



# NSWPF SUBMISSIONS TO

Law Enforcement Conduct Commission  
Bail compliance checks in NSW –  
Issues Paper

Office of the General Counsel

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# NSWPF Submission:

Law Enforcement Conduct Commission Bail compliance checks in NSW.

## NSW Police Force Submission

### Introduction

Bail is imposed on people charged with a criminal offence as a way of ensuring the person appears at court and to mitigate the risk the person poses to the community. Ultimately, after the first court appearance all bail decisions are orders of the court. It is not surprising that there are different positions on bail put forward by those advocating on behalf of the accused person and those advocating on behalf of the victims. Proactive policing strategies employed by the NSW Police Force are designed to protect the people of NSW and to ensure persons charged with committing criminal offences are behaving in compliance with their bail conditions. Only police and courts have the power to enforce bail requirements.

This submission should be read in line with the legislated mission, functions, and values of the NSW Police Force. Section 6 of the Police Act 1990 provides that it is the mission of the NSW Police Force to “work with the community to reduce violence, crime and fear”. This provision further states that the NSW Police Force’s function is to provide policing services which includes the prevention and detection of crime as well as protecting people from injury or death, and property from damage.

Section 7 of the Police Act 1990 provides, inter alia, that members of the NSW Police Force must act in a manner that upholds the rule of law and preserves the rights and freedoms of individuals.

It follows from these legislative provisions that the NSW Police Force is victim focused which is further embedded in the NSW Police Force culture through the Commissioner of Police’s key priorities, one of which is “victim focus”.

Any discussion on bail should include the interests of victims of crime and the protection bail provides to victims and the community rather than solely focusing on accused persons. The Law Enforcement Conduct Commission (LECC) is charged with promoting the integrity of the NSW Police Force in the context of the legislated mission, functions, and values of the NSW Police Force. Proactive policing strategies, such as bail compliance checks, target persons whose behavior has previously shown them to be more likely than the majority of the general public to commit criminal offences. It is also not uncommon for people on bail to commit serious offences.

The discussion in the Issues Paper could benefit from additional information in the case studies such as identifying the criminal histories of the accused, the offences they were on bail for and some commentary around the impact their offending has had on their victims. This would give the reader further context to determine for themselves whether police were acting appropriately in addressing a risk to the community when they conducted bail compliance checks.

Some further contextual information about the complaints LECC has received over the years would also assist the reader assess how the NSW Police Force manages bail compliance today. In particular, when the complaints were made and the outcome of complaints would be useful information to assist identifying the scope of the issue and whether the current complaint handling procedures are properly administered.

A significant proportion of the Issues Paper concentrates on the question of whether or not police are entitled to rely on the common law doctrine of implied licence to enter private property and enquire as to whether or not a person is at home in compliance with a bail condition. The NSW Police Force’s view is the answer is yes. The Issues Paper quotes from the minority in *Roy v O’Neill (2020) 285 A Crim R 120* rather than the majority to suggest there is ambiguity on this question.

LECC conducted Operation Cusco in 2020 and accepted that police could rely on the implied licence to conduct a bail compliance check. Operation Cusco also explored the other issues raised in this Issues Paper at length. The Issues Paper suggests that the law has developed as a result of *Roy v O’Neill (2020) 285 A Crim R 120*.

The position taken by the NSW Police Force is based on the opinion of the NSW Solicitor General. The NSW Police Force has advised LECC of the opinion of the Solicitor General. By convention, NSW Government agencies are bound to follow the legal advice of the Solicitor General. When LECC takes a different view to the Solicitor General, it places the NSW Police Force in the position that it is either in conflict with the opinion of the Solicitor General or in conflict with the opinion of the LECC Chief Commissioner.

The other issues raised in the Issues Paper have already been canvassed by LECC in Operation Cusco. If police continue to act inappropriately then this should be addressed as a complaint.

### Issue 1:

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

- I. It is settled law that police can rely on the common law doctrine of implied licence to conduct bail compliance checks.
- II. The common law implies a permission, on the part of an occupier of private premises, for persons to enter premises and approach a dwelling to engage in a legitimate purpose. If access to a private property is unobstructed, the entrance gate unlocked and there is no notice or other indication that entry by visitors is prohibited, "*the law will imply a licence in favour of any member of the public to go upon the path or driveway to the entrance of the dwelling for the purpose of lawful communication with, or delivery to, any person in the house*": *Halliday v Nevill* (1984) 155 CLR 1 at 7. The broad basis on which that licence is implied is that the pathway has been held to be a "bridge" between the public pathway and a private dwelling permitting a passer by to approach the dwelling to speak with an occupier: that conduct involving no infringement of the person's rights in their property.
- III. The scope of the implied licence was described in *Robson v Hallett* [1967] 2 QB 939 at 951 as one "*to come through the gate, up the steps, and knock on the door of the house*" and in *Brunnerv Williams* (1975) 73 LGR 266 at 272 Lord Widgery CJ held that the licence "*means that anyone who has any genuine reason for wishing to enter the house or the garden has implied licence from the occupier to approach the front or nearest door and ask whether he may be given permission for what he wishes to do*".
- IV. The generalised licence granted by *Halliday* permits communication with the owner of the land, no more. As Young J said in *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457 at 460: "*... most implied invitations will be held to be for limited purposes and in such cases an entry unrelated to those purposes will be a trespass...*".
- V. If the implied licence is revoked, the visitor becomes a trespasser if they do not retreat from the land within a reasonable period of time after the licence was countermanded. It is established law that police officers may enter private property under this implied licence.
- VI. The issue of dual purpose arose in *Barker v R* (1983) 153 CLR 338. In that case, Barker was asked by his neighbour to "look after" the neighbour's home while the neighbour was away. Barker entered it and removed some items (he said for safe keeping). He was convicted of burglary. An issue arose as to whether he could have committed a burglary, an element of which was trespass, where he had permission to be on the land and "look after" it. When considering the matter, members of the Court were called upon to consider whether authorized entry became unlawful because of an alien purpose in the mind of the entrant.
- VII. Mason J held at 347:

*If a person enters premises for a purpose which is within the scope of his authority his entry is authorised; it is not made unlawful because he enters with another and alien purpose in mind. The performance of acts with a view to the attainment of that alien purpose does not relate back to his entry so as to endow it with a trespassory character. It is hardly to the point to say that the licensor would not have given that licence, had he known the alien intention of the licensee. It is the effect of the licence actually given that is decisive.*
- VIII. Brennan J and Deane J made findings to similar effect at 357 and 358. In doing so, their Honours placed reliance on the decision in *Byrne v Kinematograph Society Ltd* [1958] 2 All ER 579 where cinema inspectors entering a theatre to investigate fraud purchased tickets and entered a cinema to check the tickets and count those in a cinema. The purpose of the inspectors' attendance was to find fraud, but it was found that their motive did not render them trespassers as they did nothing more than they were invited to do.

- IX. Moving to more recent authority, in *Roy v O'Neill* (2020) 272 CLR 291, a police officer attended Ms Roy's home to check whether she was complying with a Domestic Violence Order (DVO) which prohibited her from being in her partner's company while consuming or being under the influence of alcohol. The officer observed Ms Roy's partner in the house and Ms Roy to be intoxicated. The officer administered a breath test of Ms Roy which returned a positive result for alcohol. Ms Roy was arrested and charged. Ms Roy argued that the officer did not have authority to be present on the premises and was a trespasser. She was found not guilty on this basis. The matter was ultimately appealed to the High Court. In the High Court, the nub of the issue being addressed was whether or not the officers could enter land for the purpose of considering the exercise of coercive power. That is, enter the premises to make observations so that they might ultimately consider exercising coercive powers.
- X. By majority (3:2), the Court found that the officer was not a trespasser and that the law implied a licence so that police might undertake such enquiries and observations to ascertain whether the DVO had been breached and an offence committed (a "DVO check"). Once he had ascertained Ms Roy was present and observed her state of intoxication, the officer was authorised to remain on the premises to obtain a sample of Ms Roy's breath pursuant to the applicable statute. The reasons of the majority were split. Keifel CJ gave her reasons and Keane and Edelman JJ gave a joint judgment

- XI. The critical finding of Keifel CJ was at [18] where her Honour held:

*the approach of the majority in Halliday v Nevill readily admits of a conclusion that a licence would be implied. It is implied by the law so that police might undertake such enquiries and observations of the appellant as were necessary if she was present at the dwelling unit, to ascertain whether the DVO had been breached and an offence committed, as Constable Elliott expected might be the case. Whether this be called a "check" or an investigation does not matter. It is a non coercive aspect of police business which involves no adverse effect upon any person and nothing which might qualify as "injury" in the extended sense referred to above. It involves no interference with the occupants' possession. It is difficult to imagine how police could go about their business and more particularly how they could be expected to prevent domestic violence in the public interest unless they were able to make such enquiries and observations of the subject of a DVO and the person it is intended to protect.*

- XII. Keane and Edelman JJ explored the authorities regarding the implication of a licence and the purpose for which it is implied. Their Honours noted that a person who enters for one or more of the purposes within an implied licence will not usually be a trespasser even if they have some other purpose that falls outside the scope of the licence: a person's entry to a premises for an authorized purpose (communication) "is not made unlawful because he enters with another and alien purpose in mind". There was consideration of Barker and a separate part of Mason J's judgment where his Honour explored a hypothetical where a person enters a shop with the intent of stealing noting they were not a trespasser at the point of initial entry. Having reviewed that and other authority, their Honours held at [72]:

*This implication in law of a licence in instances of mixed purposes reflects the realities and incidents of social life. The realities and incidents of social life do not require the drawing of imperceptible, jurisprudential distinctions based upon whether a purpose within a licence is or is not accompanied by other subjective motivations or purposes that might lie outside the licence, especially where the other subjective motivations or purposes might be conditional, subservient, or uncertain, or might never be acted upon. If such distinctions were drawn the operation of an implied licence would be practically unworkable. Of course, as will be seen below, once the invitee acts upon any such motivation in a manner inconsistent with the licence the invitee will become a trespasser.*

XIII. Moreover, at [77], their Honours held:

*The police have the same implied licence as other members of the public to approach and knock on a front door, or ring a front doorbell, for the purpose of lawful communication with an occupier. The licence implied in law for all members of the public with a purpose of communicating with an occupier is not negated by the presence of some additional, perhaps contingent, subjective motivation. So too, the implied licence for police to communicate with an occupier is not negated by a subjective, perhaps contingent, motivation for the communication to investigate an occupier for the commission of a criminal offence*

XIV. Police can rely on the common law implied licence to enter onto private property for the purpose of engaging in 'proactive policing' initiatives such as bail compliance checks, provided they act in a manner consistent with the scope of the implied licence, and the implied licence has not been revoked by the occupier.

### Issue 2:

#### **Does the Bail Act proscribe police from conducting bail compliance checks when police are operating outside of s77 and in circumstances where there is no enforcement condition?**

I. Enforcement conditions are imposed under s.30 of the Bail Act 2013 which provides, relevantly :

- (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).

II. Pursuant to s.30(3) of the Bail Act 2013 enforcement conditions can only be put in place by a Court on the application of a prosecutor and in very narrow circumstances. Pursuant to s.30(4) of the Bail Act 2013, the condition itself must specify:

- II.1 The kind of direction that may be given;
- II.2 The circumstances in which it may be given (to ensure that compliance is not onerous); and
- II.3 The underlying bail condition to which it relates.

III. The imposition of an enforcement condition confers the power on a police officer, under s.81 of the Bail Act 2013, to give a direction of the kind specified in the enforcement condition:

- III.1 As stipulated in the enforcement condition; or
- III.2 At any other time where the police officer has a reasonable suspicion that the related underlying bail condition has been breached.

IV. Without descending into a detailed analysis of the legislative history, the current form of the regime was introduced into the predecessor of the current Bail Act after there was some concern about the ability of police to ensure that bail conditions were being complied with coupled with concern as to how one was to balance the intensity of enforcement and put in place safeguards. Some of those concerns specifically related to requirements that allowed police to check curfew or residence breaches by requiring people to come to the door of their house frequently or in the early hours of the morning. Holistically, there form occurred in a context where there was some suggestion that there might be a question about the implied licence, but moreover, where a licence was revoked.



- V. As LECC put it in their issues paper, the comments made during the introduction of the legislation “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.”
- VI. What is immediately apparent from the above is that there is a very important distinction to be drawn between:
- VI.1 Entry onto land in accordance with an implied licence for the purpose of communicating with the occupier of a dwelling; and
- VI.2 Directing a person to take certain action to present themselves at the door in order for police to communicate with them.
- VII. It cannot be said that the framers of the Bail Act 2013 plainly manifest an intent to remove an implied right to enter land and speak with persons by introducing a regime which permitted legal demands to be put on persons in a premises. Nothing within ss.30 or 81 of the Bail Act 2013 speaks in terms of providing lawful justification for the entry onto land—the language of giving directions is simply ill adept at concerning entry to land.
- VIII. That approach is consistent with the findings of the Court in *Dargin & Green v State of NSW* [2019] NSWCA 47. In *Dargin*, Travis Dargin was subject to a curfew condition with no enforcement condition attached and police regularly attended his residence during his curfew period to conduct bail compliance checks. He and his partner sued the State for trespass. The Court of Appeal was asked to consider whether, in the context of the Bail Act 2013, a bail compliance check can be lawfully conducted in the absence of an enforcement condition. While the Court identified difficulties with this question that led it to conclude it would be inappropriate to provide an answer, Sackville AJA at [51] observed that if the question was capable of an answer, it was “difficult to see how the answer could be anything other than: “Yes, depending upon the circumstances””. This provides strong support for the proposition that the implied licence is not swept away by the regime for giving directions.
- IX. The presence of an enforcement condition does perhaps provide something by way of legal right to enter the land. In that respect, s.81 of the Bail Act 2013 gives an officer an ability to make a direction consistent with an enforcement condition or to give a direction where the police officer has a reasonable suspicion that the related underlying bail condition has been breached.
- X. The availability of the power to give those directions carries with it an implied power to walk to the door of the property for the purpose of carrying out the exercise which it envisages: directing the person subject of the enforcement condition to come to the door of their home. In that sense, the comments of the Court in *State of New South Wales v Le* [2017] NSWCA 290 are apposite:
- While it is true that the courts will not read legislation as conferring authority to interfere with the fundamental rights of individuals, absent clear words or a necessary implication, there are two limitations implicit within that proposition. The first is that express words are not essential; the second is that what may be derived by implication will turn on the legislative context and the nature of the interference being authorised.*
- XI. It follows that whatever the practical difficulties that might arise in ensuring that a person subject of the enforcement condition comes to the door, the presence of an enforcement condition arguably gives police an implied power to walk to the door where the implied licence has been revoked—whether prior to or during their attendance at the residence.

## Issue 3:

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

- I. No. This issue has been addressed in detail above.

## Issue 4:

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

- I. The wording of this question suggests that LECC has formed the view that police are currently acting unreasonably. The NSW Police Force does not accept that proposition.
- II. Police conduct bail compliance checks as part of a strategy to keep the community safe. When a person is charged with a criminal offence a decision is made whether they pose a risk to the community. If they do, then a further decision must be made to determine whether bail conditions can be imposed which will mitigate that risk.
- III. Crafting residential bail conditions in such a manner that narrows the mitigation strategy by its nature increases the risk. For example, if a bail condition exists requiring a bailed person to remain at their home between 6pm and 6am, and that police can only check whether they are complying with their bail between 6pm and 8pm, then police would be unable to proactively check outside of those times. That, in turn, increases the risk to the community.

## Issue 5:

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

- I. A bail enforcement condition that requires a bailed person to present to the front door is completely ineffectual. If police knock at the front door and the bailed person answers then the bail compliance check has been completed.
- II. If the door is answered by another person then that person is under no legal compulsion to do anything. Police have no power to direct that person to do anything and police have no means of ensuring the bailed person is aware of their presence such to require they present themselves in compliance with the bail conditions.
- III. Short of providing police a power of entry to the premises to look for the bailed person there is no way of curing this. Persons who happen to live in the same house as a bailed person have not committed any offence and a court has no power to require them to do anything they chose not to.

### Issue 6:

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

- I. Police conducting bail compliance checks should ensure they are conducted in a manner proportionate to the risk the bailed person presents.
- II. Police are entitled to speak to other residents at the premises and make enquiries of them. Police are entitled to ask them to assist in checking bail compliance, however, have no power to direct them to do anything.

### Issue 7:

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

- I. As discussed previously, the Bail Act 2013 and the common law already allow for this and legislative change is unnecessary.

### Issue 8:

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

- I. Proactive policing is a valuable tool used by police to protect victims and the community. The Bail Act 2013 and common law are clear. Police are entitled to conduct bail compliance checks to ensure a person is complying with their bail conditions. The NSW Police Force has obtained the advice of the Solicitor General and is entitled to rely on that advice.