that "This approach assumes that an indication by a drug detection dog is invariably accurate".⁷ Meagher went on to say that, based on the empirical evidence set out in the NSW Ombudsman's report of 2006 (see below) as to the accuracy of dog detections, "It is far from clear...that an indication alone provides the reasonable grounds to search...".⁸

In the minority, Glass JA held that the dog's actions did, in this instance, constitute a search. This was because of the contact the dog had made with Mr Darby in this case. Glass JA said:

In my opinion, Rocky's sniffing in the vicinity of the appellant, indicating that there was a scent without putting his nose on it, was not a search. [para 62]

For Glass JA, the issue was that the dog's actions transgressed what a police officer could lawfully do:

If Rocky had done no more than place his nose on the appellant's pocket, it may be that there would have been only identification of a place for the police to search, and no search by the police through Rocky. But there was more. Rocky was pushing and ferreting at the appellant's pockets with his nose, and was pursuing the appellant in

the manner earlier described with the appellant attempting to push him away. At this stage Rocky was doing what the police could not do without authority. If Senior Constable Richardson had placed his hand on the appellant's pocket, had pushed against it, had ferreted at it although not getting his hand in it, and when the appellant moved away had followed him and done the same, it seems to me that his actions would correctly be described as searching for the contents of the pocket. He would have been doing the equivalent to, perhaps more than, what is sometimes known as a pat-down search. Rocky was similarly searching, and in my opinion on the facts of this case there was a search. [para 76]

The decision in *Darby* was reviewed by Black DCJ in [Harris v DPP](#)⁹. In this last case, evidence obtained following a police search was excluded, further to s 138 of the *Evidence Act*, because the dog made improper (but not unlawful) contact with the appellant before the police officer had formed any reasonable suspicion on which to base the search.

Commenting on the *Darby* and *Harris* cases in the *Law Society Journal*, Steve Bolt pointed out that the *Darby* and *Harris* cases considered the law as it stood before the commencement of the 2001 Act. On the issue of whether the touching by a sniffer could amount to a battery, Bolt said:

Arguably, the legislation may even reinforce the point that contact by a sniffer dog can constitute a battery, because s 9 of the [2001] Act requires the police to take "all reasonable precautions" to avoid the sniffer dogs making any contact with anybody.¹⁰

In 2006, the Ombudsman reported on this issue as follows:

A number of legal ambiguities contained in the Drug Dogs Act have been brought to our attention during the review. For example, the issue of whether any slight or unintentional touching by a drug detection dog constitutes a trespass under the Drug Dogs Act appears to be open to interpretation. Given this uncertainty, we have recommended that the Parliament consider clarifying the legal consequences that may flow from contact between a drug detection dog and the person being screened.¹¹

The relevant provision has not been amended since that time. Currently, ss 150(1) and (2) of LEPRA provide:

(1) A police officer carrying out general drug detection under this Division is to take all reasonable precautions to prevent the dog touching a person.

(2) A police officer is required to keep a dog under control when the officer is using the dog to carry out general drug detection under this Division.

5 Ombudsman's review of the 2001 Act

A feature of the 2001 Act was that it was to be monitored by the Ombudsman, who was to report after two years on the exercise of these powers.

On 12 June 2002 Michael Costa said in the Legislative Council:

The Government's drug detection dogs legislation passed last year tightens the controls in place for the use of drug detection dogs in New South Wales. The new laws introduce restrictions, accountability and oversight that were not previously a specific requirement of their use. The New South Wales

Ombudsman will review the use of drug detection dogs after two years, in order to ensure that police are not unfairly infringing on people's civil liberties.¹²

The Ombudsman's review of the 2001 Act was published in June 2006. This remains the most detailed account of this aspect of policing in NSW. The review's broad [conclusion](#) reads:

Our review found that despite the best efforts of police officers, the use of drug detection dogs has proven to be an ineffective tool for detecting drug dealers. Overwhelmingly, the use of drug detection dogs has led to public searches of individuals in which no drugs were found, or to the detection of (mostly young) adults in possession of very small amounts of cannabis for personal use. These findings have led us to question whether the Drug Dogs Act will ever provide a fair, efficacious and cost effective tool to target drug supply. Given this, we have recommended that the starting point, when considering this report, is to review whether the Drug Dogs Act should be retained at all.

The Ombudsman reported that:

Prohibited drugs were only located in 26% of the searches following an indication. That is, almost three-quarters of all indications did not result in the location of prohibited drugs.¹³

Discussed in detail in the report were such issues as the cost effectiveness of drug detection dogs, as well as their effectiveness in targeting those responsible for the supply of drugs. Complaints were also analysed, with the Ombudsman reporting that:

we examined over 50 written complaints from people who were affected by or concerned about the

use of drug detection dogs. The principal concerns raised in the complaints related to: 'false' indications or dog behaviour (raised in 47% of complaints); infringements of civil liberties and damage of community confidence in police (47%); feelings of embarrassment, humiliation and anger at being detained and searched (29%); escalation of searches leading to the person being arrested and charged with non-drug related offences such as resist police (24%); concerns about the way police obtained and recorded information from the person searched (16%); and victimisation felt by the person because of their racial or other minority status (12%).¹⁴

On this last point, the Ombudsman went on to report "we did not uncover any solid evidence that police used drug detection dogs in a discriminatory manner".¹⁵

On the legal question of whether an indication by a drug detection dog supplies the reasonable grounds for a police search, the Ombudsman's report stated:

Given the low rate of detecting drug offences following a drug detection dog indication, it is our view, supported by Senior Counsel's advice, that it is not sufficient for a police officer to form a reasonable suspicion that a person is in possession or control of a prohibited drug solely on this basis.¹⁶

The Ombudsman recommended "the removal of advice contained in current guidelines that police officers have reasonable suspicion to search a person based solely on a drug detection dog indication".¹⁷

6 Critical perspectives

Since they were first proposed the laws relating to the use of police drug detection dogs have been subject to critical comment. For example, the NSW Greens have long opposed these laws, both from a civil liberties perspective and in terms of their practical effectiveness.

Responding to the current proposals for reform in the 2012 Bill, [David Shoebridge](#) MLC stated (in part):

The most recent police figures show that sniffer dogs are wrongly indicating people are in possession of drugs a staggering 80 per cent of the time. Now the government wants to expand the programme?

In the first nine months of 2011 police publicly searched 14,102 people for drugs following positive indications by police dogs, and on 11,248 occasions no drugs were found.¹⁸

7 The Second Reading speech for the 2012 Bill

In the [second reading speech](#) for the 2012 Bill, the Attorney General Greg Smith said:

With the passage of this bill, those carrying illegal drugs within Kings Cross should not be under any illusions that they will be safe from detection. The Government makes no apologies for introducing these tough new powers to help the New South Wales Police Force to make Kings Cross a safer place. The bill extends the use of drug detection dogs without warrant to public places in the Kings Cross precinct. The definition of "public place" contained in the Act is broad. It will allow police to use drug detection

dogs without a warrant in places where they presently cannot be used.

The Attorney General went on to say:

However, the bill acknowledges that people go to Kings Cross for multiple purposes and that some people live there. It does not give police officers powers in private homes. The purpose for which an owner or manager of land or premises opens it to members of the public will be relevant. For example, the lobby of a strata building may not constitute a public place because, although it can be accessed by the public, it is intended to be accessed only by residents and their visitors.

Reference was also made to the amendment of the regulations to extend the use of drug detection dogs throughout the CityRail network. The Attorney General stated:

The Government is remedying a nonsensical situation by making it clear that police drug detection dogs can operate on all suburban and outer suburban rail lines on which CityRail trains operate.

Mention was made of the work of the recently centralised Police Transport Command, in relation to which the Minister commented:

The Police Transport Command has already had success on the lines to which it already has access to use a drug detection dog without a warrant. On 25 May this year, using a drug detection dog from the Dog Unit, police officers detected a man on a train between Central and Kings Cross carrying 200 ecstasy tablets.

The Attorney General added:

The Government does not judge the effectiveness of drug detection dogs solely based on the apprehension of drug traffickers. Apart from the benefit of using these dogs for specific operational objectives, their use offers many policing benefits, including creating a general deterrence and providing a visible response to drug-related crime. The Government makes no apologies for using drug detection dogs to send a message that society does not condone illicit drug use.

8 Conclusion

As noted, the novel features of the 2012 Bill are that, in one direction, it extends the use of drug detection dogs across the entire CityRail network and, in another, it applies to an entire neighbourhood, which is partly residential in nature. It is in these contexts that the Bill seeks to extend the scope of police powers. Issues of a practical nature are raised, but also concerning the balance between the exercise of police powers for the protection of the community, on one side, and concerns about the conducting, in public, of unreasonable searches.

¹ NSWPD, 6 December 2001, p 19745.

² *Ghani v Jones* [1970] 1 QB 693 at 706; *GH Photography Pty Ltd v McGarrigle* [1974] 2 NSWLR 635.

³ 31 October 2001, Local Court, Downing Centre.

⁴ Note that the Magistrate's ruling was later overturned by the NSW Supreme Court - *Darby v DPP* [2004] NSWCA 431. See also *Harris v DPP*, Lismore District Court, 11 March 2005 (Black DCJ). For a commentary on the Darby case and the 2001 Act see – P Gibson, "Sniffer dog snuffed out by magistrate", Law Society Journal,

⁵ [2002] NSWCS 1157.

⁶ [2004] 61 NSWLR 558; NSWCA 431.

⁷ D Meagher, "The status of using drug detection dogs under Australian law" (2009) 33 *Criminal Law Journal* 165 at 166. Meagher also questioned the characterisation of the dog's activities as being *solely* for the purpose of identification.

⁸ D Meagher, "The status of using drug detection dogs under Australian law" (2009) 33 *Criminal Law Journal* 165 at 169. In an article published in the *Criminal Law Journal* in 2009, Dan Meagher reviewed the law in other Australian jurisdictions, as well as in the US and Canada. He noted that the US law is basically consistent with the finding in the Darby case, to the effect that the use of a well-trained and accurate drug detection dog does not violate the constitutional prohibition against unreasonable searches. On the other hand, the Canadian position is that the use of drug detection dogs does constitute a search for the purpose of the *Canadian Charter of Rights and Freedoms*. Meagher's conclusion is that "there are respectable arguments on both sides" (page 167).

⁹ (Lismore District Court, 11 March 2005)

¹⁰ S Bolt, "Sniffer dog evidence excluded", *NSW Law Society Journal*, June 2005, p 82.

¹¹ NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, p viii.

¹² NSWPD, 12 June 2002, p 2970.

¹³ NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, p ii.

¹⁴ *Review of the Police Powers (Drug Detection Dogs) Act 2001*, p v.

¹⁵ *Review of the Police Powers (Drug Detection Dogs) Act 2001*, p v. The Ombudsman has also reported on other legislation authorizing the use of drug detection dogs. The [website](#) states in this respect: "The *Police Powers (Drug Detection Trial) Act 2003* aimed to equip police with additional powers to tackle the vehicular trafficking of indictable quantities of drugs by allowing police to randomly stop and screen vehicles with drug detection dogs in areas where there is intelligence and evidence suggesting that drugs are being couriered on a regular basis. A critical examination of this trial and its predecessor - the *Police Powers (Drug Detection in Border Areas Trial) Act 2003* - reveals the powers are demonstrably

ineffectual in assisting police to apprehend drug couriers on a sustained basis".

¹⁶ *Review of the Police Powers (Drug Detection Dogs) Act 2001*, p iii.

¹⁷ *Review of the Police Powers (Drug Detection Dogs) Act 2001*, p iv. See NSW Police Force, [Code of Practice for Crime](#), January 2012.

¹⁸ See also - A Petty, "Sniffer dogs get it wrong four out of five times", [Sydney Morning Herald](#), 12 December 2011.

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