

# Bail compliance checks in NSW

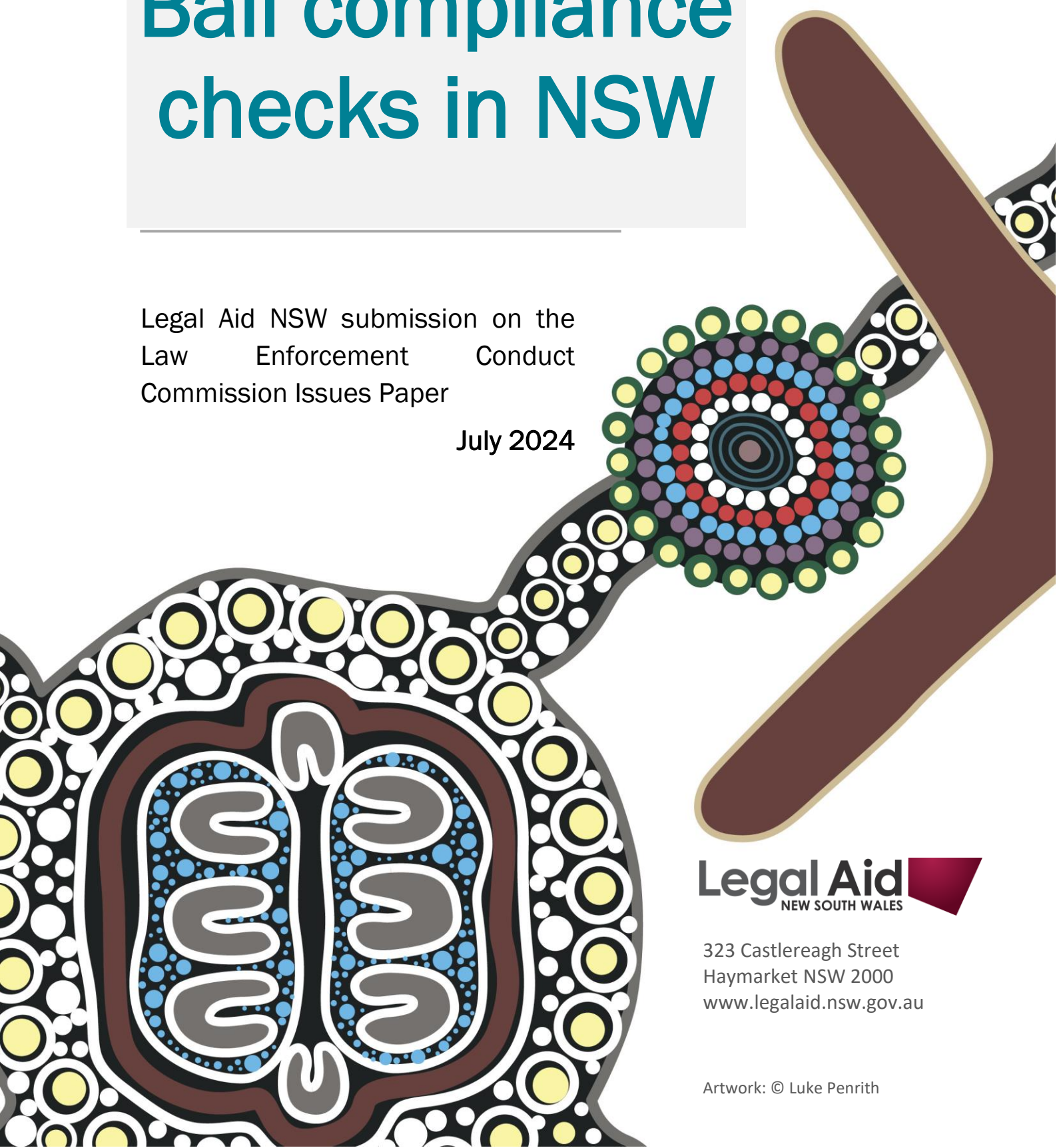
Legal Aid NSW submission on the  
Law Enforcement Conduct  
Commission Issues Paper

July 2024

**Legal Aid**  
NEW SOUTH WALES

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# Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

## About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients. We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law. Specialist services focus on the provision of family dispute resolution services, family violence services, services to Aboriginal families and the early triaging of clients with legal problems through the Family Law Early Intervention Unit. Legal Aid NSW provides duty services at all Family and Federal Circuit Court registries and circuit locations through the Family Advocacy and Support Service, all six specialist Children's Courts, and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and most regional offices. The purpose of the Civil Law Division is to improve the lives of people experiencing deep and persistent disadvantage or dislocation by using civil law to meet their fundamental needs. Our civil lawyers focus on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners, older people experiencing elder abuse and people impacted by disasters.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

# Summary of Legal Aid NSW Responses

## **Issue 1: To what extent can the doctrine of implied licence be relied upon by police officers when undertaking bail compliance checks?**

The doctrine of implied licence cannot be relied upon by police officers when undertaking bail compliance checks. The *Bail Act 2013* (NSW) (***Bail Act***) is intended to ‘cover the field’ of circumstances in which such compliance monitoring or enforcement action can be taken. It cannot be said that it is unworkable or impracticable for police to seek enforcement orders from a court in appropriate cases, and a suite of actions are provided for under the *Bail Act* to address suspected failure to comply.

Alternatively, a bail compliance check undertaken as a proactive policing strategy in the absence of reasonable suspicion of non-compliance is not an entry ‘for a legitimate purpose’ as set out by the High Court in *Roy v O’Neill*.<sup>1</sup> In addition, in practice, such compliance checks are often conducted in a way that causes interference with possession or injury to an occupier or their guests.

## **Issue 2: Does the *Bail Act* proscribe police from conducting bail compliance checks when police are operating outside of section 77 and in circumstances where there is no enforcement condition?**

Yes, the legislative history of the current enforcement conditions provides clear evidence that Parliament intended to ‘cover the field’ of circumstances in which bail compliance checks can be conducted by police. Bail compliance checks outside of section 77 and in circumstances where there is no enforcement condition are not lawful.

## **Issue 3: If the court fixes an accommodation or curfew condition, is a bail enforcement condition a necessary pre-requisite to the conduct of any bail compliance checks that are undertaken outside of section 77 of the *Bail Act*?**

Yes, consistent with our response to Issues 1 and 2, police must apply to a court for a bail enforcement condition before conducting bail compliance checks outside of section 77 of the *Bail Act*.

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<sup>1</sup> (2020) 272 CLR 291; [2020] HCA 45.

**Issue 4: How could an enforcement condition relating to an underlying curfew or accommodation condition be crafted in a manner that ensures it is not unreasonable (taking into consideration the bailed person and any other residents of the property at which the bailed person resides), but remains an effective tool for checking compliance with the underlying condition?**

Sections 20A and 30(5) of the *Bail Act* strike an appropriate balance and do not require amendment. The *Bail Act* provides a degree of flexibility to ensure conditions are workable and responsive to specific bail concerns.

An enforcement condition must however be expressed by the court with sufficient particulars as required under section 30(4) to be valid. An open-ended condition allowing police to undertake enforcement action “no more than is reasonable” is not likely to be valid.

Guidance to decision makers in the form of a standardised bench sheet setting out minimum particulars that should be considered and specified would be beneficial.

**Issue 5: What are the practical limitations to the effectiveness of enforcement conditions that require a bailed person to present to the front door, and how could these be resolved?**

While there are clearly some limitations to the enforcement regime for checking compliance in the residence, an inability to confirm compliance does not necessarily indicate that the bail concern has not been effectively mitigated (by influencing a change in behaviour in the accused) or that there has been failure to comply with the underlying condition or the risk of further offences. Any proposed expansion of police powers is not the solution (or a proportionate solution) to this practical issue given the suite of actions which may already be taken by police under the *Bail Act*.

**Issue 6: What issues should be considered in relation to other residents of the property at which a bailed person resides, and the capacity for police to ask or require them to assist in checking bail compliance?**

Consistent with our position on Issue 5, any practical challenges presented by an inability to confirm compliance alone is not a sufficient basis to authorise entry and search of the home or to give directions to third parties. To do so would intrude too far into the rights of those people to quiet enjoyment of their property.

**Issue 7: Should the *Bail Act* make provision for the carrying out of bail compliance checks, in the absence of a bail enforcement condition?**

No. To the extent this would result in circumventing the current legislative limits of section 30 we do not support it. We welcome further consultation if a particular proposal is under consideration.

### **Issue 8: How could the *Bail Act* be amended to make clearer the circumstances in which police can do bail compliance checks when they do not have grounds to suspect that bail conditions are being breached?**

We do not believe that the *Bail Act* requires amendment, as it covers the field of circumstances in which bail compliance checks may be undertaken. Police Standard Operating Procedures (**SOPs**) should however be amended to reflect that implied licence does not operate to permit bail checks outside the terms of an order under section 30 or action taken under section 77 of the *Bail Act*.

### **Additional issue: Overrepresentation of Aboriginal people and police discretion**

Aboriginal people are vastly overrepresented in our criminal justice system, and particularly in custody. In our view, NSW Police Force's (**NSWPF**) approach to bail compliance, including the broad discretion they believe implied licence affords them, is a contributing factor to this issue. Further, we have observed that where NSWPF engage in similar proactive policing strategies, with officers given discretion about who to target, such strategies often disproportionately impact Aboriginal and Torres Strait Islander people.

*\* Note: all case studies referred to in this submission have been deidentified to protect the privacy of the client.*



## General observations on police bail decisions

In considering the specific issues raised by the Law Enforcement Conduction Commission (**LECC**) regarding bail compliance checks, it is first important to consider the purpose of bail. Bail allows a person who has been charged with an offence the authority to be 'at liberty' in the community on bail while they wait for a court to hear the charges.<sup>2</sup> The power to impose bail conditions is limited.

Section 20A of the *Bail Act* provides that a bail condition can only be imposed if there are identified bail concerns that the accused will:<sup>3</sup>

- a) fail to appear at any proceedings for the offence
- b) commit a serious offence
- c) endanger the safety of victims, individuals or the community, or
- d) interfere with witnesses or evidence

Conditions may only then be imposed which are:<sup>4</sup>

- reasonable and proportionate to the offence for which bail is granted
- appropriate to the bail concern in relation to which it is imposed
- no more onerous than necessary to address the bail concern
- reasonably practicable for the accused person to comply with, and
- where there are reasonable grounds to believe that the condition is likely to be complied with.

Legal Aid NSW has observed that NSWPF officers often impose conditions that are inappropriate and disproportionate to the bail concerns identified. Jane's story is one of many examples from our casework, and illustrative of our concerns:

### Case Study 1: Jane's Story

Legal Aid NSW represented Jane, a young person with a very limited criminal history. Jane was arrested and charged for a reckless wounding offence that allegedly occurred at 6 pm. Jane was granted police bail, which imposed the condition that she comply with a curfew restricting her to her residence between 9 pm and 6 am.

Due to the allegation occurring outside the curfew hours, and Jane not having a history of offending at night, Legal Aid NSW lodged a bail variation application to remove the curfew condition. This was listed at the next Children's Court list day, one month later.

In the meantime, Jane's mother contacted Legal Aid NSW concerned that NSWPF were attending her residence regularly to conduct bail compliance checks. Legal Aid NSW was instructed to write to NSWPF confirming that the occupant had revoked any implied licence to enter the property.

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<sup>2</sup> *Bail Act 2013* (NSW) s 7.

<sup>3</sup> *Ibid* s 17(2).

<sup>4</sup> *Ibid* s 20A.



Immediately after receiving this letter, NSWPF wrote to the court seeking that the matter be urgently listed for a detention application or, in the alternative, variation application to add an enforcement condition to Jane's bail. The detention application was filed on the basis that Jane was 'about to fail to comply with a bail condition' pursuant to section 77(1)(c) of the *Bail Act*. NSWPF claimed that 'the bail concerns of committing a further serious offence and endangering the victims, individuals or the community were ameliorated by the imposition of a curfew condition... [however] upon the purported revocation of police's ability to attend the premises that bail concern is an unacceptable risk.'

NSWPF sought an enforcement condition to enable them to conduct bail compliance checks up to two times per day, up to five times per week. Legal Aid NSW opposed this application and sought removal of the curfew condition.

The magistrate agreed with Legal Aid NSW's position, refusing the police applications for detention and (the alternative) enforcement condition, and varied Jane's bail by deleting the curfew condition.

Imposition of inappropriate police bail conditions, together with a lack of understanding of the condition(s), often lead to children and vulnerable adults spending additional short periods on remand for a minor breach of bail, in circumstances where the substantive offending is minor and will not result in a sentence of control or custody.

Any contact with the criminal justice system, even for short periods, or contact via a parent, is associated with poorer outcomes in children.<sup>5</sup> The evidence shows that ongoing interactions with police are harmful for children who are working to get their lives on track. It can generate mistrust and suspicion and erode confidence in the police. Arrest and detention should always be a last resort for children.<sup>6</sup> However, as Andre's story demonstrates, bail often results in increased contact with the criminal justice system, including further periods of short-term remand.

## Case Study 2: Andre's Story

Legal Aid NSW represented Andre, a 12-year-old Aboriginal boy from a regional town. Despite his young age Andre had a significant history of involvement with NSWPF. Andre had spent much of the past year on bail and had previously been arrested on approximately 20 occasions for breaching bail. Andre had never been convicted of any offences, and the charges against him were always withdrawn by NSWPF on the hearing days due to a lack of evidence to rebut the presumption of *doli incapax*.

After his most recent charges were withdrawn Andre was again arrested and charged with offences related to vehicle theft. NSWPF placed Andre on police bail that included a curfew condition.

Shortly after Andre was granted bail NSWPF conducted a routine bail compliance check and spoke with Andre's mother, who informed them Andre was not at home. NSWPF later returned at 11 pm and knocked on the door. Nobody answered the door so they left.

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5 Centre for Policy Development, *Partners in Crime: The Relationship Between Disadvantage and Australia's Criminal Justice Systems* (Report, December 2020) 10.

6 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Dec 40/33, UN GAOR, 40<sup>th</sup> sess, 96<sup>th</sup> plen mtg, UN Doc A/40/53 (29 November 1985); *Young Offenders Act 1997* (NSW).

A few days later NSWPF attended the address again and observed Andre in the back yard. Andre's mother was obstructive and asked the police to leave. They ignored this request and entered the house and arrested Andre for breaching his bail a few nights earlier.

Andre spent the night in youth detention before being granted bail by the Children's Court the next morning. The court deleted the curfew condition.

As articulated by Hamill J in *R v Connor Fontaine (a pseudonym)* [2021] NSWSC 177:

*Bail conditions are calculated to mitigate risk.<sup>7</sup> Their imposition does not create an occasion for attempts at social engineering or paternalistic interventions in parenting decisions.<sup>8</sup>*

This is important to keep in mind when considering the questions posed by this review.

### Applications for enforcement conditions

Section 30 of the *Bail Act* enables courts to impose enforcement conditions. Enforcement conditions can only be imposed by a court (not NSWPF), for the purpose of monitoring or enforcing compliance with another bail condition.<sup>9</sup> When imposed, they require the person granted bail to comply with specified kinds of police directions (given for the purpose of monitoring or enforcing compliance with the underlying bail condition).<sup>10</sup> The condition must specify:

- the kinds of directions that may be given to the person while at liberty on bail, and
- the circumstances in which each kind of direction may be given (in a manner that ensures that compliance with the condition is not unduly onerous), and
- the underlying bail condition or conditions in connection with which each kind of direction may be given.<sup>11</sup>

The *Bail Act* sets strict limits around the imposition of enforcement conditions. They can only be imposed if the court considers it reasonable and necessary in the circumstances, having regard to the following:

- the history of the person granted bail (including criminal history and particularly if the person has a criminal history involving serious offences or a large number of offences),
- the likelihood or risk of the person committing further offences while at liberty on bail,

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<sup>7</sup> Section 20A(2) of the *Bail Act 2013* (NSW) provides, inter alia, a bail condition may "only" be imposed if it is "reasonably necessary to address a bail concern", "is reasonable and proportionate" and "is no more onerous than necessary".

<sup>8</sup> Compare, in the context of extended supervision orders, the observations of Fullerton J in *State of New South Wales v Bugmy* [2017] NSWSC 855 at [89] adopted and applied by Hamill J in *State of New South Wales v Carr* [2020] NSWSC 643 at [5].

<sup>9</sup> *Bail Act 2013* (NSW) s 30(1).

<sup>10</sup> *Ibid* s 30(2).

<sup>11</sup> *Ibid* s 30(4).

- the extent to which compliance with a direction of a kind specified in the condition may unreasonably affect third parties.<sup>12</sup>

In our experience, police regularly seek the addition of enforcement conditions in circumstances where it is neither reasonable, nor necessary. This demonstrates the necessity for such power to be limited to the court. Reliance on implied licence has the consequence of eroding the efficacy of this power. The addition of enforcement conditions is often sought immediately after a defendant has taken steps to challenge the validity or reasonableness of the bail compliance checks being done by NSWPF. Similar to Jane's story above, Kate's story is another illustrative example.

### Case Study 3: Kate's story

Legal Aid NSW represented Kate, an Aboriginal woman in her 20s. Kate was arrested for a robbery offence. She made full admissions to police. Kate was charged and granted bail by NSWPF. Kate's bail included a condition that she comply with a curfew between 8 pm and 6 am. Kate had no record of non-compliance with her bail and did not have a lengthy criminal history.

Kate instructed her Legal Aid NSW lawyer that the NSWPF 'Raptor' squad were regularly attending her address at odd hours of the night to conduct bail compliance checks. Legal Aid NSW wrote to NSWPF about this, revoking any implied licence to attend her residence. A few days later NSWPF filed a variation application under section 77(1)(c) of the *Bail Act* on the basis Kate had 'failed to comply with her bail'. The variation application stated that because the implied licence had been revoked, "*police are unable to ensure compliance with the curfew condition of the accused bail*". NSWPF sought that an enforcement condition be imposed.

The court refused to grant the variation application on the basis it was not appropriate to do so, given Kate had no record of non-compliance with her bail.

### Limits on police actions for breach of bail under section 77

Section 77 of the *Bail Act* sets out actions to be taken if bail is breached or threatened to be breached. Section 77(1) provides that a police officer may take one of the following six actions if they reasonably believe that a person has failed to comply with a bail condition:

1. decide to take no action in respect of the failure or threatened failure, or
2. issue a warning to the person, or
3. issue a notice to the person (an application notice) that requires the person to appear before a court or authorised justice, or
4. issue a court attendance notice to the person (if the police officer believes the failure is an offence), or
5. arrest the person, without warrant, and take the person as soon as practicable before a court or authorised justice, or
6. apply to an authorised justice for a warrant to arrest the person.

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<sup>12</sup> Ibid s 30(5).

In determining which of the above six actions to take, a police officer is *required*<sup>13</sup> to consider the following matters:

- the relative seriousness or triviality of the failure or threatened failure,
- whether the person has a reasonable excuse for the failure or threatened failure,
- the personal attributes and circumstances of the person, to the extent known to the police officer,
- whether an alternative course of action to arrest is appropriate in the circumstances.<sup>14</sup>

Importantly for this inquiry, section 77 does not allow for investigation of breaches in the absence of any reasonable suspicion.

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<sup>13</sup> See recent NSW Court of Criminal Appeal (CCA) case of *Bugmy v Director of Public Prosecutions (NSW)* [2024] NSWCA 70. In this case the CCA held that the lawfulness of the exercise of the arrest power under section 77(1) depended upon an officer complying with the requirements of section 77(3).

<sup>14</sup> *Bail Act 2013* (NSW) s 77(3).

## Issue 1: The doctrine of implied licence

Legal Aid NSW's position is that the doctrine of implied licence cannot be relied upon by NSWPF to enter private property to undertake routine bail compliance checks. As held by the High Court in *Coco v The Queen* [1994] HCA 15<sup>15</sup> (*Coco v The Queen*) statutory authority to engage in what would otherwise be tortious conduct must be 'clearly expressed in unmistakable and unambiguous language'.

In our view, the conferral of limited statutory authority under the *Bail Act* to impose enforcement conditions (under sections 31 and 80) and police powers to take action in the case of reasonably suspected breach of conditions (under section 77), 'cover the field' of circumstances in which police may engage in monitoring and enforcement of bail.

Additionally, routine bail checks fall outside the general functions of policing as set out under the *Police Act 1990*.<sup>16</sup> This is because in conducting routine bail checks police are not investigating crime,<sup>17</sup> protecting anyone from injury, or responding to emergencies.

For these reasons, we are of the view that bail compliance checks undertaken outside of section 77 and in the absence of an enforcement condition are prohibited by statute.

### 1.1 Criteria for implied licence

The High Court has recognised an implied licence may exist to enter the property for the purposes of lawful communication with a person if access to a property is unobstructed, an entrance gate is unlocked, and there is no indication that entry is prohibited.<sup>18</sup> This equally applies to police.<sup>19</sup>

In *Roy v O'Neill* [2020] HCA 45 (*Roy v O'Neill*), the High Court set out the criteria for a valid implied licence, being:

- there is an unobstructed path/driveway/means of travel between the public thoroughfare, and their private dwelling<sup>20</sup>
- a legitimate purpose exists for entry onto the property,<sup>21</sup>
- the legitimate purpose must not involve any interference with the occupier's possession, or injury to the person or property of the occupier, or their guests,<sup>22</sup> and
- the implied licence has not been revoked.<sup>23</sup>

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<sup>15</sup> *Coco v The Queen* (2004) 179 CLR 427; [1994] HCA 15 at [8] ('Coco').

<sup>16</sup> *Police Act 1990* (NSW) s 6(3).

<sup>17</sup> A breach of bail is not a crime.

<sup>18</sup> *Halliday v Nevill* [1984] HCA 80; (1984) 155 CLR 1 at 6-7 ('Halliday').

<sup>19</sup> *Roy v O'Neill* [2020] HCA 45 at [77] ('*Roy v O'Neill*').

<sup>20</sup> As set out in *Halliday* at [6].

<sup>21</sup> As set out in *Halliday* at [6]. However this need not be the sole purpose for entry- see *Roy v O'Neill* [15]-[20] (Kiefel CJ); [77]-[79] (Deane and Edelman JJ).

<sup>22</sup> *Roy v O'Neill* [15]-[20] (Kiefel CJ); [77]-[79] (Deane and Edelman JJ).

<sup>23</sup> *Ibid* at [12].

We argue that a routine bail compliance check, without an enforcement condition or reasonable suspicion of non-compliance, does not amount to ‘entry for a legitimate purpose’.

Alternatively, if entry for the purpose of conducting a random bail check is capable of being regarded as a ‘legitimate purpose’, random checks commonly involve interference with and injury to occupants and their guests. This renders any purported legitimacy of purpose invalid.

## 1.2 A legitimate purpose for entry onto the property

A legitimate purpose must exist for entry into private property. This can include lawful communication with a person in a private residence (including to investigate an offence).<sup>24</sup> However an implied licence to enter to “knock and talk”<sup>25</sup> does not compel an individual to do anything, including to answer the door.<sup>26</sup>

Further, police cannot rely on an implied licence when entry onto private property is for the sole purpose of exercising a coercive power.<sup>27</sup> What is, and is not, a ‘coercive power’ was not clearly defined in *Roy v O’Neill*, but some examples referred to in the decision included entry for the sole purpose of:

- requiring a person to submit to a breath test absent a statutory power<sup>28</sup>
- searching the premises in the absence of a warrant<sup>29</sup>
- giving orders<sup>30</sup> or to compel a person to do something.<sup>31</sup>

While the implied licence to “knock and talk” *may* allow a police officer to walk up to the front door of a premises to ask whether a bailed person is present, in our experience bail compliance checks are rarely carried out in this limited way. For example:

- if there is no immediate answer of the door, police may walk around the premises, knocking on backdoors or windows, telephoning occupants, shining lights into the property searching for who is at home or to raise attention of the occupants.
- if residents do not appear or refuse to answer the door, police will often presume to give directions to the accused, other residents and occupants at the property that they must bring the person to the front door to be ‘sighted’. This is sometimes accompanied by threats of further action for non-compliance, such as arrest.

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<sup>24</sup> *Halliday* at [7]; *Roy v O’Neill* at [15].

<sup>25</sup> *Roy v O’Neill* at [33].

<sup>26</sup> *Ibid* at [35]-[36].

<sup>27</sup> *Ibid* at [37]. These coercive powers include entry and search of premises; production of information or documents; oral examination; and the provision of information which requires a warrant or other external authorisation. See Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* (Report No 48, 1 May 2008) 1.

<sup>28</sup> *Roy v O’Neill* at 304 [17] (Kiefel CJ)

<sup>29</sup> *Ibid*.

<sup>30</sup> *Ibid* at [36] (Bell and Gageler JJ).

<sup>31</sup> *Ibid* [40] (Bell and Gageler JJ)

- once at the door, police sometimes purport to further direct the accused to do things. For example, the mother of one young client reported to Legal Aid NSW that police directed her son to “turn around in a circle with his hands in the air” after he presented to the door.
- bail compliance checks are often used as a means to communicate further with the accused and/or other residents about the behaviour of the accused and conduct more generally. Conversations had with the accused or others can often lead into police questioning the accused or other individuals and, in turn, form part of the investigations. It is rarely made clear to these people that there is no obligation to respond to police.

In some cases, bail compliance checks are conducted even after the underlying condition has been removed, as the following cases demonstrate:

#### **Case Study 4: Peter’s story**

Legal Aid NSW acts for Peter who is a child. Peter was charged with an offence and was initially granted bail by NSWPF with strict conditions including a curfew.

Following review, the Children’s Court varied those conditions, including deleting the curfew condition. Despite this, NSWPF continued to attend Peter’s home in the middle of the night to conduct bail compliance checks. After the third such occasion, Peter’s father complained about this to Peter’s lawyer. He told the lawyer that the ‘checks’ by police were causing extreme disruption to Peter, the family and their neighbours.

Peter’s Legal Aid NSW lawyer sent an email to NSWPF alerting them to the amended bail conditions, and absence of a curfew or enforcement condition. That evening, police attended the house again but this time asserted that they were conducting “a residence check”.

Peter and his father asked Legal Aid NSW to write to police to ask them to stop. Legal Aid NSW formally wrote to NSWPF withdrawing any consent, implied or otherwise, for police to attend and enter his bail residence for the purpose of any bail compliance check.

#### **Case Study 5: Eric’s story**

Legal Aid NSW acts for Eric who is a child. Eric was initially granted bail by NSWPF. Eric’s bail included a residence and curfew condition. When the matter was next before the Children’s Court, the magistrate deleted the curfew condition.

Despite this, Eric continued to be subjected to multiple ‘curfew compliance checks’. Eric told the police he didn’t have a curfew, however the police informed him that their system showed he was still on a curfew.

Eric’s parents asked Legal Aid NSW to write to NSWPF withdrawing their consent for police to attend the family home for the purpose of conducting bail compliance checks.



### 1.3 Interference with possession or injury to person or property

Entry by police onto private property, at a reasonable hour, merely to ask whether the bailed person is home *may* not interfere with possession or do injury to occupiers or their guests. However, as stated by Kiefel CJ in *Roy v O'Neill*:<sup>32</sup>

*“Injury” is a broader concept in the law of trespass than in some other torts. It may include an affront to a person’s dignity or apprehension of harm. (Emphasis added).*

The potential for harm as a result of this kind of proactive policing strategy designed to ‘monitor’ and ‘disrupt’ has been considered by LECC in previous investigations.

In Operation Tepito, LECC investigated the use by NSWPF of its Suspect Target Management Plan (**STMP**) over a five-year period, making various adverse findings in October 2023 including that:<sup>33</sup>

- bail compliance checks had been identified by police as a ‘disruption toolkit’ strategy. This targeted young people in an overt and intrusive way.
- The way in which police conducted bail compliance checks showed lack of understanding by officers about the limits of implied licence.

LECC concluded the use of the STMP on children met the threshold for agency maladministration and “was, or could be, unreasonable, unjust, oppressive or improperly discriminatory in its effect”.<sup>34</sup>

This followed earlier findings from LECC’s Operation Cusco report in 2020,<sup>35</sup> which found evidence to establish that there had been a practice in Newcastle Local Area Command of conducting routine bail compliance checks absent an enforcement condition, and that many of the police officers interviewed:

- had no (or limited) training about the legality of bail compliance checks,<sup>36</sup>
- often failed to independently assess whether it was appropriate to conduct a bail compliance check before undertaking them. Instead, they did what they were ‘told’ to do by the Sargeant and went through a list of names they were given each shift.<sup>37</sup>
- commonly conducted bail checks in an unreasonable manner, including by shining torches into windows,<sup>38</sup> shining car headlights onto the property, conducting multiple checks in one night, or at very late hours.

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<sup>32</sup> *Roy v O'Neill* [16].

<sup>33</sup> Law Enforcement Conduct Commission investigation, Operation Tepito: An investigation into the use of the NSW Police Force Suspect Targeting Management Plan on children and young people (Final Report, October 2023) (Operation Tepito Final Report) at 109 [8.1].

<sup>34</sup> Operation Tepito Final Report, 133.

<sup>35</sup> Law Enforcement Conduct Commission, Operation Cusco: Report pursuant to section 132 *Law Enforcement Conduct Commission Act 2016* (Report, April 2020) (Operation Cusco Report).

<sup>36</sup> Operation Cusco Report, 28 [8.1].

<sup>37</sup> See Operation Cusco Report 7 [5.7], 8 [5.9] and [5.12], 10 [5.18] and 14 [5.36].

<sup>38</sup> Operation Cusco Report 10 [5.19], 12 [5.30].

While the findings from Operation Cusco relate to specific issues that arose in a particular Local Area Command and some years ago now, our casework experience shows that random bail compliance checks are still sometimes conducted:

- by large numbers of officers
- repeatedly, including multiple times in a 24 hour period or several times a week
- late at night or in the early hours of the morning when all occupants are asleep
- in a manner which involves moving around the exterior of the property, entering the back yard, shining lights into windows and sometimes continuous banging on doors and windows, and/or
- in full view of neighbours.

Bail compliance checks of these types are commonly reported by our clients and their families as disruptive, harassing, embarrassing and sometimes frightening. They have the potential to cause reputational damage and to increase adversarial encounters in already overpoliced communities.

### Case Study 6: Neveah's story

Legal Aid NSW acts for Neveah, an Aboriginal woman in her 40's. Neveah resides in a home in regional NSW with her six children.

Neveah's teenage son, Luke, is on bail. His bail includes a curfew condition but does not include an enforcement condition. Despite this, NSWPF regularly attend and conduct curfew compliance checks on Luke. Sometimes these checks occur multiple times a night, and often in the early hours of the morning.

One night, two plain clothes police officers attend at 3 am. The officers knocked on the front door for about five minutes. When nobody opened the door the officers moved to the side of the house. The officers began to shine a torch light through the windows of the home and moved between windows until they approached the bedroom window of Neveah's ten-year-old son, Tom. Tom's curtain was partially open which allowed the torch light to shine on his face. This woke him up.

The officers began to yell at Tom through the window and directed him to go to the front door of the home and answer the door.

Neveah's 23-year-old daughter, Trish, overheard this. Trish did not wish for her ten year old brother to be alone with the officers and therefore went to the front door. Trish and Tom spoke to the officers for a brief period before they left. Tom was distressed by the encounter.

Neveah approached Legal Aid NSW and instructed them to make a complaint to LECC. LECC referred the complaint to the relevant Police District "for assessment and appropriate action".

Sometime later Legal Aid NSW received a response from NSWPF. The response stated that NSWPF had assessed the matter and made a decision to decline the complaint in accordance with section 132 of the *Police Act 1990*. The response stated that the officers involved were completing "a lawful bail check" and that "any alleged distress" caused to a child in the home would have been prevented by Neveah "answering the door in the first instance".

Despite the complaint officers continued to attend Neveah's home. Neveah and her children found these bail compliance checks disruptive. Officers often attended the residence in full view of the neighbours and community members which caused Neveah embarrassment.

Shortly after the complaint was declined, Legal Aid NSW wrote to NSWPF on Neveah's instructions revoking the implied licence.

## 1.4 Revocation by words or action

While the existence of an implied licence in such circumstances has long been doubted, in practice Legal Aid NSW lawyers usually respond to client complaints about unwanted or disruptive bail compliance checks with correspondence to NSWPF 'revoking any implied licence'. This approach is generally taken for pragmatic reasons: to secure desistence of the disruptive conduct by the most immediate and effective means possible.<sup>39</sup> It is not to be taken as acceptance that a licence is otherwise validly implied.

It is notable that, where Legal Aid NSW has been engaged to write on behalf of a client or occupier revoking any purported licence to enter, police generally appear to accept this prevents further action: they either desist from conducting further checks or make an application to the court for the addition of an enforcement condition.

### Case Study 7: Joseph's story

Joseph was a young person charged with driving offences. He had been granted bail by the Children's Court with conditions including that he live with his parents and that he 'spend each night' at their address. There was no enforcement condition imposed.

NSWPF had been coming around to the house every second night for approximately a month to conduct bail compliance checks. These checks were usually conducted between 11 pm and 3 am. Joseph and his parents found the checks highly intrusive and disruptive.

Joseph's Legal Aid NSW lawyer wrote to NSWPF prosecutor to raise concerns about the checks. The prosecutor spoke to the local NSWPF crime manager and the bail checks ceased.

### Case Study 8: Andrew's story

Andrew is a young adult with Autism Spectrum Disorder and several other health conditions which resulted in him being placed on the Disability Support Pension. Andrew was charged with offences and granted bail by NSWPF. His bail included a curfew condition but did not include an enforcement condition.

Despite the absence of an enforcement condition, NSWPF routinely attended Andrew's home to conduct curfew compliance checks. During these checks, officers 'required' Andrew to present to the front door so they could 'sight' him. These checks were conducted at various times of the night, including very late or in the early hours of the morning. These checks disturbed other occupants at the address, including Andrew's parents.

Andrew was upset about the constant disturbance and sought advice from Legal Aid NSW. On Andrew's instructions, Legal Aid NSW wrote to NSWPF withdrawing their consent for police to attend the family home for the purpose of conducting bail compliance checks.

The letter was copied to the local police prosecutors who contacted Legal Aid NSW, acknowledging the correspondence and confirmed the bail checks should not have been conducted. The checks ceased.

Three observations follow: First, many individuals affected by random bail compliance checks are vulnerable or disadvantaged people. They include children and young people, Aboriginal people and their families and community. They also include people with complex trauma, mental

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<sup>39</sup> This is more readily achieved through explicit communication of revocation, than argument that no implied licence exists in the first place.

illness and cognitive impairment. These people are less likely to understand their legal rights and be in a position to advocate for themselves when police attend, including by refusing to comply with any unlawful directions or by revoking any implied licence. Many are not aware of what an 'implied licence' is, let alone that they have the right to revoke it, or the confidence to do so in the face of an authority.

In our experience, some communities have become so accustomed to over policing that they no longer report harassing bail compliance checks, or only do so following repeat attendances which have resulted in escalation. For example, in some Western Sydney and Central Coast areas, our lawyers report clients disclosing in passing while taking instructions that NSWPF have been conducting frequent checks at unreasonable times and in the absence of any enforcement condition. This imbalance of power may result in vulnerable individuals acquiescing to conduct which exceeds statutory authority or the limits of any implied licence.

Second, the pattern of desistance after communication of revocation tends to suggest that most bail compliance checks are being conducted as a matter of course, as part of 'shift routine', without regard to whether it is necessary, or appropriate, or the potential for detrimental impact on the accused or other occupants – all factors which *must* be taken into account by a court before imposing enforcement conditions under section 30 of the *Bail Act*.

Third, cases where police respond by seeking variation of bail to add enforcement conditions also demonstrate that licence *need not* be implied to enable compliance activity to be undertaken. The *Bail Act* provides a proper process for seeking the addition of enforcement conditions: It is neither unworkable, nor impracticable, for NSWPF to seek such conditions from the court where appropriate. In cases of actual, suspected or imminent breach, section 77 already enables action to be taken.

## Issues 2 & 3: Does the *Bail Act* proscribe police power?

Yes. While the *Bail Act* does not *expressly* prohibit police from conducting bail compliance checks outside of section 77 and in the absence of an enforcement condition, police powers to conduct bail compliance checks are not ‘at large’.

In enacting a statutory enforcement regime, NSW Parliament intended to give courts, not police, the power to determine when and how NSWPF could enter private property for the purpose of ascertaining bail compliance.

Legal Aid NSWs position is that the legislative history and language of the statutory regime indicates that Parliament intended it to ‘cover the field’. As such, routine bail compliance checks which circumvent section 30 of the *Bail Act* are proscribed.

As to action in the case of known or suspected failure to comply with a condition of bail, these situations are distinct from the ‘routine’ bail compliance checks undertaken where there is no evidence of breach or reasonable suspicion of the commission of an offence. Section 77 provides a comprehensive suite of actions that may be taken. It too however is closely circumscribed and does not permit investigation of breaches in the absence of a reasonable suspicion.

### 2.1 Legislative history of bail enforcement

The *Bail Amendment (Enforcement Conditions) Bill 2012* introduced the power to impose enforcement conditions under the *Bail Act 1978* (the precursor to the current *Bail Act*).<sup>40</sup> Before this, enforcement conditions were held to be unlawful on by the Supreme Court in the case of *Lawson v Dunlevy*.<sup>41</sup>

Shortly after *Lawson v Dunlevy* and prior to the introduction of the Bill, the findings of the NSW Law Reform Commission (**NSWLRC**) in its report on Bail<sup>42</sup> were delivered and tabled in Parliament. The Commission considered that if a legislative framework expressly permitting the imposition of ‘enforcement conduct directions’ was developed, it would be “*important to provide a clear legislative solution that would preclude the unreasonable imposition, or exercise, or any such direction.*”<sup>43</sup> The Commission concluded:

If conduct directions are limited and properly targeted to risk, then there is a stronger case for ensuring that police have adequate powers to monitor and enforce their compliance.  
We recognise that enforcement conduct directions ... may need to be imposed by a bail

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<sup>40</sup> This Bill was introduced after the Supreme Court of NSW decision of *Lawson v Dunlevy* [2012] NSWSC 48, in which a bail condition requiring an accused to ‘submit to a breath test when requested by a police officer’ was found to be unlawful.

<sup>41</sup> *Lawson v Dunlevy* [2012] NSWSC 48.

<sup>42</sup> New South Wales Law Reform Commission, *Bail* (Report No 133, April 2012) (NSWLRC Bail Report).

<sup>43</sup> NSWLRC Bail Report, 250 [16.23].

authority (whether police or a court) in cases where the released person is assessed, by reference to their history or the special needs of the case, as presenting a significant risk of non-compliance, or where police would otherwise be unable to detect a breach, or where monitoring by other means would be unnecessarily costly or ineffective. In any such case, it should be necessary for police to justify the imposition of any such enforcement conduct direction to the Court on review of police bail, or on any other application to the court.

We consider that there is also a role for safeguards to be built into the use of enforcement conduct directions. Adequate specification of the circumstances in which the power can be exercised would be desirable, including the imposition, in suitable cases, of some reasonable limits on the frequency, location or time of any compliance check, or alcohol or drug test to ensure that the direction is not overly onerous.<sup>44</sup> (Emphasis added).

The Second Reading Speech<sup>45</sup> for the Bill sets out in clear detail the rationale. It noted the reforms were being made in response to the decision of *Lawson v Dunlevy* which held a bail condition requiring an accused to ‘submit to a breath test when requested by a police officer’ was unlawful. Following that decision, NSWPF had advised the NSW Government that their ability to check that an accused person was complying with their bail conditions was ‘negatively impacted’.

The purpose of the Bill was to amend the *Bail Act* to authorise the imposition of enforcement conditions on a grant of bail because it was “*appropriate that police be able to take steps to check, and compliance and enforcement conditions facilitate the checking.*”<sup>46</sup>

The Second Reading Speech also made plain that it was intended that, outside of the terms of a court ordered enforcement condition, police would be able to give directions to check compliance with bail conditions “*only where they reasonably suspect the accused is in breach of his or her [condition]*”.

## 2.2 The necessity of reasonable limits and safeguards

The clear, unambiguous intention of the Bill was to remedy a situation where police did not have a recognised power to conduct bail compliance checks absent some reasonable suspicion of non-compliance. In providing for such power to be conferred through conditions imposed by a court, the statutory scheme took care to embed safeguards that balanced the need for reasonable monitoring activity of bail conditions with the privacy and liberty of citizens. Those provisions, which have been substantially replicated in the *Bail Act*, are closely circumscribed and cover the field of circumstances in which bail checks, compliance or enforcement action may be undertaken.

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<sup>44</sup> NSWLRC Bail Report, 251 [16.28]-[16.29].

<sup>45</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 24 October 2012, 1 (Michael Gallacher, Minister for Police and Emergency Services).

<sup>46</sup> *Ibid.*

If the *Bail Act* does not operate to limit when and how bail compliance checks can be undertaken, the effect is that police may avoid judicial oversight entirely and take action which circumvents the specific limitations under section 30. The response of NSWPF to this investigation that it ‘does not regard enforcement conditions as a prerequisite to undertaking a bail compliance check’, and ‘does not ordinarily seek enforcement conditions even in circumstances where it is likely it will conduct routine bail compliance checks’ demonstrates a systemic understanding and practice which renders the statutory enforcement provisions in the *Bail Act* otiose. Moreover, it leads to an incongruous situation in which a Court may expressly decline to impose an enforcement condition to permit bail compliance checks having regard to the matters in section 30, only for police to decide to conduct them anyway.

The response of NSWPF to this investigation suggests that when enforcement conditions place limits on the frequency or timeframe in which police can conduct bail compliance checks, bailed persons are “*likely to modify their behaviour to commit offences after the quota of compliance checks for the night/week is met*”.<sup>47</sup> However, no evidence has been provided to indicate the prevalence of such behaviour. In cases where modification of behaviour is a legitimate concern, police have several options at their disposal: these include using the ‘quota’ sparingly and in a considered way (rather than routinely, as a matter of course), patrol surveillance and, where there is credible evidence of potential non-compliance, either application to the court to vary or revoke bail or breach action under section 77 of the *Bail Act*.

It appears that NSWPF see bail compliance checks as a tool to engage in proactive policing to deter potential breaches. This is not a purpose contemplated by the *Bail Act*. Like STMP, which relied heavily on ‘implied licence’ bail checks, this type of proactive and disruptive policing practice often results in misunderstanding of the limits, or misuse of, power and authority.

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<sup>47</sup> Issues Paper at [5.3.6].



## Issue 4: Balancing reasonableness and effectiveness of enforcement

Legal Aid NSW is of the view that sections 20A and 30(5) of the *Bail Act* strike an appropriate balance, providing the court with guidance about matters relevant to the determination of bail conditions, as well as a degree of flexibility to ensure conditions are workable and responsive to specific bail concerns.

We do however have concerns about open-ended enforcement conditions, for example that police undertake a relevant enforcement action “no more than is reasonable”. We are of the view that for an enforcement condition to be valid, it must address with sufficient particularity the matters in section 30(4):

- (4) An enforcement condition is to specify—
  - (a) the kinds of directions that may be given to the person while at liberty on bail, and
  - (b) the circumstances in which each kind of direction may be given (in a manner that ensures that compliance with the condition is not unduly onerous), and
  - (c) the underlying bail condition or conditions in connection with which each kind of direction may be given.

An enforcement condition which is open-ended effectively leaves decision making about the circumstances in which a direction may be given to individual officers. This may be an impermissible delegation of judicial power, but even if it is not, the lack of certainty leaves open the risk that conditions will be enforced in a way that is unduly onerous, or inadvertently results in tortious conduct by NSWPF.

Our experience is that the Children’s Court is generally highly cognisant of the need for balance, specificity and adequate safeguards to enforcement conditions. This is aided by the standard bail conditions Bench Sheet ([Appendix H](#)) which draws the decision maker’s attention to the frequency, times and other restrictions that should be considered under the *Bail Act*. Appendix I also sets out clear guidelines for bail decision making, and the limits that should be considered in imposing underlying bail conditions.

In contrast, the Local Court standard bail conditions Bench Sheet ([Appendix J](#)) provides no specific reference to the content or limits of enforcement conditions. In our experience, open ended conditions are sometimes made by Local Court magistrates, on an assumption that police are ‘best placed’ to determine what is reasonable and that the court is ‘entitled to expect’ they will exercise reasonableness and restraint. As our casework demonstrates, this is not always the case.

While we do not support codification of enforcement conditions and accept a degree of flexibility is called for, we are of the view that the bench sheet should draw the decision maker’s attention to the relevant considerations for imposition of enforcement, and a range of circumstances including frequency, time and limits which would satisfy the specificity requirements of section 30(4).

## Issues 5 & 6: Practical limitations to ‘presenting to the front door’ and third party compliance

A decision to grant an accused bail follows careful weighing of the risks, and imposition of conditions to mitigate those concerns. An enforcement condition is simply a mechanism to enable police to confirm whether an accused is complying with a relevant underlying condition of bail.

Like any bail condition, or conditions of an Apprehended Domestic Violence Order (**ADVO**), police cannot know whether they are being complied with at all times. Equally, residential and curfew conditions do not need to be actively monitored at all times to be effective. If police observe an accused in public outside curfew hours, or receive intelligence of this, then they have evidence of non-compliance/breach. Many breaches are detected in this way. Much like deprivation of liberty is punishment of itself and any additional restriction may be considered unduly onerous or disproportionate, the imposition of the underlying bail condition of residence and/or curfew serves its purpose in mitigating the risk of further offending and ensuring the appearance of a person before the court, without the additional requirement of police conducting checks reliant upon implied licence, and outside of enforcement conditions.

While there are clearly some limitations to the enforcement regime for checking an accused’s compliance with bail conditions *in a private home*, an inability to confirm compliance at all times does not necessarily indicate there has been failure to comply with the underlying condition, or the risk of further offences, or that the existence of the condition has not been effective in mitigating bail concerns by influencing the accused’s conduct.

In our view, the practical challenges presented by an inability to accurately confirm compliance at all times alone is not a sufficient basis for the expansion of police authority to enable entry and search of the home or to give directions to third parties. Such an expansion would represent a significant intrusion on the rights of private citizens for the sake of administrative ease and expediency. As stated in *State of NSW v Bugmy*,<sup>48</sup> in the context of the high-risk offender regime:

*...conditions must not be unjustifiably onerous or simply punitive...Neither may they simply be an expression of State paternalism or imposed to meet what might be thought to be in the public interest in some generalised sense or because they might be a convenient or resource efficient means of the Department exercising supervision under an extended supervision order. (Emphasis added)*

Our Youth Koori Court casework often involves imposition of multiple bail addresses and nomination of several ‘approved adults’ in recognition of the vulnerability of the young person, kinship ties and desirability of having a number of ‘safe places’ for the child to go. We acknowledge this can be challenging for NSWPF to identify at which of the addresses the child is to conduct bail compliance checks. However, this is also an example of how authorising police

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<sup>48</sup> *State of New South Wales v Bugmy* [2017] NSWSC 855 at [89] (Fullerton J).

entry into private homes, search, or to direct third parties has capacity to lead to significant overreach and intrusion. It has the capacity to do significant damage to parent child or caregiver relationships, and to exacerbate marginalisation of already overpoliced and disadvantaged communities.

In our view, there are also several alternative actions available to police in cases where compliance cannot be confirmed at the point of a bail compliance check. The appropriate course of action will depend on the triviality or seriousness of the breach, whether the person has a reasonable excuse, and the person's personal attributes and circumstances, so far as they are known to police.<sup>49</sup> These including:

- Taking no action and conducting a subsequent enforcement check (if authorised by an enforcement condition). By analogy, a failure to report at the police station on one occasion will not necessarily call for an immediate police response if the person has otherwise been complying with their reporting condition and other bail conditions. If they attend the police station and report the next day, and provide an explanation for the failure to report, they may be adequately dealt with by a warning or no-action at all.
- Issuing an application notice or Court Attendance Notice: where, for example, police had attended on more than one occasion announcing their appearance at the door and directing the accused to present at the door, and had been unable to confirm compliance because no one answered the door, there may then be reasonable suspicion about failure to comply with residence or curfew warranting notice to the court and possible variation of bail.
- If police attend in accordance with the enforcement condition and are met with hostility by an occupier who repeatedly refuses a request that they tell the accused that police are at the front door, this *may* give rise to a basis for initiation of court process. For example, if the accused is a child and therefore reliant on a parent or guardian to answer the door and wake them up, it may be appropriate that bail be reconsidered by the court to ensure suitability of residence, practicality of the enforcement arrangements, and understanding of the accused and their guardian about the nature and importance of the conditions.

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<sup>49</sup> *Bugmy v Director of Public Prosecutions (NSW)* [2024] NSWCA 70 at [41] (Leeming JA, Mitchelmore JA and Basten AJA agreeing).

## Issues 7 & 8: Whether the *Bail Act* should provide for bail checks outside enforcement or reasonable suspicion of non-compliance

No. In our view, the *Bail Act* provides an extensive suite of actions that may be taken to confirm compliance and address actual or reasonably suspected non-compliance. They are carefully calibrated to balance risk mitigation with necessary safeguards.

We note that in addition to court-imposed enforcement conditions, several other conditions enable police to effectively monitor or curtail a person's behaviour in the community, including reporting and place restrictions. We welcome further opportunity to be consulted in the event that a particular proposal is being considered.

We are of the view that the *Bail Act* does not need to be amended to make clearer when police can and cannot conduct bail checks or to take action for suspected breach.

We would however support revision of NSWPF Standard Operating Procedures to make explicit the limits of bail compliance checks. Consistent with our response to Issues 1-3, this should include that officers are not empowered to enter private property to conduct random or routine bail checks outside the terms of a court ordered enforcement condition, or section 77 of the *Bail Act*.

## Additional issues: Overrepresentation of Aboriginal people and police discretion

We are concerned about over policing and regular bail compliance checks on Aboriginal people, including children. We are concerned this is a factor contributing to the overrepresentation of Aboriginal people in both adult and juvenile custody.

Target 10 of the National Agreement on Closing the Gap (**CTG Agreement**) aims to reduce the rate of Aboriginal and Torres Strait Islander adults incarcerated by at least 15 percent by 2031.<sup>50</sup> Target 11 of the CTG Agreement aims to reduce the rate of Aboriginal and Torres Strait Islander children in detention by 30 percent by 2031.<sup>51</sup> Based on the most recent year of data, neither of these targets are on track to be met in New South Wales.<sup>52</sup>

Aboriginal people are vastly overrepresented in our criminal justice system, and action for breach of bail contributes to this trend. Recent data from the Bureau of Crime Statistics and Research (BOCSAR) published in March 2024 showed that the number of Aboriginal adults who had their bail revoked for technical breaches increased by 17.1 percent in the previous 12 months while the number of Aboriginal children who had their bail revoked for technical breaches increased by 38.2 percent in the same period. This is against a background of court convictions and sentences of imprisonment remaining stable for adults, and a decrease of 9.9 percent in the number of children found guilty in court.<sup>53</sup>

The data provided in the Issues Paper also highlights the disproportionate impact of current bail compliance check practices on Aboriginal people.

One of the drivers of this overrepresentation is likely to be the approach of NSWPF to bail compliance measures, including the broad discretion they believe implied licence affords them. Experience with similar proactive policing strategies consistently demonstrates that when officers are given discretion about who to target, that discretion is exercised in a way that disproportionately impacts on Aboriginal and Torres Strait Islander people.

One example is the use of consorting laws, which were introduced in 2012 as a suite of amendments to assist NSWPF to tackle organised crime and criminal gangs in response to

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<sup>50</sup> Closing the Gap, 'Closing the Gap Targets and Outcomes' (Web Page, May 2024) <<https://www.closingthegap.gov.au/national-agreement/targets>>.

<sup>51</sup> Ibid.

<sup>52</sup> NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Justice Aboriginal overrepresentation: Quarterly update – Aboriginal Adults* (Report, September 2023). See also Productivity Commission, 'Socioeconomic outcome area 10 - Aboriginal and Torres Strait Islander adults are not overrepresented in the criminal justice system', *Closing the Gap Information Repository - Productivity Commission* (Web Page, 29 June 2022) <<https://www.pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area10>>.

<sup>53</sup> NSW Bureau of Crime Statistics and Research, *NSW Closing the Gap Target 10 and 11 Summary Report* (March 2024) <>.

concerns about drive by shootings. In a 2016 review of those laws, the NSW Ombudsman<sup>54</sup> found:

- evidence to indicate use by police officers in relation to a broad range of offending, including minor and nuisance offending.
- use of the consorting law in relation to disadvantaged and vulnerable people, including Aboriginal people, people experiencing homelessness, and children and young people.
- an exceptionally high police error rate when issuing consorting warnings in relation to children and young people.

The subsequent 2023 report by the LECC into operation of the consorting laws found that, during the review period, 42 percent of people who were the subject of consorting laws and 46 percent of all warnings issued by General Duties police were to people who identified as Aboriginal.<sup>55</sup> LECC also found:<sup>56</sup>

This review, and the Ombudsman's earlier review, have both shown that police often use the laws to attempt to disrupt comparatively less serious potential criminal activity, such as drug possession. The Commission has seen many examples where people searched by police on suspicion of drug possession are given an oral consorting warning and often a move on direction.

In a large number of cases ...there appears to be no clear link between serious criminal activity and the warning issued.

A separate report by LECC reviewing the NSW Police Strategic Direction 2018-2023 noted statistics for several types of policing interactions with Aboriginal adults and children, such as STMP, strip searches, consorting warnings, bail refusals, bail compliance checks, and the issue of infringement notices for offensive language. The Commission reflected upon those statistics, finding that they highlight the way NSWPF is policing Aboriginal communities may be undermining the aims of reducing Aboriginal overrepresentation in the criminal justice system, and improving the safety and wellbeing of Aboriginal children. The Commission went on to observe:<sup>57</sup>

Crucially, many of the types of policing interactions described above relate to pro-active policing. This means officers have a substantial degree of discretion in how to choose to apply the law when an offence is detected, and influence the way an interaction with the person of interest will proceed.... The statistics ... highlight that currently, NSW police officers may be using their discretion in a way that causes more Aboriginal people to come into the criminal justice system.

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<sup>54</sup> NSW Ombudsman, *The Consorting Law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900* (Report, April 2016) 'foreword' at iii and Ch 8.

<sup>55</sup> Law Enforcement Conduct Commission, *Review of the Operation of the amendments to the consorting law under Part 3A Division 7 of the Crimes Act 1900* (Report, February 2023) (**LECC Review of Consorting**) 39.

<sup>56</sup> *Ibid* 'foreword' at ii.

<sup>57</sup> Law Enforcement Conduct Commission, NSW Police Force *Aboriginal Strategic Direction 2018-2023 monitoring report* (Report, October 2023) 36.

The recent LECC findings about the former STMP are also illustrative of the tendency of police powers-based schemes to produce adverse and discriminatory outcomes in vulnerable populations. LECC noted that the proportion of Aboriginal young people in the investigation cohorts over several years remained extremely high, and the NSWPF “*did not appear to have any practical strategies for addressing this*”.<sup>58</sup>

While STMP has since ceased, it is clear that bail compliance checks formed a substantial part of that program and that this practice continues.



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<sup>58</sup> LECC Final STMP Report, p.10.