

# The Shopfront

YOUTH LEGAL CENTRE

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25 July 2024  
By email

## **Bail compliance checks: Submission from The Shopfront Youth Legal Centre**

### **About The Shopfront Youth Legal Centre**

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. The Shopfront is based in Sydney and is a joint project of Mission Australia, the Salvation Army and the law firm Herbert Smith Freehills.

Our service was established in 1993 in response to the AHRC (or HREOC, as it was then known) report, *Our Homeless Children*, known as the Burdekin Report.

Our clients are among the most disadvantaged in our community. Many are, or have been, in out-of-home care. Most are affected by a combination of issues including homelessness, unresolved trauma, serious mental illness and cognitive impairment.

Our four solicitors appear in court for vulnerable children and young people almost daily, mostly in criminal matters. We also provide other forms of legal assistance, education and social support.

The Shopfront's Principal Solicitor is an Accredited Specialist in criminal law and in children's law and has been practising in the field for almost 30 years.

We also have two other senior solicitors and a legal assistant with years of experience working with disadvantaged young people in their capacity as victims of crime, alleged offenders, and parties to civil proceedings.

Our Caseworker and our Intake and Engagement Worker also have extensive experience working with young people and other clients who are experiencing homelessness.

We have significant expertise in the law relating to police powers, and have been actively involved in legal education and policy work in this area.

We would also like to acknowledge the contribution of our student volunteers (in particular Izabella Brzowska, Tristan Price and Jason Li) in the preparation of this submission.

### **General comments**

#### ***The impact of bail checks***

The Shopfront Youth Legal Centre has, over the last 30 years, acted for thousands of children and young adults in criminal proceedings.

Most of our clients have complex needs, and many have unstable housing. A large proportion have a residential condition as part of their bail. A significant percentage also have a curfew condition. Enforcement conditions, however, are rare.

Police practices with bail checks seem to vary widely depending on the geographical area, the profile of the alleged offender, and a range of other factors.

Doc 114205942

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The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills in association with Mission Australia and The Salvation Army



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HERBERT SMITH FREEHILLS

Our experience is that clients with enforcement conditions do not receive visits from police any more frequently (and, if anything, *less* frequently) than clients who do not have enforcement conditions.

Our clients often report feeling uncomfortable about frequent visits from the police, for reasons including:

- Bail checks cause disruption not only to the accused but to other household members, often interfering with work and schooling due to people being woken up late at night.
- Many young people have reported feeling stigmatised by their neighbours, who observe police officers frequently visiting the house. This is all the more concerning when the accused person is under 18, as it undermines the privacy to which children are entitled under the *Children (Criminal Proceedings) Act*.
- Some clients even report being evicted from their tenancies due to frequent visits from the police and the disruption this causes to neighbours, particularly in blocks of units.

Our clients and their household members generally lack understanding about their rights, or lack the practical ability to assert these rights, when it comes to police bail checks.

Our clients, particularly in the Children's Court, are often desperate to get rid of their curfew conditions. In some cases this may be because they see it as an imposition on their personal life and their freedom to be out at night. Sometimes it may be because they feel unsafe or uncomfortable at home due to family violence or overcrowding. However, in a significant proportion of cases it is not about wanting or needing to be out at night – it is about the disruption and stigma associated with curfew checks.

Many young people (rightly or wrongly) believe the only way to stop these bail checks is to have their matters finalised as quickly as possible, which generally means pleading guilty. We have found this works as an inappropriate inducement to plead guilty in circumstances where the young person is actually not guilty or at least has a good defence to the charge.

Of course, curfew conditions may be varied or deleted by a court at any time, and we will assist our clients with these applications where appropriate. However, magistrates may be reluctant to do this because they believe a curfew is necessary to address bail concerns.

If there is no enforcement condition, bail checks may be stopped by withdrawing the implied licence for police to enter the property. However, this is not always a simple matter. Young people living in a family home or refuge-type accommodation are more likely to be a licensee than an occupier, and thus they need to rely on a parent or a service provider to withdraw the implied licence, which they may or may not be willing to do. The situation may also be complicated in blocks of flats and similar premises where there are common areas (see, for example, *State of New South Wales v. Koumdjiev* [2005] NSWCA 247, in which it was held that an occupier of a unit cannot unilaterally revoke the implied licence to the common areas). See further our response to question 1 below.

### ***Is there a need or justification for bail checks and enforcement conditions?***

*In our view, police should not be permitted to conduct bail compliance checks without an enforcement condition.* This is because of the widespread misuse of, and *lack of genuine consent* to, informal bail checks. See further our response to question 7 below.

We also believe that bail compliance checks, and therefore enforcement conditions, should be relatively rare.

It is important to remember that police attendance at a person's private residence,

particularly where it involves household members other than the accused, and particularly when it takes place late at night, can be a significant incursion on their rights to “quiet enjoyment” of their residential premises.

There are undoubtedly some cases in which an enforcement condition and curfew checks are called for. However, we believe that curfew checks are overused, are often misused for ulterior purposes (such as STMP strategies – see our further comments below) and are not genuinely necessary to monitor compliance with curfews.

Overuse of curfew checks (whether or not there is also an enforcement condition) tips the balance too far towards law enforcement at the expense of liberty and privacy.

The concerns raised by the NSW Law Reform Commission in its 2012 report on *Bail* (cited in the Issues Paper at pp. 15-17) are shared by us and remain valid.

Having worked with children and young people for over 30 years, we recall a time when curfew checks were comparatively rare. Curfew conditions would be enforced by police conducting patrols in public places in the ordinary course of their duties, and taking action against accused persons who were found away from their homes after curfew. Many defendants who are subject to curfew conditions, particularly if they are young people, are well known to their local police and are readily identified if they are away from home after curfew.

We also suggest that *supporting* young people to comply with their bail, and to address criminogenic risk factors, is likely to be more effective in addressing bail concerns than *monitoring* compliance with bail conditions.

### ***Interaction between bail checks and STMP***

As the Issues Paper acknowledges (see p. 25), there are significant overlaps between bail checks and STMP-related home visits.

The final report of the LECC investigation into the use of the NSW Police Force Suspect Targeting Management Plan (STMP) on children and young people (“Operation Tepito”), released on 30 October 2023, found that young people, particularly young First Nations people, were being disproportionately targeted under the STMP.

Specifically, the report identified that bail compliance checks were the most common STMP interaction, particularly for young people. Further, the manner in which they were being conducted was often unreasonable, without clear purpose and in the absence of an enforcement condition. Police officers often conducted STMP home visits interchangeably with bail compliance checks. The report also found that the way in which NSW Police conducted bail checks showed a lack of understanding by officers about the limits of implied licence. Young people are often unaware of their rights regarding bail compliance checks (or home visits associated with the STMP), incorrectly believing that they must consent to such checks and not knowing that the implied licence can be withdrawn. [see chapters 7.2.2, 7.2.24, 8.1.1, 8.1.2, 8.2.2 and 8.1.3].

The Operation Tepito final report also concluded [at chapters 1.5, 1.7.1, 4.1 and 8.1] that the targeting strategies employed by police under the STMP, including bail compliance checks, were highly intrusive and disruptive to the lives of the young people targeted, and increased the likelihood of the young person having further interactions with the criminal justice system.

The report also identified [at chapter 3.7] that the young people selected as STMP targets often had complex needs that were not adequately considered by police when selecting individuals for inclusion in the STMP and when deciding which STMP targeting strategies to employ.

The cessation of the STMP for young people under 18 (as of December 2023) does not give us confidence that police will cease using bail checks for ulterior purposes, or will stop disproportionately targeting vulnerable young people for bail checks.

As the LECC would be aware, NSW Police are currently developing another program as a replacement for the STMP for children. We also understand that the police are still using the STMP, or a version of it, for adults (in particular for alleged domestic violence offenders).

### ***Lack of genuine consent to STMP strategies and bail checks***

A fundamental problem with the STMP, also identified in the Operation Tepito final report, is that most STMP strategies rely on the consent of the person being targeted, yet it is rare for such consent to be explicitly sought or genuinely obtained.

The Operation Tepito report discusses the notification letters that were often sent to young people selected for the STMP. Young people and/or their parents were asked to sign these letters to indicate their consent to various STMP strategies listed in the letter. However, the scope of what they are consenting to was not adequately explained or understood.

“The notification letters police issued to some STMP targets may have improperly influenced some young people to ‘consent’ to a search. Because the letter asked for ‘consent’ for police to participate in listed strategies, this created a risk that a young person and/or their carers may have believed they must submit to all stop and search interactions while on STMP”. [Operation Tepito final report, chapter 6.3]

It was also noted [also in chapter 6.3] that when LEPRA section 34A (i.e., the power to search with consent) was used within the STMP context, “young STMP targets may not have understood that in some circumstances police were requesting ..., rather than demanding, that they submitted to a person search.” Language used by police in these contexts did not make clear that these searches were optional. Even if it was understood by the young person, they may not have felt they were in a position to refuse the search due to power imbalances in police interactions.

Concerns about the lack of genuine consent also extended to home visits [see Chapter 7.2]. Concerns were also raised about interactions with family members during home visits. The review conducted by LECC showed that during home visits where the target was not home, police have sometimes spoken to family members to gather intelligence. In the context of these visits, “It is possible that the parents and family members of these young people did not feel they could decline to answer the questions posed by police at these visits, or to tell them to leave.”

Additionally, “[w]ithout a proper explanation of the relationship between court-ordered police actions and police actions under the STMP, young people and their parents/carers could have understandably, and reasonably, misinterpreted proposed STMP actions as being extensions of court orders.” [Chapter 7.2.2]

We raise these issues here because, in our view, similar problems exist with bail compliance checks. As with other STMP strategies, police do not generally explain to young people that their cooperation is voluntary. Young people and their families are likely to believe that bail checks have the imprimatur of the court and therefore must be complied with, even where there is no enforcement condition.

### ***Other issues of concern***

We have had the benefit of reading the draft submission from the Justice and Equity Centre and we generally endorse the views they have expressed.

They have raised some additional concerns, which we share, including:

- The disproportionate impact of bail checks on First Nations people;
- Biases inherent in risk assessment tools;
- Confusion caused by conflicting bail conditions.

## Responses to questions raised in Issues Paper

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

The law of implied licence is discussed in some detail in the Issues Paper. In this submission we do not propose to embark on a comprehensive analysis of the law.

It is certainly arguable that performance of a bail check is a coercive power in the sense contemplated by the High Court in *Roy v O'Neill* (2020) 272 CLR 291. It may require a person to perform a positive act, e.g. present themselves at the front door, and there may be criminal consequences if they do not comply (e.g. police may form a belief that bail has been breached and may pursue a detention application or other action under section 77). Depending on the nature and frequency of bail checks, police activities may also constitute interference with property rights or “injury” to occupiers which would be beyond the scope of the implied licence.

However, the precise legal position remains unresolved. As summed up in the passage from *State of NSW v Dargin* [2019] NSWCA 47, quoted at page 23 of the Issues Paper, police bail checks may be lawfully justified by implied licence or may be tortious, depending on the manner in which they are carried out.

In performing bail checks where there is no enforcement condition, police are relying not only on implied licence but on the *actual* consent of the accused or the people who reside with them. Implied licence generally takes police as far as the front door. Anything beyond that (e.g. answering the door, or allowing entry inside the home) requires a voluntary action by the accused and/or another occupier.

Our experience suggests that such “consent” is rarely, if ever, free and informed consent.

Firstly, many accused people (particularly children and young people) and members of their households are ignorant of their legal rights in this situation.

Secondly, even if aware of their right to refuse entry or ignore the police knocking, people will often comply through fear or pragmatism. For example:

- A parent with young children who are asleep may answer the door in order to stop the police from persisting in knocking or ringing the doorbell.
- A young person may present themselves “voluntarily” at the front door out of a perceived fear that failure to do so will lead to police harassment or action for alleged breach or bail.
- Staff at youth refugees and similar types of accommodation will often permit police to enter (even going as far as the young person’s bedroom) out of a wish to maintain cordial relationships with their local police.

This is an invidious position in which to place people.

*If bail checks are to be performed in the absence of an enforcement condition, it is imperative that there be a legal requirement for police to inform all concerned* (not only the accused, but any other occupier or household member) of their right to refuse entry and to decline to speak with police.

### ***Question 2: Does the Bail Act 2013 proscribe police from conducting bail compliance checks when police are operating outside of s 77 and in circumstances where there are no enforcement conditions?***

In our view the *Bail Act* does not *proscribe* police from conducting bail checks in the absence of an enforcement condition or circumstances to which section 77 applies.

However, an accused person is under no obligation to *cooperate* with bail checks unless there is an enforcement condition.

***Question 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 s77 of the Bail Act?***

In our view, an enforcement condition is not necessary in order for police to perform bail compliance checks. However, in the absence of an enforcement condition, a person is under no obligation to *cooperate* with bail checks.

We would note that section 77 of the *Bail Act* does not authorise the police to perform bail compliance checks. It authorises various actions to be taken if police believe on reasonable grounds that a person has breached (or is about to breach) a bail condition.

Section 77 does not give police any power of entry or overcome the withdrawal of an implied licence. However, if police had the state of mind required by section 77 and formed the view that arrest was the appropriate option, *and* believed on reasonable grounds that the person was on the premises, section 10 of LEPR would confer a power of entry for the purpose of arresting the person.

***Question 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?***

The suggested enforcement conditions used by the Children's Court, referred to in the Issues Paper, provide a good starting point.

Needless to say, it is important that conditions be crafted according to the circumstances of the accused and others who may be affected. As the Children's Court guidelines emphasise, curfew conditions should not be imposed as a behaviour management tool and must be directed at genuine bail concerns. Nor should enforcement conditions be imposed unnecessarily or in a formulaic way.

***Question 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?***

We acknowledge that there may sometimes be practical problems with a requirement for the accused to present themselves at the front door when visited by police. At the times when police are likely to visit, usually late at night, the accused may be asleep and will not be woken by a doorbell or a knock. Also, it is not within the power of the police or the court to require another household member to go and alert the accused and produce them at the front door. Additionally, an enforcement condition of this type does not confer a licence for police to step onto the property and approach the front door, so its operation may be frustrated if the implied licence is withdrawn by the occupier.

However, in our experience, when enforcement conditions are appropriately framed by the court, and appropriately carried out by the police, the accused and other household members will generally cooperate to the best of their ability.

We acknowledge that police have also raised concerns that a bailed person may modify their behaviour after the quota of bail compliance checks for the night/week has been met. The answer to this may lie in police using bail checks more judiciously, not using up their full quota in order to preserve the element of surprise.

Of course, as we have already noted above, monitoring compliance with curfews can also be done in other ways, including observing the accused's movements while conducting police patrols in public places.

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

Firstly, it is important to consider the potential disruption to the amenity of household members. This is already acknowledged in section 30, which requires the court to consider the impact of an enforcement condition on persons other than the accused.

Secondly, we acknowledge that an enforcement condition cannot compel a third party to do anything, such as answer the door to the police or fetch the accused. However, as we have mentioned in our response to the previous question, we believe household members are unlikely to frustrate bail checks if they are performed in a reasonable manner within the framework of an appropriately-crafted enforcement condition,

It is standard practice in Supreme Court bail applications for the court to require a letter from the person with whom the accused proposes to reside, confirming the availability of the accommodation. Such letters are sometimes tendered in Local Court bail applications or, in the Children's Court, the accommodation is verified via a Youth Justice report.

Perhaps the court, if of the view that an enforcement condition is necessary, could also seek an undertaking from this person that they will comply with appropriate requests from police in the context of bail checks. A parent, relative, friend or carer who is willing to provide accommodation for a person on bail is usually also willing to cooperate with reasonable enforcement conditions.

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

In our view the *Bail Act* should clearly provide that bail compliance checks may be performed only if there is an enforcement condition imposed by the court.

If this suggestion is not accepted, and the police are to be permitted to continue performing bail checks informally, it is important for some safeguards be built into the legislation.

This would include the kind of information required by Part 15 of LEPRA when police are exercising a power (e.g. the identity of the police officer, the reason for the bail check), and, most importantly, *an obligation for police to inform the accused (or any other occupier or household member, if relevant) that cooperation is entirely voluntary.*

**Question 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?**

Please see our answer to Question 7 above. We would be happy to participate in further consultations as to the drafting of any such provision(s).

**Further comment: pre-requisites to imposition of enforcement conditions**

We support the current position that enforcement conditions may only be imposed by a court and not by police. Allowing enforcement conditions to be part of police bail has too much potential for abuse. Also, there is an inherent conflict in police imposing a condition that may place restrictions on their own activities by limiting the frequency of bail checks.

In our experience, it is rare for police prosecutors to request enforcement conditions; it seems that police prefer to conduct bail checks relying on implied licence and "consent" limitations as to timing and frequency. We have also (thankfully, only in rare cases) encountered police who, upon learning that the implied licence to attend the accused's home has been revoked, threaten to make a detention application rather than seeking an enforcement condition.

We do not necessarily support the court being able to impose enforcement conditions of its own motion, as there may be some magistrates who would impose enforcement conditions as a standard practice or in a formulaic way.

However, we believe it may be worth considering an amendment to allow courts to impose enforcement conditions on request from the accused. In some cases, being able to offer an enforcement condition assists a person's prospects of being granted bail as it enables the court to deal with relevant bail concerns.

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Thank you for the opportunity to comment. We are happy to be contacted for further comment. Our preferred means of contact is via email at [jane.sanders@theshopfront.org](mailto:jane.sanders@theshopfront.org).

Yours sincerely



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