

# LECC

Law Enforcement  
Conduct Commission

## OPERATION CUSCO

REPORT PURSUANT TO SECTION 132 *LAW  
ENFORCEMENT CONDUCT COMMISSION ACT 2016*

APRIL 2020

# LECC

Law Enforcement  
Conduct Commission

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16 April 2020

The Hon John Ajaka MLC  
President  
Legislative Council  
Parliament House  
SYDNEY NSW 2000

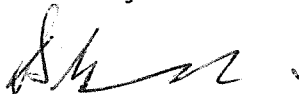
The Hon Jonathan O'Dea MP  
Speaker  
Legislative Assembly  
Parliament House  
SYDNEY NSW 2000

Dear Mr President and Mr Speaker

In accordance with section 132(3) of the *Law Enforcement Conduct Commission Act 2016* ('the Act'), the Commission hereby furnishes to you a Report in relation to its investigation in Operation Cusco .

Pursuant to section 142(2) of the Act, I recommend that this Report be made public immediately.

Yours sincerely



The Hon R O Blanch AM QC.  
Acting Chief Commissioner

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# 1 Introduction

1.1 On 14 December 2018, the Commission decided to investigate whether:

- (i) *The conduct of police officers from Newcastle City concerning the enforcement of bail granted in May and July 2014 to CU1 subject to conditions as to residence and curfew, and arrest and charging of CU1 in Condobolin in May 2014 with various offences and withdrawal of charges in February and March 2015 is or might be serious misconduct and/or serious maladministration, and*
- (ii) *The rules, orders or practice of the NSWPF either generally or by particular stations, regions or commands concerning the imposition and enforcement of bail conditions are or could be indicative of a systemic problem or agency maladministration.*

## 2 The Commission's Report

2.1 This report is made pursuant to Part 11 of the *Law Enforcement Conduct Commission Act 2016* (LECC Act). Section 132(1) provides that the Commission may prepare reports "*in relation to any matter that has been or is the subject of investigation under Part 6*".

2.2 Section 133 (Content of Reports to Parliament) provides that:

*(1) The Commission is authorised to include in a report under section 132:*

*(a) statements as to any of the findings, opinions and recommendations of the Commission, and*

*(b) statements as to the Commission's reasons for any of the Commission's findings, opinions and recommendations.*

*(2) The report must include, in respect of each affected person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:*

*(a) obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the person for a specified criminal offence,*

*(b) the taking of action against the person for a specified disciplinary infringement,*

*(c) the taking of action (including the making of an order under section 181D of the Police Act 1990) against the person as a police officer on specified grounds, with a view to*

*dismissing, dispensing with the services of or otherwise terminating the services of the police officer,*

*(d) the taking of reviewable action within the meaning of section 173 of the Police Act 1990 against the person as a police officer,*

*(e) the taking of action against the person as a Crime Commission officer or an administrative employee on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the Crime Commission officer or administrative employee.*

*Note. See section 29(4) in relation to the Commission's opinion.*

*(3) An "affected person" is a person against whom, in the Commission's opinion, substantial allegations have been made in the course of or in connection with the investigation (including examination) concerned.*

*(4) Subsection (2) does not limit the kind of statement that a report can contain concerning any affected person and does not prevent a report from containing a statement described in that subsection in respect of any other person.*

2.3 Part 4 of the LECC Act sets out the functions of the Commission. Pursuant to s 29 the Commission may, *inter alia*, make findings and form opinions on the basis of its investigations as to whether officer misconduct occurred and to make recommendations as to whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences or whether consideration should be given to the taking of action under Part 9 of the *Police Act 1990*. However, the Commission cannot include in a report under Part 11 of the LECC Act a finding or opinion that any conduct of a specified person is officer misconduct unless the conduct is serious misconduct.

2.4 Serious misconduct is defined in s 10 of the LECC Act as:

*(1) For the purposes of this Act, "serious misconduct" means any one of the following:*

*(a) conduct of a police officer, administrative employee or Crime Commission officer that could result in prosecution of the officer or employee for a serious offence or serious disciplinary action against the officer or employee for a disciplinary infringement,*

*(b) a pattern of officer misconduct, officer maladministration or agency maladministration carried out on more than one occasion, or that involves more than one participant, that is indicative of systemic issues that could adversely reflect on the integrity and good repute of the NSW Police Force or the Crime Commission,*

*(c) corrupt conduct of a police officer, administrative employee or Crime Commission officer.*

*(2) In this section:*

*"serious disciplinary action" against an officer or employee means terminating the employment, demoting or reducing the rank, classification or grade of the office or position held by the officer or employee or reducing the remuneration payable to the officer or employee.*

*"serious offence" means a serious indictable offence and includes an offence committed elsewhere than in New South Wales that, if committed in New South Wales, would be a serious indictable offence.*

2.5 "Officer maladministration" and "agency maladministration" are both defined in section 11 of the LECC Act. "Officer maladministration" is defined in s 11(2) in these terms:

*Officer maladministration means any conduct (by way of action or inaction) of a police officer, administrative employee or Crime Commission officer that, although it is not unlawful (that is, does not constitute an offence or corrupt conduct):*

- (a) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or*
- (b) arises, wholly or in part, from improper motives, or*
- (c) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or*
- (d) arises, wholly or in part, from a mistake of law or fact, or*
- (e) is conduct of a kind for which reasons should have (but have not) been given.*

2.6 The conduct of an officer or agency is defined as "serious maladministration" if the conduct, though not unlawful, is conduct of a serious nature which is unreasonable, unjust, oppressive or improperly discriminatory in its effect or arises wholly or in part from improper motives: LECC Act, s 11(3).

- 2.7 The Commission may hold an examination for the purpose of an investigation into conduct that it has decided is (or could be) serious misconduct or serious maladministration: s 61(a).
- 2.8 Before expressing any opinion that serious misconduct has, or may have occurred, or that in all the circumstances it is of the opinion that consideration should be given to the prosecution of any person for a specified criminal offence, the Commission should be comfortably satisfied of the relevant facts, applying the civil standard of proof in the manner suggested by Dixon J in *Briginshaw v Briginshaw*.<sup>1</sup> His Honour said:<sup>2</sup>
- The seriousness of an allegation made, the inherent unlikelihood of any occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issues had been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony or indirect inferences.*
- 2.9 Section 143 (Persons to be heard) requires the Commission, before including in a report under Part 11 any comment about a person that the Commission considers adverse, so far as practicable, to inform that person of the substance of the grounds of the adverse comment and give the person an opportunity to make submissions.<sup>3</sup>
- 2.10 The Commission determined that, having regard to the provisions of s63(5)(d) of the LECC Act, the identities of all witnesses and other persons referred to in the evidence would be suppressed. Accordingly, codenames have been issued for the purposes of this report. There is to be no publication of the actual name of any person referred to in the Commission's investigation, the subject of this report, without further order of the Commission.

### 3 Background

- 3.1 Civil proceedings were commenced by CU1 and his partner, CU2, against the State of New South Wales in the District Court on 10 May 2017. In particular it was alleged that from 10 May 2014 until 19 August 2014, when police conducted 55 bail checks on CU1, they had no right to enter the premises to conduct a bail check. Part of the history of that particular matter is that it was asserted CU1 and CU2's solicitor sent a communication to the police revoking any licence to enter their premises on 13 June 2014.

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<sup>1</sup> (1938) 60 CLR 336.

<sup>2</sup> Ibid p.361.

<sup>3</sup> LECC Act, s 143(1).

The letter was resent on 21 August 2014 because the bail checks had continued.

- 3.2 The evidence to the Commission from the police was that the letter of 13 June was not received and when the letter of 21 August was received police immediately made application to the court to revoke the bail because if they could not enter the premises they could not monitor the bail conditions. This caused CU1 and CU2 to reverse their position and thus allow police to enter the premises. Bail then continued as before.

## 4 The Commission Investigation

- 4.1 The Commission decided to hold examinations in Operation Cusco and, because of the nature of the allegations, and after taking into account the factors set out in s 63 of the LECC Act, decided that the examinations would be held in public.

- 4.2 The following witnesses were called to give evidence in public examinations before the Commission:

- 1) Officer 1
- 2) Officer 2
- 3) Officer 13
- 4) Officer 14
- 5) Officer 15

- 4.3 The examinations took place on 9 and 11 September 2019.

- 4.4 The general scope and purpose of the public examinations was to investigate whether:

- 1) *The arrest and charging of CU1 by NSWPF officers in Condobolin in May 2014 and the withdrawal of charges in February and March 2015; and the enforcement by NSWPF officers of bail granted to CU1 in May and July 2014, was or concerned serious misconduct and/or unlawful, unreasonable, unjust or oppressive conduct or arose, wholly or in part from a mistake of fact or law.*
- 2) *Whether the rules, orders or practice of the NSWPF either generally or at particular stations or commands concerning the imposition and enforcement of bail conditions are or could be indicative of a pattern of unlawful, unreasonable, unjust or oppressive conduct or arose, wholly or partly from a mistake of fact or law or systemic issues that could adversely reflect on the integrity and good repute of the NSWPF.*



4.5 The Commission ultimately decided not to investigate the circumstances which led to the arresting and charging of CU1 and the subsequent withdrawal of those charges. Consequently, the Commission sought no information in relation to that issue and it was not raised during the examinations. The Commission did, however, obtain CU1's criminal record. There was nothing in CU1's record that suggested he had been involved in anything much more than *ad hoc* nuisance type offences. At the same time, the offence with which CU1 had been charged involved serious criminality (for all that it was subsequently withdrawn) exceeding by far the gravity of his previous offences. There was a suggestion also that possible witnesses who might cooperate with police were threatened. This implied that bail checks to ensure compliance with the curfew condition were indeed necessary. It is the nature and extent of those checks which needs consideration.

## 5 Evidence

### (i) Conducting Bail Checks

5.1 Five police officers were called to give evidence in public hearings before the Commission. They all gave similar evidence as to how they were tasked to conduct bail compliance checks. At the start of their shift, the shift supervisor, usually a Sergeant, tasked them with their duties, which included bail checks. They were provided with a list of persons in the Command who were on curfew bail. That curfew list was prepared by NSWPF Intelligence officers. Some shift supervisors told the officers to conduct checks of persons on that list, with no specific names tasked to those officers. The number of checks, if any, would depend on whether they had time on their shift to conduct those checks. Other shift supervisors would direct the officers to conduct checks on specified persons, and either provided the officers with a list of specified persons or the curfew bail list on which the shift supervisor had highlighted the names of those to be checked. Depending on the shift supervisor's approach, different car crews were allocated different persons on which to conduct bail curfew checks.<sup>8</sup> The same list of bailed persons would be provided to officers on consecutive shifts, resulting in bail checks being conducted on the same person in the same evening by different officers.

5.2 The police officers were asked about specific bail curfew checks they had conducted on CU1. Officer 1 was asked about a bail check he conducted on CU1 on 18 August 2014 at 11.45pm. He stated that he could not recall that particular bail check. He was unaware that a bail check had already been conducted at 11.08pm that same evening. He indicated that even if he had known about that earlier check, he would possibly still have conducted the

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<sup>8</sup> See transcript of public examination of Officer 1, 9 September 2019, p. 21; transcript of public examination of Officer 2, 9 September 2019, p. 62; transcript of public examination of Officer 13, 11 September 2019, p. 83.

bail check as “because they were there at 11.08 doesn’t mean they’re going to be still there at 11.45, check on it again.”<sup>9</sup>

- 5.3 Officer 1 said that from time to time more than one bail check would be conducted on the same person because in addition to car crews on shifts, there were also plain clothes officers who could also conduct bail checks. They would have the same list as everyone else on shift.<sup>10</sup> Officer 1 also noted that, theoretically, several checks could be conducted on the same person during one shift if everyone had their own bail list and conducted bail checks of their own accord.<sup>11</sup>
- 5.4 Officer 1 stated that bail curfew checks would always be conducted at night as those were the curfew hours. He would not conduct checks at the same time on each occasion as the offender would then know when to be home. Officer 1’s procedure was to knock on the door. If someone other than the bailed person answered the door, he would ask if that person was home and if so, would request them to go get that person, or otherwise inform the police officer where that person was. If there was no answer, he would knock louder or knock on a window.<sup>12</sup> He may have gone around and knocked on side windows or doors and possibly would have shone a light through the window to see if anyone was there or if he could wake them up.<sup>13</sup>
- 5.5 Officer 2 had been a police officer since 2001 and at the rank of senior constable since 2006. She gave evidence that when she conducted bail checks, she would knock on the door and if there was no answer, she might knock on a window if it was near the door. She stated that she never shone a torch into the house. If there was no answer, she would leave.<sup>14</sup>
- 5.6 Officer 2 was questioned about a specific bail check she conducted on CUI on 3 June 2014. She had no specific recollection of that bail check. She believed that she would have only knocked once as that was how she conducted bail checks. She stated that if there was no answer, she would not return later in her shift to conduct another check. Her COPS event would record that there was no response.<sup>15</sup>
- 5.7 Officer 2 would have conducted a bail check the following day, even if she had conducted one the day before, as it was a different day. She also stated that “*I just do what I’m told, or whatever is-whatever ones they pick for me that’s the ones I do*”.<sup>16</sup>

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<sup>9</sup> Transcript of public examination of Officer 1, 9 September 2019, p. 34.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid p. 36.

<sup>12</sup> Ibid p. 28.

<sup>13</sup> Ibid pp. 28-29.

<sup>14</sup> Transcript of public examination of Officer 2, 9 September 2019, pp. 64-66.

<sup>15</sup> Ibid pp. 71-72.

<sup>16</sup> Ibid p. 70.

- 5.8 Officer 2 agreed that on her next shift the following day (4 June 2014) she conducted another bail check on CU1. In addition to creating a COPS event in relation to that bail check she also updated the COPS event in relation to the 3 June bail check to record that CU1 informed her that the reason he did not respond on the previous bail check was that he had not heard the knocking.<sup>17</sup>
- 5.9 Officer 13 had been a police officer for 20 years. He stated that at the start of the shift, he would be given a list with a “*bunch of names*” on it and depending on the supervisor, he would be told to either pick people at random or told which ones he was to conduct bail checks on.<sup>18</sup> There were usually 2 cars on shift and they would be given different lists with different names asterisked to avoid doubling up. However, he saw no issue with doubling up.<sup>19</sup>
- 5.10 Officer 13 gave evidence of the process he used to conduct a bail check. He would not conduct them any later than 3am. He would knock on the door and if there was no response, he would knock between five and ten times with a gradual increase in the strength of the knock. Sometimes he would wait between knocks as he may have heard footsteps approaching and so he would know that someone was coming to the door. He was conscious of trying to wake as few people as possible as he would not know whether there were small children or other family members inside.<sup>20</sup> If he had been to the house before he would have a better idea of who was living there.
- 5.11 Officer 13 never knocked on a window, shone a torch in the house or flashed car headlights as alternative means to try to raise people.<sup>21</sup>
- 5.12 Officer 13 was specifically asked about a bail check he conducted on CU1 on 15 May 2014. He could not recall the specific event and he only had a vague recollection of CU1.<sup>22</sup> He would have conducted that particular bail check as his name would have been on the list. It was not unusual to attend at 1.15am. He used the common phrase “*presented himself to the door upon request*”. “*He may have popped his head out of the window right above the door, but rather than just saying, you know, I just kept it simple*”.<sup>23</sup> That phrase was his standard text. He stated that he would not necessarily have recorded anything unusual on the COPS event, for example, if there had been a threat. He said he would most likely have reported a threat to his

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<sup>17</sup> Ibid p. 73.

<sup>18</sup> Transcript of public examination of Officer 13, 11 September 2019, p. 83.

<sup>19</sup> Ibid p. 85.

<sup>20</sup> Ibid p. 90.

<sup>21</sup> Ibid p. 91.

<sup>22</sup> Ibid p. 93.

<sup>23</sup> Ibid p. 94.

supervisor but he had never been threatened whilst conducting a bail check.<sup>24</sup>

- 5.13 Officer 13 confirmed that he conducted another bail check on the same day, 15 May 2014. The first was at 1.15am and the second one was at 23.25. Whilst it was the same calendar day, the second check occurred on a different shift. He did not recall that check but he did not think it was unusual to go back twice in a row.<sup>25</sup>
- 5.14 Officer 13 stated that they were required to sight the bailed person but acknowledged that the bail conditions (in 2014) did not necessarily require someone to present themselves to the door.<sup>26</sup>
- 5.15 Officer 13 was referred to the passage in the then applicable NSWPF Code of Practice for CRIME which discussed “*entering and searching premises and seizing property*” and informs readers that it is unlawful for police to enter and remain on private premises without the consent of the lawful occupier. Officer 13 said that that did not change his understanding of bail compliance checks as he was not entering the property apart from coming to the front door. He took “*premises*” to mean the actual house.<sup>27</sup>
- 5.16 Officer 13 was unaware of bail enforcement conditions and did not believe that his recent online training had referred to enforcement conditions or police powers in that regard.<sup>28</sup>
- 5.17 Officer 14 had been a police officer since 1988 and a leading senior constable for 15 years. He gave similar evidence to the other police officers as to how bail compliance checks were assigned. The supervisor would download a list of persons currently on curfew bail and a number of checks would be allocated to each of the truck crews to perform during the evening.<sup>29</sup> He stated that he would try to conduct the checks before midnight so as not to impose too much on the person. Personally he would not conduct them at “*unrealistic hours, like, say after 2am*” and he would “*try to do it in such a manner that you don’t disturb other persons, like neighbours or other members of the household. Like I knock once, if no-one answers, then I leave. We have a classification where you can put it as unable to determine.*”<sup>30</sup>

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<sup>24</sup> Ibid p. 95.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid p. 97.

<sup>27</sup> Ibid p. 100.

<sup>28</sup> Ibid p. 101.

<sup>29</sup> Transcript of public examination of Officer 14, 11 September 2019, p. 109.

<sup>30</sup> Ibid.

5.18 Officer 14 stated that he would assume that his shift supervisor would be giving him a lawful direction within his powers regarding bail checks. He was not *au fait* with any actual parts of the relevant legislation. *"Just a part of my duties to check that the curfews are being complied with"*.<sup>31</sup>

5.19 Officer 14 was asked whether he would shine a light into the building to see if anyone was there. He gave the following evidence:

*On occasion you would arrive at a premises and you would see curtains or something come open from the front window, and you may at that point shine it towards the window and recognise the head that is there...*

*...not without warning. As I said, if it was indicated someone was there, like, hearing the window either open, curtains come aside, or someone call out, so then I would shine the torch, recognise the face and that would be sufficient for a bail check.*<sup>32</sup>

5.20 When asked about putting effort into finding out whether they were there or not he responded:

*Yes, but it has to be reasonable as well. Like you try to do it in such a manner that you don't disturb other persons. I'm not going to stand there and bang bang bang on the door until someone comes out, like. You would probably-with those sort of situations, you would record it as the undetermined, you are unable to tell whether the person is home or not.*<sup>33</sup>

5.21 Officer 14 was aware that different approaches were taken by others. He observed that quite often there would be other persons, including children, at properties where he was conducting bail checks. It was for this reason that he developed his own methodology of trying to get there at a reasonable time.<sup>34</sup> He would also comply with instructions of the occupants such as *"Can you just come to the side door or the shed down the back where I'm living, instead of disturbing people in the house."*<sup>35</sup>

5.22 Officer 14 was asked about a number of bail checks he conducted on CU1. He was shown the COPS event in relation to a bail compliance check on 16 May 2014. He could not recall that particular check. He did recall generally going to the door on occasions and knocking. He recalled that CU1 stayed in the upstairs bedroom and sometimes he would open the curtain and officer 14 could see him so was satisfied that he was there. He may have

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<sup>31</sup> Ibid p. 110.

<sup>32</sup> Ibid p. 111.

<sup>33</sup> Ibid p. 112.

<sup>34</sup> Ibid p. 114.

<sup>35</sup> Ibid.

shone the torch towards him on those occasions.<sup>36</sup> He would record that he found him in compliance with his bail undertaking and that could have meant that he had been at the front door or he might have seen him at the window.<sup>37</sup> He was aware that CU1 had a partner.<sup>38</sup>

- 5.23 Officer 14 was asked how the doubling up of bail checks could be avoided. He stated that he would create a job on the computer and so the address would appear as a job which the other car crews could see and he could see theirs. *"So if I seen an address that someone else is attending, I'd probably steer away from it"*. He conceded that a doubling up of bail checks could occur if they were not *au fait* with the checks that another crew were doing.<sup>39</sup> He did not see that as a problem as *"they are on bail to remain at the premises, so I don't know whether you would want to instill that sort of belief with the person, that once they have been checked once, they are right for the rest of the night, go and do what you like."*<sup>40</sup>
- 5.24 When asked whether it might be a good thing to do multiple checks, Officer 14 stated: *"If you know that they are an active break and enter offender, okay, you might check them two or three times, just to make sure they are not out, especially if you are aware that something's happening in the area"*.<sup>41</sup>
- 5.25 Officer 14 stated that when conducting a bail check, if he got no response that would be the end of it. It was not his practice to walk around to a side window and knock or look in.<sup>42</sup>
- 5.26 Officer 14 was questioned about a bail check he conducted on 3 June 2014. The COPS event recorded that *"police attended and conducted a bail compliance check, sighting the POI and therefore complying with his bail conditions"*. Officer 14 could not recollect whether he sighted CU1 at the front door or at the window. He did not complete that COPS event. He was unaware that a bail check had been conducted the previous evening and also twenty minutes after his check on 3 June. He explained that it was not a particularly unusual thing to happen as at stage *"unfortunately, the-there was another section called, like, the target action group, who also used to go out doing bail compliance checks... I'm not aware that there was much discussion between us in general duties and our supervisors, and the activities that they were performing for the evening, because they had their own supervisors to go out and conduct bail checks and that sort of thing as well"*.<sup>43</sup>

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<sup>36</sup> Ibid pp. 118-119.

<sup>37</sup> Ibid p. 119.

<sup>38</sup> Ibid p. 120.

<sup>39</sup> Ibid p. 121.

<sup>40</sup> Ibid p. 122.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid p. 124.

<sup>43</sup> Ibid p. 127.

- 5.27 Officer 15 had been a police officer for 12 years. In 2014 she was at the rank of Senior Constable. She gave similar evidence to the other officers as to how she was tasked to conduct bail compliance checks: *"Ideally we would be given a list and the sergeant would - or the supervisor would mark out whom we were to do checks on that night, if we could get to them."* If everybody was busy and no checks were allocated to her, she explained that; *"I would just go and do some myself"*.<sup>44</sup> On those occasions, Officer 15 would download the list herself, which she estimated would contain 50 names, and she would try to do four a night.<sup>45</sup> If she was in a particular area for a job, she would then take the opportunity to conduct a bail check on a person residing in that area. This *ad hoc* way of determining which bail checks to conduct occasionally led to more than one bail check being conducted on the same person on the same night.<sup>46</sup>
- 5.28 In relation to the expectation as to completing bail checks, she stated that *"the Sergeant would say 'make sure you get your bail checks done' or else, you know, the Commander has a go at us at the next meeting."*<sup>47</sup>
- 5.29 Officer 15 understood that the purpose of bail checks was a *"strategy to target high-risk offenders"*.<sup>48</sup> She would conduct bail checks at different hours of the night, sometimes quite late or very early in the morning. On occasion they would have to wake people up. Officer 15 explained that if she arrived at a house and all the lights were off, that they *"would knock a few times, but I'm not going to wake the whole neighbourhood up"*.<sup>49</sup> She would never walk around the property unless she had been directed to do so. *"So some bail offenders would give us instructions to say, 'Come around to the back door and I will come to the back door' and so forth, but otherwise, no"*.<sup>50</sup>
- 5.30 Officer 15 would use a torch to look in a window but generally only because the person was at the window. She explained that *"you see movement and so shine the torch at the window to see what the movement was. That's probably an instinctive thing to do"*.<sup>51</sup> It was not her practice to knock on windows and she was not aware of other officers doing that.<sup>52</sup>
- 5.31 Officer 15 noted that on occasion people would open their door as they were approaching and she was not sure if it was *"the noise of the car or it's the dead of the night or headlights, or whatever."* When asked about

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<sup>44</sup> Transcript of public examination of Officer 15, 11 September 2019, p. 140.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid pp. 141-142.

<sup>47</sup> Ibid p. 154.

<sup>48</sup> Ibid p. 142.

<sup>49</sup> Ibid p. 143.

<sup>50</sup> Ibid p. 144.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

shining headlights towards the property she explained that she would never pull up in a person's driveway so that headlights would shine onto their property.

- 5.32 Officer 15 was specifically asked about a number of bail checks she conducted on CU1. She was first directed to a bail check conducted on 31 May 2014 at 10.20pm. She indicated that that was not an unusual time to conduct a check. She conducted the check as it was on her list. She had no recollection of this particular check but could recall performing checks on CU1. She remembered the location of his house and front door and she was able to provide a description of the house. She recalled that *"occasionally, sometimes, I would have to knock at the door and he would open the door; other times, as we would walk up the footpath, he would look out the window [upstairs] and I would shine the torch at his face and he would wave at me and I would wave at him and then I would leave."*<sup>53</sup> She was not aware of who else resided at that property.
- 5.33 Officer 15 was asked about a bail check she conducted on CU1 on 18 August 2014 at 11pm. She could not recall that particular bail check but it was more than likely that she would have been specifically tasked to perform that check as CU1's name would have been on the list.<sup>54</sup> She was also asked about a bail check she conducted on 11 June 2014 of which she had no specific recollection but she was satisfied that the COPS event was an accurate reflection of what occurred.<sup>55</sup>

## (ii) Revocation of Implied Consent

- 5.34 Officer 1 was asked about his understanding of implied consent to enter premises. He stated that he had learned about it in recent training. He stated that if he was informed that someone had revoked their consent then he would update COPS. He would also *"email, firstly, those intelligence officers who compiled the list and more than likely the police prosecutors as well, or maybe the officer in charge of that particular charge that they're on bail for"*.<sup>56</sup>
- 5.35 Officer 1 gave evidence that in preparation for his appearance before the Commission he requested information about bail checks he had conducted and he was shown an email about CU1's withdrawal of implied consent for police to enter the premises.<sup>57</sup> Officer 1 was not aware of the revocation in 2014. He was shown an email dated 21 August 2014 from the crime manager at the time which informed the recipients that in relation to CU1

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<sup>53</sup> Ibid p. 146.

<sup>54</sup> Ibid p. 150.

<sup>55</sup> Ibid p. 155.

<sup>56</sup> Transcript of public examination of Officer 1, 9 September 2019, p. 43.

<sup>57</sup> Ibid p. 45.



the “ALS have advised that the common law right of entry to premises by police has been withdrawn by the occupier as of this date 21082014. Accordingly police no longer have a lawful right to access purely to routinely check compliance with the curfew condition at this property alone.” (This email shall be hereafter referred to as “the revocation email”). He confirmed that the revocation email was sent to everyone in the Newcastle Area Command and accordingly, he would have been a recipient of the email. He stated that he would have “possibly” seen it as “A lot of emails that we do receive, sometimes you don’t view them for whatever reason, don’t read them”.<sup>58</sup>

- 5.36 Officer 1 was shown a COPS event in relation to a bail check conducted on CU1 on 30 October 2014. He agreed that he had conducted the bail check, which was after the date that he received the revocation email. He explained that “I just went about my duties as per normal. If it was on the bail list, like I discussed before, and we attended to the bail checks from that bail list, whether or not it was tasked from a supervisor on that date or not, I don’t know by, yeah, pretty much it was on that curfew bail list and nothing to say that don’t conduct them at this address, then we would go and do the checks.”<sup>59</sup> Officer 1 stated that “if there was something that we were not supposed to go to that address we wouldn’t have went to that address, having knowledge of that”,<sup>60</sup> and that he would have expected the officer assigning the duties to tell him of a matter which he did not know or at least not put that bail check on his assigned duties.<sup>61</sup>
- 5.37 Officer 2 could not recall seeing the revocation email. She said that she probably did not read it but could not recall as it was 5 years ago.<sup>62</sup> She agreed that she would “just turn up” and do what she was told. She relied on the Sergeant to tell her who to bail check and she would expect the Sergeant to not put someone on the list who had withdrawn permission for the police to enter the premises.<sup>63</sup>
- 5.38 Officer 13 understood that every person has the right at common law to knock on a front door. He was not sure whether he could still enter property if permission to come in had been withdrawn as he had not come across one of those.<sup>64</sup>
- 5.39 Officer 14 was shown a copy of the 13 June 2014 letter from CU1’s legal representative revoking the implied consent for police officers to attend at

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<sup>58</sup> Ibid p. 53.

<sup>59</sup> Ibid pp. 54-55.

<sup>60</sup> Ibid p. 55.

<sup>61</sup> Ibid p. 56.

<sup>62</sup> Transcript of public examination of Officer 2, 9 September 2019, p. 75.

<sup>63</sup> Ibid p. 76.

<sup>64</sup> Transcript of public examination of Officer 13, 11 September 2019, pp. 87-88.

his premises for the purpose of bail checks. He had a faint recollection of seeing that letter and that he may have received an email about the subject matter.<sup>65</sup> Officer 14 was asked whether if he had seen that letter and he was then tasked to conduct a bail check on CU1, whether in his view he would still have the power to do it. He responded: *"Well, I would have thought possibly - looking at that letter as it stands, I would still have power to conduct bail check, as it's not an order that has been made by the court or something, an authority."*<sup>66</sup>

- 5.40 Officer 14 was shown the revocation email dated 21 August 2014 and sent to all staff. He confirmed that that was the email he had referred to earlier. He had not seen any other such emails which discussed people withdrawing their consent.<sup>67</sup>
- 5.41 Officer 15 was shown the revocation email. She confirmed that on 21 August 2014 they received the email and they were directed not to do any further bail checks until it had been sorted out. She had recently looked at that email in preparation for her appearance before the Commission.<sup>68</sup> She recalled the email being sent around because it *"was a topic of conversation because it was very unusual."* People reacted by saying *"What's the point of having bail checks if they can just stop them?' I don't know, it was just brought up, I suppose, the whole topic of bail checks in general. You know, they get conditions on them because obviously they have done something wrong, and they can easily stop us, you know, enforcing those conditions."*<sup>69</sup> Officer 15 did not conduct a bail check on CU1 after receiving that email. She indicated that it was news to her the idea that someone could withdraw consent for an officer to conduct a bail check.<sup>70</sup>
- 5.42 Officer 15 was questioned about her understanding of her right to enter someone's property to knock on the front door. She replied; *"I believe everybody has a common law right to enter someone's property for a lawful purpose, to go to their front door"*, with the limitation that if *"the person asks you to leave, you must leave"*. She was not aware that there were any limitations as to time of day or night.<sup>71</sup>

### (iii) Training

- 5.43 Officer 1 gave evidence that early in his career as a police officer he had some training around bail checks. He recalled his first bail check and that

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<sup>65</sup> Transcript of public examination of Officer 14, 11 September 2019, p. 129.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid p. 131.

<sup>68</sup> Transcript of public examination of Officer 15, 11 September 2019, p. 147.

<sup>69</sup> Ibid p. 149.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid p. 150.

the procedure was to go to the house, knock on the door and see if the person is present. If no answer, they were considered to be in breach of bail. The position in relation to recording a no response as a breach of bail changed (he could not recall when) so that a report was created to indicate that there was a suspected breach of bail as there had been no answer. (T 24) In the past 6-12 months he had completed a compulsory five-minute online training course on bail checks. He understood from that training *"not to knock on side windows and shine torches through windows... and if you are asked to leave by the occupier, I believe that you had to leave their premises"*.<sup>72</sup>

5.44 Officer 1 has been told in training if the implied consent is removed, they have to leave. That would be noted on COPS.<sup>73</sup>

5.45 Officer 2 gave evidence that as at 2014, her training in relation to bail checks was observing senior police officers over the years.<sup>74</sup> She could not recall what formal training she had had or whether she had completed any on line courses. She was *"sure I would have"* but she could not recall.<sup>75</sup>

5.46 Officer 13 said that they were not trained in conducting bail checks and when asked about how he learned how to do one, responded *"Follow our nose, I guess"*.<sup>76</sup> In the past 2 weeks prior to giving evidence, he had completed the online training module in relation to bail checks. It took him about five minutes to complete.<sup>77</sup> The training had not changed his understanding about the right to enter property. He took away from the online training that *"you can't go into the yard, you can only go straight to the front door and you can't go, say, shining your torch inside the house"* although he agreed that they were things he was not personally doing in 2014.<sup>78</sup>

5.47 Officer 14 stated that police were not trained in doing bail checks. He believed that there was now training but he had yet to complete it. He used a lot of commonsense with respect to knowing what to do when he was first tasked with a bail check.

5.48 Officer 15 said that before 2014 she had received no official training that she was aware of with respect to bail. The only unofficial training she had was to *"to watch other officers perform a bail check and see how they did it"*.<sup>79</sup> She informed the Commission that a three-minute video on bail had

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<sup>72</sup> Transcript of public examination of Officer 1, 9 September 2019, p. 38-40.

<sup>73</sup> Ibid p. 55.

<sup>74</sup> Transcript of public examination of Officer 2, 9 September 2019, p. 63.

<sup>75</sup> Ibid p. 74.

<sup>76</sup> Transcript of public examination of Officer 13, 11 September 2019, p. 87.

<sup>77</sup> Ibid p. 89.

<sup>78</sup> Ibid p. 93.

<sup>79</sup> Transcript of public examination of Officer 15, 11 September 2019, p. 142.

been recently issued to them. It was not mandatory but she had watched it as she was coming to the inquiry.<sup>80</sup> Her understanding of the right to enter premises was consistent with the video. She also learnt that it was “*not appropriate to shine lights in windows, to walk around into the backyard or to look into the house through windows.*”<sup>81</sup>

#### (iv) Change re bail compliance checks

- 5.49 Officer 1 stated that he had not conducted a bail check for some time. He remarked that in 2014 there was a “*push for us to do a lot of bail checks, whereas now it’s – you’ve still got that list of people but it’s priority bail checks... and the supervisor instead of, like in 2014, may hand out a heap of bail checks, they usually go, ‘Okay. Can you do this one?’ or ‘Can you do these two bail checks?’*” Officers are still being tasked to do bail checks but a lower number.<sup>82</sup>
- 5.50 Officer 2 stated that she did not think the process in relation to bail had changed. In 2014 she would have conducted bail checks every block (four-day block of shifts) and that they were predominantly at night.<sup>83</sup> She had conducted at least one in the past 2 and a half months but could not recall the last time she had conducted one.<sup>84</sup> (The Commission notes that at the time of giving evidence, Officer 2 had been back at work for a period of about 2 months, having been on maternity leave for about 8 months.)
- 5.51 Officer 13 stated that in 2014, the plain clothes unit would also conduct bail checks and it would be the situation that general duties police would not know what the plain clothes were doing and vice versa.<sup>85</sup>
- 5.52 In 2014, they were tasked to conduct as many as five bail checks a night whereas now they are being tasked to do two a night.<sup>86</sup> Officer 13 could not recall the last time he had conducted a bail check.<sup>87</sup> He was not sure whether the change in number of bail checks was due to plain clothes taking up the slack or whether overall fewer bail checks were being done.<sup>88</sup>
- 5.53 Officer 14 stated that things were now done differently with respect to bail checks. He said that they are now prioritised. He last conducted a bail check on the Sunday prior to giving evidence before the Commission. He was provided with a sheet which had two names marked off it and he was

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<sup>80</sup> Ibid p. 151.

<sup>81</sup> Ibid.

<sup>82</sup> Transcript of public examination of Officer 1, 9 September 2019, p. 40.

<sup>83</sup> Transcript of public examination of Officer 2, 9 September 2019, p. 61.

<sup>84</sup> Ibid.

<sup>85</sup> Transcript of public examination of Officer 13, 11 September 2019, p. 91.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid p. 92.

<sup>88</sup> Ibid.

told to conduct bail checks on those two persons. He would not conduct checks on others on the list if he had not been specifically asked to do so.<sup>89</sup>

5.54 Officer 15 stated that she had only recently returned to police duties after having been away for a while. She last conducted a bail check in January 2019. She noted that there had been a change in the practice surrounding bail checks. *“There doesn’t seem to be so much pressure on having a large quantity of bail checks done. It was more focused on the quality of the checks, as in the people that we’re checking are now people that we have been given information are more likely to be out and about.”* They were more focused.<sup>90</sup> There was still a list with fifty-odd names on it but there is now an additional list called the *“high priority bail checks”* and they are asked to try to do the high priority checks. She explained that there was nothing stopping them conducting other bail checks on the larger list but that *“we have been really busy at work so it’s really hard just to get the priority ones done as well.”*<sup>91</sup>

#### (v) Other evidence

5.55 The Commission proposed to call CU1 and CU2 to give evidence but was informed by their legal representative that due to personal circumstances, including caring responsibilities and their residence outside of Sydney, their preference was not to give evidence in person before the Commission. The Commission accepted into evidence their affidavits prepared for the District Court proceedings.<sup>92</sup>

5.56 CU1’s evidence as set out in his affidavit was that they used to retire to bed around 8.30 or 9.00pm. Police checks were usually conducted after they had already gone to bed. The lights from the police car would sometimes shine into their upstairs bedroom window. The police would usually park on the street but on occasion they would park in their driveway. The police would knock loudly on the front door and it sounded like they were using the police torch to bang on the door. The banging usually woke up CU2, who would then wake him up. The police would then usually shine the torch in his face when he came to the door so as to confirm his identity.

5.57 CU1 stated in his affidavit that there were occasions when the police turned up two or three times in one evening. *“It was getting too much”*. It was disturbing CU2. Consequently, his lawyer sent the 13 June letter to the police. The police continued to conduct bail checks after that letter was sent. CU1 claimed the frequency and nature of the bail compliance checks

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<sup>89</sup> Transcript of public examination of Officer 14, 11 September 2019, p. 133.

<sup>90</sup> Transcript of public examination of Officer 15, 11 September 2019, p. 155.

<sup>91</sup> Ibid p. 156.

<sup>92</sup> Affidavit of CU1 dated 31 October 2019; Affidavit of CU2 dated 31 October 2019.

had a significant impact on his mental health. It was also claimed to have had a significant impact on CU2.

- 5.58 CU2's evidence as set out in her affidavit was that she was residing with CU1, and her son, who was three at the time. She was also pregnant with her second son who was born in August 2014. She stated that when the police came to do bail compliance checks they would knock very loudly on the front door, either with their hand or their torch. On occasion they would shine torches into their bedroom window. They would also shine torches at CU1 when he opened the door at least on every second occasion. There were also occasions when the police flashed their lights or sirens. There were also occasions when the police conducted more than one bail check on the same evening. The constant bail checks made CU2 feel "*very tired and stressed out*" and it was "*all getting a bit too much*". Consequently CU1's lawyer sent the 13 June 2014 letter. CU2 states that it made no difference and the police continued to attend to conduct bail compliance checks. Sometime later she informed CU1 that "*I don't want to do it no more*" and CU1 informed her that his lawyer would send another letter to the police.
- 5.59 At the conclusion of the public examinations of the 5 police officers, the Chief Commissioner foreshadowed that further witnesses would be called, including more senior police officers. After considering the available evidence, the Commission subsequently decided that further information from the NSWPF would be sought by way of a section 54 Notice rather than requiring any other police officers to appear before the Commission.
- 5.60 On 9 December 2019, the Commission issued a section 54 Notice to Officer 17, requesting a response to specific questions. In particular, Officer 17 was asked what changes, if any, had been implemented since his commencement as Commander (3 December 2017) with respect to bail compliance checks.
- 5.61 Officer 17 commenced duty as the Commander of the (now) Newcastle City Police Command on 3 December 2017 and, accordingly, was unable to speak to the local policies and procedures which were in place at the relevant time. The prior Commander was Officer 4 who had instituted the use of a "Blueprint" covering in very general terms, appropriate approaches to policing. One of the points in the Blueprint was: "Undermine criminals - bail compliance checks". Officer 17 said he was unaware of any formal or informal local bail compliance policies and procedures or any written directions concerning bail compliance policy that applied prior to his arrival. Since his arrival he had introduced new procedures concerning bail compliance checks. Amongst other things, this involves the preparation of daily operational briefing documents dealing with a range of policing issues, including bail priority checks. In order not to disclose policing

methods, it is not proposed to set out the particular matters considered under this head. It is sufficient for present purposes to state that it appears to the Commission that no fair criticism could be made of the arrangements.

- 5.62 Officer 17 explained in his response that he had introduced, amongst other things, a specific “*Bail-Priority Check*” slide as part of a daily briefing document. Significantly at the bottom of that particular slide, which includes details such as name of offender, last bail check and bail curfew condition, there is the following message:

*Please conduct daily checks on these offenders. Please co-ordinate to ensure multiple checks aren't being conducted on same night and checks are lawful/reasonable. Details on bail list.*

- 5.63 Officer 17 pointed out that the NSWPF Bail Law Reform Standard Operating Procedures (BLRSOPs) set out the corporate policy as to bail management but each Command manages their crime strategies as they see fit and they might differ throughout the State.
- 5.64 The BLRSOPs were provided to the Commission. Whilst they contain a detailed and comprehensive discussion of the issues that need to be considered when deciding whether bail should be granted, they do not deal at all with the issue of bail compliance checks, except as to the power to enter premises. They state (at 5.2) that, where the implicit licence for police to enter a property has been revoked, “*police cannot lawfully enter the property to check that the accused person is complying with ... [a curfew]*” and a detention application should be made on the ground that the curfew condition cannot satisfactorily address the risk which it was imposed to deal with.
- 5.65 Officer 17 also attempted to check on whether the letter of 13 June 2014 had been received by police and, if so, what had happened to it. The Records Management System had no record of the letter, nor did the email system or Duty Officer shift reports. The fax machines had been replaced since 2014 and, at all events, they only kept a log of the last 40 transmissions. Given particularly the immediate response of officer 5 to the letter of 21 August 2014, it seems unlikely that the earlier letter would have been ignored had its existence been known.
- 5.66 In response to submissions received from the Commissioner of Police that this inquiry had been terminated prior to receiving evidence he wished to adduce, the matter was reopened to allow that evidence to be received. The Commission accepted into evidence the statement of officer 4 who was the Superintendent, Commander of the Newcastle City Local Area in 2014 and he had held that position since 2011.

- 5.67 He confirmed there was a proactive policy of police checking bail in respect of persons subject to a curfew. His evidence was that in his experience a policy of checking on compliance often and at unpredictable times is the most effective way of ensuring compliance with the order of the Court. He also stated that studies have shown such a policy has been shown to reduce crime rates and protect the public. He referred to a graph to demonstrate the point.
- 5.68 A statement was also received from Officer 10 who was a Sergeant at Waratah Police Station in 2014 in the intelligence unit of the Newcastle City Local Area Command. Her duties included bail checks on persons on bail and subject to a curfew. She stated there was a policy of doing as many of these checks as possible. She referred to a graph created by an analyst who worked for her and is part of the tender. It demonstrated the higher the incidence of performance of curfew bail checks the lower the number of break and enter offences.

## 6 Submissions in Response

- 6.1 The Commission received submissions in response on behalf of CU1 and CU2 and on behalf of the Commissioner of Police.
- 6.2 Amongst other matters, CU1 and CU2's legal representatives submitted that they did not agree with the Commission's position that "*it is settled law that the common law has recognised an implied licence to enter private land for the purpose of conducting bail curfew checks.*" They noted that there is no decided case on the issue. They also submitted that the Commission's position as stated in the draft report with respect to whether police officers have the power to conduct bail curfew checks on private property in the absence of an enforcement condition provisions does not reflect decided law.
- 6.3 The Commission notes that the report reflects its view and interpretation of the law as it currently stands.
- 6.4 The Commissioner of Police did not agree with the preliminary findings or recommendations set out in the draft Report.
- 6.5 Both submissions argued that the report should not be made public whilst civil proceedings involving the same parties were on foot.
- 6.6 Whilst the Commission did not agree with, nor accept, all the matters raised in the submissions it received, it amended its draft report to take into account some of those issues.



6.7 The Commission held public hearings and is therefore required to submit a report pursuant to s 132 of the LECC Act. The Commission has rejected the calls to delay publication of the report until the conclusion of the District Court proceedings. As noted at paragraph 2.10, the identities of all the witnesses and other persons have been suppressed and publication of any names is prohibited by Commission order. Given this, the Commission is satisfied that the parties to the District Court proceedings cannot suffer any prejudice as a consequence of the report being made public prior to the conclusion of the civil proceedings as their anonymity is preserved.

## 7 The Law: Bail Checks and Trespass

7.1 The law is well settled when it comes to what constitutes trespass. No person may enter private property without consent (licence) of the occupier unless he or she is justified by law. This principle applies to everyone, including police officers. Whether a licence has been granted by the occupier is essentially a question of fact. There are circumstances in which a licence will ordinarily be implied as a matter of law:

*“ ... [If] the path or driveway leading to the entrance of a suburban dwelling-house is left unobstructed, with any entrance gate unlocked, and without indication by notice or otherwise that entry by visitors or some class of visitors is forbidden, the law will imply a licence in favour of any member of the public to go on that path or driveway for any legitimate purpose that in itself involves no interference with the occupier's possession or injury to the person or property of the occupier, or the occupier's guests...”<sup>93</sup>*

7.2 A licence to enter land may be revoked at any time by the occupier. Once the licence has been revoked, the entrant will become a trespasser if he or she does not leave the land as soon as it is reasonably practicable to do so.<sup>94</sup>

7.3 A police officer is entitled to enter private premises to prevent a breach of the peace (see s 9 *Law Enforcement (Powers and Responsibilities) Act 2012*) (LEPRA) and in entering private property in the exercise of a statutory power of arrest without warrant (see s 10 LEPRA).

7.4 LEPRA also specifically empowers police officers to enter premises without the consent of the resident in domestic violence situations. (See Part 6 LEPRA, specifically s 82).

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<sup>93</sup> Per Gleeson CJ, Gummow, Kirby and Hayne JJ in *Kuru v State of NSW* (2008) 236 CLR 1 [45].

<sup>94</sup> See *Kuru v State of New South Wales* (2008) 236 CLR 1.

7.5 In the context of making a bail compliance check, the requirement of the occupant's (implied or explicit) licence (or permission) covers not only entry into the residence itself but also the surrounding land. (References to "premises" that follow should be understood as meaning the whole of the private property on which the residence is situated including the residence itself.) The licence is not required, however, where the officer "*believes, on reasonable grounds, that a person has failed to comply with, or is about to fail to comply with, a bail acknowledgement or a bail condition*" and enters the premises for the purpose of effecting an arrest: s 77(1)(e) of the *Bail Act 2013*.

7.6 If, for example, a police officer attends premises to conduct a bail check and on arrival, obtains information which reasonably suggests that the bailed person is about to breach the curfew condition, they could lawfully enter the premises, despite any withdrawal of the implied licence, and effect an arrest.

7.7 The existence of implicit consent is a question of fact and, therefore, always depends on the particular circumstances. It can always be explicitly revoked, as it was in this case by the letters sent by the complainants' lawyers to police, at least that which was actually received. The implication also has limits. In the case of a curfew condition, the implied consent is limited to the reasonable conduct of checks both as to time and number. Of course, there is no bright line here but several times a night including the early morning is unlikely to be reasonable in the absence of a reasonable suspicion that it is necessary. The implicit consent applies only to bona fide bail checks. As a matter of fact, it would be difficult to imply consent to a check made for the purpose of simply ascertaining whether someone was at home (unless there were a residence condition).

#### (i) Bail enforcement conditions

7.8 A question arose during the investigation as to whether police have the power to conduct a bail curfew compliance check in the absence of an enforcement condition.

7.9 Section 20A of the *Bail Act 2013* (all legislative references are to this Act unless otherwise indicated) provides:

*(1) Bail conditions are to be imposed only if the bail authority is satisfied, after assessing bail concerns under this Division, that there are identified bail concerns.*

*(2) A bail authority may impose a bail condition only if the bail authority is satisfied that:*

*(a) the bail condition is reasonably necessary to address a bail concern, and*

*(b) the bail condition is reasonable and proportionate to the offence for which bail is granted, and*

*(c) the bail condition is appropriate to the bail concern in relation to which it is imposed, and*

*(d) the bail condition is no more onerous than necessary to address the bail concern in relation to which it is imposed, and*

*(e) it is reasonably practicable for the accused person to comply with the bail condition, and*

*(f) there are reasonable grounds to believe that the condition is likely to be complied with by the accused person.*

*(3) This section does not limit a power of a court to impose enforcement conditions.*

*Note. Enforcement conditions are imposed for the purpose of monitoring or enforcing compliance with other bail conditions. Section 30 provides for this type of bail condition.*

7.10 Section 30 provides:

*(1) Bail conditions can include one or more enforcement conditions that are imposed for the purpose of monitoring or enforcing compliance with another bail condition (the underlying bail condition).*

*(2) An enforcement condition is 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).*

*(3) An enforcement condition can be imposed:*

*(a) by a court only, and*

*(b) only at the request of the prosecutor in the proceedings.*

*(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.*

*Note: For example, an enforcement condition imposed in connection with an underlying bail condition that requires a person to refrain from consuming drugs or alcohol may require the person to undergo testing for drugs or alcohol as directed by a police officer and may include specifications as to when such directions may be given.*

*(5) An enforcement condition can be imposed only if the court considers it reasonable and necessary in the circumstances, having regard to the following:*

*(a) 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),*

*(b) the likelihood or risk of the person committing further offences while at liberty on bail,*

*(c) 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.*

7.11 Section 81 provides:

*If bail is granted subject to an enforcement condition, a police officer may give a direction of a kind specified in the enforcement condition:*

*(a) in the circumstances specified in the enforcement condition, or*

*(b) at any other time the police officer has a reasonable suspicion that the accused person has contravened the underlying bail condition in connection with which the enforcement condition is imposed.*

7.12 CU1's legal representatives made a submission to the Commission in which they summarised their argument as follows:

*"The statutory regime for monitoring compliance with bail conditions was introduced by the Bail Amendment (Enforcement Conditions) Act 2012 (the Enforcement Conditions Act).*

*Putting to one side the question of whether the statutory enforcement condition regime give police a new power, not otherwise available at law, to enter private property, the legislative*

*history of the Enforcement Conditions Act, described below, makes it clear it is intended to, inter alia:*

- *Govern bail condition monitoring and enforcement activity by NSW Police Force, including the monitoring of curfew conditions, commonly known as 'bail compliance checks', and*
- *Incorporate safeguards to prevent unlawful, unreasonable, unjust or oppressive conduct by NSW Police officers in conducting bail compliance checks.*

*In enacting the statutory enforcement condition regime, NSW Parliament expressly declined to give the NSW Police Force the power to determine the timing and frequency of enforcement and monitoring activity, such as bail compliance checks.*

*Despite this, in the seven years since the statutory regime commenced, police officers throughout NSW regularly enter onto private property to monitor compliance with curfews or residence conditions, through routine 'bail compliance checks', without obtaining an enforcement condition from the court.*

*As the circumstances in CU1 and CU2's case, as well as many others, illustrate, the circumvention of the enforcement condition regime and the important safeguards within it, has in many cases resulted in a pattern of unlawful, unreasonable, unjust or oppressive bail compliance checking activity by NSW Police which has intruded upon the privacy, family and home life of members of the community.*

*There has been no explanation as to why the statutory enforcement condition regime had not been strictly implemented and followed by the NSW Police Force. This has implications as to whether the current policy and practice of bail compliance checking arises 'from a mistake of fact or law or systemic issues that could adversely reflect on the integrity and good repute of the NSWPF'."*

7.13 (Officer 13 was asked several questions about his understanding of enforcement conditions. He had not heard of an enforcement condition in relation to permitting police to attend a property to conduct a bail curfew check and the training he had recently completed in relation to bail did not mention enforcement conditions.)<sup>95</sup>

7.14 The power of a bail authority to impose a bail condition is provided by s 20A. The enforcement conditions provided for under s 30 are for the purpose of monitoring or enforcing compliance with bail conditions. The mere fact that no enforcement conditions are imposed does not mean that police are not entitled to check on a bailed person subject to, say, a curfew,

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<sup>95</sup> Transcript of public examination of Officer 13, 11 September 2019, p. 101.

to ascertain whether the curfew condition is being complied with. In doing so, of course, they are bound to do so lawfully. The submission, therefore, made on behalf of the complainants that bail compliance checks cannot be carried out in the absence of an enforcement condition is mistaken.

- 7.15 It is clear, moreover, that no bail or enforcement condition can affect the proprietary rights of a third person. Section 30 is directed only to the person granted bail. Interference with fundamental common law rights would require language of undoubted clarity. The Bail Act at no point purports, either implicitly or explicitly, to interfere with third party rights, except as mentioned above, when exercising the power of arrest.
- 7.16 Thus, for example, the mere fact that a child, charged with an offence and granted bail was subject to a curfew, could not provide any basis for any order that might bind his or her parents or the occupants of the child's place of residence to permit police to enter on their premises for the purpose of conducting a bail check. Where the person bailed, on the other hand, had the legal right of possession or occupation of the place of residence, acceptance of a curfew condition would imply consent to reasonable bail checks. Joint possession or occupancy would not remove this implied consent.
- 7.17 In short, police are entitled to check compliance with bail conditions within the law providing that to do so does not trespass on third party rights, even in the absence of an enforcement condition. If a person on bail revokes the implied consent for the police to enter onto their premises, a bail check could no longer be carried out at those premises. An enforcement condition could not remedy such a situation as it could not override the common law right of an occupier, even if subject to a curfew or residence condition, to revoke a licence to enter land. In those circumstances, consideration would then need to be given by police to whether application should be made to vary bail conditions or even to have bail revoked.
- 7.18 Similarly, an occupant other than the bailed person, who answers the front door when a police officer attends to conduct a bail compliance check, cannot be directed (as distinct from requested) to, for example, fetch the bailed person or inform the police officer whether the bailed person is there. An enforcement condition would make no difference as any such condition could not impose any obligations on a third party in order to monitor or enforce compliance with bail conditions.
- 7.19 Thus, a bail direction under s 30 imposes conditions to which a bailed person is subject, breach of which might lead to a revocation of bail, but it does not affect rights of property and does not give police right of entry onto premises in the absence of an implied licence to do so.

- 7.20 The Commission understands that, not infrequently, enforcement conditions are imposed having the effect of requiring the bailed person to have continuous access during curfew periods to a mobile phone, to answer the phone when called by an identified person or number, and show themselves to police who are within eyesight. The advantage of such a condition is that it obviates the need to enter premises. Of course, the number and timing of calls need to be reasonable.

## 8 Assessment of evidence and Findings

- 8.1 As outlined above, all the officers, except Officer 1, gave evidence that they had no formal training with respect to bail checks and instead gained knowledge and experience through on-the-job training by observing what more senior police officers did or by "*following their noses*". Since 2014, the NSWPF has introduced a brief online training module with respect to bail. This training appears to have assisted some officers in understanding what they are permitted to do in relation to bail checks whilst others were still unsure about their powers. Relevantly they were unsure about implied consent and whether an occupant could revoke such consent even if bail conditions, such as a curfew, had been imposed on them. Officer 13 and Officer 14 were still of the view that they could conduct a bail compliance check at premises where the implied consent to enter the premises had been revoked. Officer 15 was unaware that a person could revoke the implied consent.
- 8.2 All five officers gave similar evidence as to the procedure which was in place in the Newcastle Local Area Command as at 2014 in relation to bail compliance checks. Officers gave evidence that they did not think it unusual for more than one bail check being conducted on the same person in the same evening. Multiple checks could occur because in addition to the general duties officers conducting bail checks, plain clothes police officers could also conduct their own bail checks. There was no system of communication between the car crews or the plain clothes officers so as to ensure that there was no doubling up of bail compliance checks.
- 8.3 In the period 10 May 2014 to 19 August 2014, NSWPF officers conducted fifty-five (55) bail checks on CU1, with the earliest occurring at 9.08pm and the latest at 3.30am. On twenty-one occasions the checks were conducted after midnight (the dates and times are set out at Annexure 1). On at least 13 occasions, bail checks were conducted twice in the same evening. For example, on 3 June, a police officer attended at 9.08pm and then another police officer attended at 9.30pm, some 22 minutes later. On the evening of 23-24 June, police officers attended three times in one evening, at 10.30pm, then 2 hours later at 12.30am and then again 2 hours later at 2.30am.

- 8.4 Most curfew conditions impose restrictions on movements of the bailed person at night, for obvious reasons, and are therefore likely to involve significant interference with the rights of not just the person subject to the bail conditions but also to other occupants on the premises who are not subject to bail. At that time, CU1 was residing with his pregnant partner and her young son. In those circumstances, police officers should have ensured that bail checks were conducted in a reasonable manner and at appropriate times. However, there were no rules or procedures in place so as to give officers guidance as to what was considered reasonable when conducting bail compliance checks.
- 8.5 It is clear from the evidence of the officers who were involved in the checks on CU1 that their understanding of the appropriate manner of conducting bail checks was inconsistent and rudimentary. Some officers imposed their own rules as to how late they could conduct a bail check. Officer 14 stated that he would try not to conduct them after midnight. Some officers knocked only once, others up to ten times. Some flashed their torch at CU1, whether he was at the front door or at the bedroom window, to confirm his identity.
- 8.6 There was no information to suggest that CU1 had breached bail conditions in the past nor that the police officers were concerned that he was likely or intending to breach his bail conditions. It is clear that the decision to make the particular checks were arbitrary, indeed accidental. In these circumstances, the frequency of bail checks could not be seen to be reasonable. There was also no justification for conducting more than one bail curfew compliance check in an evening.
- 8.7 Since 2014, changes have been made to the procedure with respect to bail compliance checks in the Newcastle Police District. As noted earlier, Officer 17 has introduced a "*Bail-Priority Check*" slide as part of a daily briefing document. Significantly at the bottom of that particular slide, which includes details such as name of offender, last bail check and bail curfew condition, there is the following message:
- Please conduct daily checks on these offenders. Please co-ordinate to ensure multiple checks aren't being conducted on same night and checks are lawful/reasonable. Details on bail list.*
- 8.8 Most of the police officers who appeared before the Commission confirmed that there was now less pressure to do bail checks than there was in 2014. They are still tasked to conduct bail checks but they are doing less of them and those that they are conducting are prioritised.



**(i) When was the implied licence revoked?**

- 8.9 If the police were aware that the implied licence had been withdrawn by CU1 and CU2, then any bail compliance check conducted thereafter was an act of trespass.
- 8.10 On receipt of the 21 August letter, immediate action was taken by the NSWPF, including acknowledgement of the letter by way of email to ALS. The revocation email referred to earlier was sent to all officers within the Newcastle command informing them that implied consent had been withdrawn. The matter was immediately listed for a bail hearing and set down before the Court on 26 August 2014. The matter was thereafter withdrawn after agreement was reached between the prosecutors and CU1 as to the revocation of the implied consent.
- 8.11 It seems likely that, for reasons unknown, the NSWPF was unaware of the 13 June letter until the second communication was sent to the NSWPF on 21 August 2014. The NSWPF took immediate steps in response to the revocation of the implied consent, including notifying all police officers that they no longer had a lawful right to access the property to conduct a bail curfew compliance check. This was an appropriate response by the NSWPF.
- 8.12 At the same time, there can be little doubt that the faxes of 13 June were successfully sent. One was appropriately addressed to the Officer in Charge of Newcastle and the other to the Local Area Commander of Waratah Police Station. The complainant's solicitor could reasonably have inferred that the Command would have appropriate arrangements in place to ensure that correspondence was passed to the relevant officer. The Commission is reasonably satisfied that, for whatever reason, this did not occur and does not consider that its resources would be usefully expended to attempt to find out what happened. Nor is it necessary for the purposes of this investigation that the Commission should resolve the issue of the legal consequences of this failure. The Commission accepts that none of the relevant officers were aware of the 13 June revocation and it follows that no misconduct could have arisen from the failure to act on it. Furthermore, as has been pointed out, the NSWPF has in its BLRSOPs accepted that the licence to enter property for the purpose of a bail check may be revoked by the occupier.

**(ii) Was there any officer or agency misconduct?**

- 8.13 As has been mentioned, it was the complainants' preference not to give evidence in person but they provided copies of their affidavits sworn for the purpose of the proceedings. Although the Commission has power under s 69 of the LECC Act to require persons to give evidence, the Chief

Commissioner decided not to do so in light of the reasons they provided as referred to in paragraph 5.55 above. It follows that, although their affidavits provided evidence of the facts, it is not appropriate in this case to make findings adverse to the police witnesses where there has been no opportunity to test this evidence by cross-examination. The question of officer misconduct is therefore to be decided on the basis of the evidence of the police and relevant documentation.

- 8.14 Overall, the Commission is satisfied that the police witnesses were truthful and their accounts as reliable as far as their recollections went, noting that the events occurred almost six years ago. The Commission is satisfied that there is no basis for concluding that any officer engaged in serious misconduct.
- 8.15 The list of bail compliance checks shows, as has been mentioned, fifty-five such checks between 10 May and 19 August 2014, many twice a day, and large numbers around midnight and the early hours of the morning. On each occasion, CU1 responded. Whilst it might well have been reasonable to check even nightly for a period (and obviously there is no bright line) it is clear that by mid-June there was no basis for any reasonable suspicion that he was or might be in breach of the curfew condition of his bail and no such suspicion was in fact entertained. That is not to say that no bail checks should have been made, but the question whether it was reasonable to continue them with the kind of frequency with which they commenced needed to be given serious consideration.
- 8.16 The fact there were unintentional double checks does highlight a fault that then existed in the system of bail checks of a lack of communication between different police shifts. It is not possible to say how long that system existed but it is clear that Officer 17 instituted a system to avoid accidental multiple bail checks when he became the Commander in 2017. There is no evidence that would permit the Commission to make a finding as to the position in other Commands.
- 8.17 When a Court orders a curfew as a condition of bail it is expected the police will check if the curfew is being observed. If it is not the usual result is a refusal of bail. The Commission accepts the evidence given that frequent checks at irregular times can be an appropriate way of policing the order. On the other hand the checking could be thoroughly oppressive, for example checking every hour during the night. The question ultimately is whether in the particular circumstances the checking is reasonable.
- 8.18 The Commission has concluded that at least from mid-June the frequency and timing of the checks was unjustified, unreasonable and oppressive. It also appears that this situation arose in part from unintentional double checks due to the failure of one shift to communicate with a succeeding

shift that a check had already been carried out. That was a failure in the system at that time.

- 8.19 It is not possible to say how long that system existed in the Newcastle Area Command but it is clear that Officer 17 instituted a system to avoid accidental multiple bail checks when he became the Commander in 2017. There is no evidence that would permit the Commission to make a finding as to the position in other commands.

## 9 Affected Persons

- 9.1 In Part 2 of this report the Commission set out the provisions of s 133 of the LECC Act dealing with the content of reports to Parliament. Subsections (2), (3) and (4) relate to "*affected persons*".

- 9.2 There are no affected persons.

## 10. Conclusions

- 10.1 The problem identified in this investigation was corrected in the Newcastle Area Command in 2017. As a result there will be no recommendations. On the other hand it demonstrates a need for a consistent approach to this issue throughout the State. To ensure that exists the Commission will conduct an audit of the various Police Commands to assist in achieving that if it does not already exist.

## ANNEXURE A

### LIST OF BAIL COMPLIANCE CHECKS

1.	10 May - 9.30pm	29.	25 June - 1.42am
2.	10 May - 10.55pm	30.	25 June - 3.30am
3.	12 May - 10.50pm	31.	30 June - 1.30am
4.	13 May - 10.19pm	32.	4 July - 12.00am
5.	15 May - 1:15am	33.	4 July - 3.30am
6.	15 May - 11:25pm	34.	5 July - 12.32am
7.	16 May - 11.09pm	35.	5 July - 3.10am
8.	17 May - 11.46pm	36.	5 July - 11.53pm
9.	24 May - 11.37pm	37.	6 July - 12.20am
10.	29 May - 11:34pm	38.	6 July - 9.55pm
11.	31 May - 10:20pm	39.	14 July - 10.05pm
12.	1 June - 11:28pm	40.	20 July - 12:00am
13.	2 June - 2:12am	41.	20 July - 12.50am
14.	2 June - 10.40pm	42.	27 July - 9:40pm
15.	3 June - 12:50am	43.	29 July - 12:54am
16.	3 June - 9:08pm	44.	30 July - 12:15am
17.	3 June - 9:30pm	45.	31 July - 11:35pm
18.	4 June - 11:55pm	46.	2 August - 11:59pm
19.	10 June - 10:50pm	47.	5 August - 10:00pm,
20.	11 June - 12:30am	48.	5 August-10:05pm
21.	11 June - 11:11pm	49.	8 August-11:30pm
22.	13 June - 2.46am	50.	11 August -11:10pm
23.	19 June - 2.30am	51.	12 August - 2.05am
24.	19 June - 11.10pm	52.	13 August-11:30pm
25.	20 June - 11.30pm	53.	18 August -11:02pm
26.	23 June - 10.30pm	54.	18 August -11:45pm
27.	24 June - 12.30am	55.	19 August -11:10pm
28.	24 June - 2.30am		

Operation Cusco  
Report pursuant to s 132  
*Law Enforcement Conduct Commission Act 2016*  
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