



THE LAW SOCIETY
OF NEW SOUTH WALES

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26 July 2024

The Hon. Peter Johnson SC
Chief Commissioner
Law Enforcement Conduct Commission
Level 3, 111 Elizabeth Street
Sydney NSW 2000

By email: engage@lecc.nsw.gov.au

Dear Mr Johnson,

Bail compliance checks in NSW Issues Paper

Thank you for providing a copy of the Law Enforcement Conduct Commission (**LECC**) Issues Paper, 'Bail compliance checks in NSW' (**Issues Paper**). The Law Society's Criminal Law, Indigenous Issues and Children's Legal Issues Committees contributed to this submission.

The Law Society supports the LECC taking steps to assess the effectiveness and appropriateness of the NSW Police Force (**NSWPF**) approach to monitoring and enforcing bail conditions, including in circumstances where no enforcement condition has been imposed as a condition of bail. We welcome the opportunity to contribute to the LECC's work in this space and offer the following comments in respect of each key issue raised in the Issues Paper for consideration.

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

It is our view that the doctrine of implied licence can only be relied upon by police officers in very limited circumstances when conducting bail checks, if at all, particularly given the uncertainty around whether, and to what extent, bail compliance checks constitute a coercive power, in light of *Roy v O'Neill*.¹

In the absence of express statutory provisions authorising police to enter private property to monitor bail compliance, we understand that police rely on express or implied licence to enter private property.² As noted in the Issues Paper, police officers rely on the doctrine of implied licence to the extent that they:

- Have a legitimate purpose for that entry, which can include undertaking enquiries with the occupier in respect of whether a breach of bail conditions has occurred.
- Have a legitimate purpose that does not involve 'interference with the occupier's

¹ *Roy v O'Neill* (2020) 285 A Crim R 120.

² LECC, Issues Paper (2024) p. 20.

- possession or injury to the person or property of the occupier, or the occupier's guests'.³
- Promptly leave the property if the occupier revokes an implied licence for police to be on their property, by words or actions, that would be understood by a reasonable person in the position of the police officer to constitute a revocation of that licence (for example, in circumstances where the occupier holds the door shut or asks police to leave).⁴

As set out below, we consider the practice of police relying on the doctrine of implied licence to be problematic, and in need of review and reform.

Inappropriate reliance on a lack of community knowledge

The doctrine of implied licence does not appear to be a concept well understood by the public. We consider it likely that homeowners, occupiers and residents are not familiar with the concept, and lack knowledge of both the extent of the powers police may exercise under the doctrine, and of their own right to revoke licence. In our view, it is inappropriate for the law to function in a way that enables police to employ coercive powers, including those associated with or flowing from bail compliance checks, by relying on the uninformed action, or lack of action, of civilians.

The status quo is particularly concerning when considering that, when relying on the doctrine of implied licence, there is no requirement for police to identify the power under which they are operating, or for police to explain to the occupier their rights, including the occupier's right to ask police to leave or not answer any questions. We also note the power imbalance at play when police interact with residents on private property, and consider it likely that many citizens would be unaware that they may request that police leave their property.

We consider this to be an undesirable way for the law to operate and would support consideration of improved ways to support bail compliance, while better protecting occupiers' rights and community safety.

Scope for misunderstanding and misinterpretation

We are also concerned about the scope for, and adverse consequences of, police misinterpretation of the doctrine of implied licence, including police misunderstanding of 'legitimate purpose' and what may be considered 'interference with the occupier's possession or injury to the person or property of the occupier, or the occupier's guests'.⁵

Issues considered by the LECC in Operation Cusco, by the High Court in *Roy v O'Neill*,⁶ and by the Supreme Court of NSW in *Romani*,⁷ suggest that there are divergent views and interpretations as to the nature of a 'legitimate purpose' amongst the NSWPF, including, for example, misunderstanding as to the appropriate number and frequency of bail compliance checks, and as to the extent of police powers to remain on private property.

Our members report that, notwithstanding common law guidance around the doctrine of implied licence, difficulties persist with interpreting 'legitimate purpose'. Members report instances where police have conducted bail compliance checks in ways that have counterproductive outcomes, including attending residences late into the evening when a young person, subject to a curfew, may have already gone to sleep.

³ LECC, Issues Paper (2024) p. 21, citing *Halliday v Neville* (1984) 155 CLR 1, 7-8; *Kuru v New South Wales* (2008) 236 CLR 1, 15; *Roy v O'Neill* (2020) 272 CLR 291, 302-303 [13].

⁴ LECC, Issues Paper (2024) p. 23, citing *New South Wales v Koumdjiev* (2005) 63 NSWLR 353, 360.

⁵ See note 3 above.

⁶ See note 1 above.

⁷ *Romani v State of New South Wales* [2023] NSWSC 49.

In our view, these issues highlight a lack of clarity around the relevant police powers, guidance for their appropriate use, and awareness of occupiers' rights in connection with bail compliance checks and the doctrine of implied licence.

We would support steps toward developing clearer governing rules around bail compliance monitoring to ensure there is clarity and understanding of the relevant police powers and occupiers' rights.

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

We are of the view, as further detailed below, that the *Bail Act 2013*, correctly interpreted, proscribes police from conducting bail compliance checks unless there is an enforcement condition in place under section 30, or, as per section 77, unless a police officer believes on reasonable grounds that the person has failed to comply with, or is about to fail to comply with, a bail acknowledgement or bail condition.

Interpreting section 30 of the Bail Act 2013

Under section 30(2) of the *Bail Act 2013*, an 'enforcement condition' is defined as:

a bail condition that requires the person granted bail to comply, while at liberty on bail, with one or more specified kinds of police directions (given for the purpose of monitoring or enforcing compliance with the underlying bail condition).

In our view, the purpose of the provision is to authorise and require compliance by the bailed person with police directions given for the purpose of monitoring or enforcing compliance with a bail condition. It follows that, absent enforcement conditions, certain police directions, including for example a direction for a person to submit to a breath test to demonstrate compliance with an abstention condition, may not otherwise be authorised, or require compliance.

This interpretation appears consistent with the views the then Minister for Police and Emergency Services, the Hon. Michael Gallacher MP, expressed when enforcement conditions were first introduced into bail legislation by the *Bail Amendment (Enforcement Conditions) Act 2012*. In the Second Reading Speech, it was noted that:

the absence of enforcement conditions is negatively impacting on [police] ability to check that an accused person or accused persons are complying with their bail conditions.⁸

We agree with the suggestion put forward in the Issues Paper that the comments made in the Second Reading Speech, including the above, 'clearly show that Parliament's understanding was that without an appropriate bail enforcement condition, police did not have the ability/power to direct a person to come to their front door so police could check they were complying with a curfew condition',⁹ and that 'in 2012 the NSWPF considered that the absence of bail enforcement conditions limited police ability to check a person was complying with their bail conditions.'¹⁰

⁸ New South Wales, Parliamentary Debates, (Legislative Council), 24 October 2012, 16261 (The Hon. Michael Gallacher).

⁹ LECC, Issues Paper (2024) p.18.

¹⁰ LECC, Issues Paper (2024) p.18.

In our view, the intent of the legislation was, and should remain, to support police to monitor bail compliance, particularly of ‘high-risk accused persons,’¹¹ in a way that is controlled and safeguarded by the Courts through the requirements under section 30, to ensure that ‘enforcement conditions are not imposed in inappropriate cases or in a way which makes compliance too onerous.’¹²

We recognise that the current police practice of conducting bail compliance checks in the absence of enforcement conditions, as prescribed in the NSWPF Bail Compliance Standard Operating Procedures, is at odds with our interpretation.¹³

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 s 77 of the Bail Act?

We consider a bail enforcement condition necessary for police to conduct bail compliance checks outside of section 77 of the *Bail Act 2013*. In our view, it is appropriate for police to seek an enforcement condition as an adjunct to an accommodation or curfew condition to be imposed by a Court, rather than relying exclusively on implied licence to enter property and conduct bail compliance checks. We would support consideration of measures to clarify and confirm whether an enforcement condition is required to conduct bail compliance checks.

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?

We consider Courts well-equipped to consider the appropriate crafting of an enforcement condition that is not unreasonable, and remains an effective tool for checking compliance with the underlying condition. The bail enforcement conditions set by the Children’s Court of NSW, as referenced on page 39 of the Issues Paper are, in our view, examples of effective enforcement conditions.

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

We accept that there may be practical limitations on the effectiveness of enforcement conditions that require a bailed person to present to the front door, including for example, that a bailed person may modify their behaviour after the quota of compliance checks for the night/week is met.

However, monitoring bail compliance is one tool, amongst many, available to mitigate bail concerns and support community safety. To better support defendants to comply with their bail conditions, we are of the view that it may be beneficial to consider directing resources into community initiatives, including community support for bailed persons, and functions of law enforcement other than bail compliance monitoring, to ensure the community is properly protected. In our view, investment in community support and in broader initiatives to reduce recidivism is a preferred, and more effective, approach to increasing compliance with bail

¹¹ New South Wales, Parliamentary Debates, (Legislative Council), 24 October 2012, 16261 (The Hon. Michael Gallacher).

¹² New South Wales, Parliamentary Debates, (Legislative Council), 24 October 2012, 16261 (The Hon. Michael Gallacher).

¹³ LECC Issues Paper (2024) pp. 29-30.

conditions and reducing the risk of reoffending by defendants on bail, as compared with a narrow focus on bail compliance checks.

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?

We note that, even where there are enforcement conditions in place, there is no obligation on residents other than the defendant to assist police in checking bail compliance. However, residents may nevertheless seek to assist, and/or otherwise become involved in the process of bail compliance monitoring.

Indeed, our members report bail compliance checks can cause significant disruption to residents other than the bailed person, and in some cases neighbours, including, for example, where:

- frequent compliance checks are conducted, particularly late, and on multiple occasions, at night,
- families, including children, who reside with defendants, may witness frequent interactions with police in their home, resulting in distress or trauma. It may also lead to the stigmatisation of already marginalised families,
- police communicate with persons other than the defendant during a bail compliance check, and there is a risk of privacy infringements, or contamination, if the other resident is a witness in the substantive matter,
- residents who are children and young people, particularly those in residential care, may experience adverse impacts of increased exposure to police and the criminal justice system.

In our view, requiring an enforcement condition to be in place for police to conduct bail checks mitigates the risk of inappropriate interference and disruption with other residents, as, under section 30 of the *Bail Act 2013*, a Court must have regard to ‘the extent to which compliance with a direction of a kind specified in the condition may unreasonably affect persons other than the person granted bail’¹⁴ in deciding whether to impose an enforcement condition.

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

In light of the concerns canvassed above, we do not consider it appropriate for the *Bail Act 2013* to make provision for the carrying out of bail compliance checks in absence of a bail enforcement condition. Instead, we support consideration of appropriate amendments to make clear that a court ordered enforcement condition is required for police to conduct bail compliance checks.

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 would support the development of appropriate amendments that would remove the need for police to rely on the doctrine of implied licence, and make clear that enforcement conditions under section 30 of the *Bail Act 2013* are required for police to conduct bail compliance checks outside the scope of section 77 of the *Bail Act 2013*.

¹⁴ *Bail Act 2013*, s 30(5).

Further, in developing appropriate amendments to improve the legislative scheme, the LECC may wish to consider whether an enforcement condition should also be able to be imposed at the request of the defendant, in addition to the prosecutor, under section 30(3). Expanding section 30(3) to enable defendants to request an enforcement condition, in our view, may be a beneficial amendment to support increased consideration of practical enforcement conditions by the Court.

We appreciate the opportunity to provide a submission in response to the items raised in the Issues Paper and look forward to further opportunities to provide input as part of the review and any resulting law reform process. If you have any questions in relation to this letter, please contact Claudia Daly, Policy Lawyer on (02) 9926 0233 or by email: claudia.daly@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Brett McGrath', written in a cursive style.

pp.
Brett McGrath
President