

LECC

Law Enforcement
Conduct Commission

Bail compliance checks in NSW – Final Report

April 2025

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Conduct Commission

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The Law Enforcement Conduct Commission acknowledges and pays respect to the Traditional Owners and Custodians of the lands on which we work, and recognises their continuing connection to the lands and waters of NSW. We pay our respects to the people, the cultures, and the Elders past and present.



Office of the Chief Commissioner

17 April 2025

The Hon Ben Franklin, MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon Greg Piper, MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Mr Speaker

Bail compliance checks in NSW – Final Report

In accordance with s 138 of the *Law Enforcement Conduct Commission Act 2016* (the Act), the Commission provides you with a copy of its report *Bail compliance checks in NSW – Final Report*.

Under s 142(2) of the Act, I recommend that this report be made public immediately.

Yours sincerely



The Hon Peter Johnson SC
Chief Commissioner

Foreword

Bail serves an important function in our criminal justice system. It allows a person who has been charged with a criminal offence to remain at liberty in the community while they wait for the court to hear the charges.

In May 2024, the Commission published *Bail compliance checks in NSW – Issues Paper*. The Issues Paper looked at police practices for checking compliance with bail conditions and sought public submissions on 8 key questions, particularly on the topics of accommodation and curfew conditions and the ways in which police check for compliance with these conditions.

The submissions helped us to assess whether the *Bail Act 2013* (NSW) (Bail Act) is clear on its face in relation to the parameters for when police are authorised to conduct bail compliance checks. The Commission has now undertaken a thorough review of the existing provisions surrounding bail in the Bail Act, and carefully considered each of the submissions received.

In the Commission's view, there is a powerful argument that bail curfew and residential compliance checks which involve entry onto private property cannot be undertaken by the NSW Police Force in the absence of an enforcement condition fixed by a court under s 30 of the Bail Act. Given the intrusive nature of such compliance checks, they should only be undertaken when approved by a court. In the Commission's view, the doctrine of implied licence (if it is available at all) is a vague, weak and cancellable form of authority for the NSW Police Force to undertake bail compliance checks. The NSW Police Force should make use of the statutory scheme provided in the Bail Act, which gives police clear powers to assist them in checking compliance with curfew and residence conditions.

Courts in NSW have been entrusted with a statutory responsibility under the Bail Act to assess the risk presented by an accused person and the decision whether or not to impose bail conditions and bail enforcement conditions form part of that risk assessment process. In many cases, the court will be satisfied that the risk presented by the accused person is ameliorated by the imposition of bail conditions accompanied by an enforcement condition. Such statutory safeguards may be undermined if police are able to conduct bail curfew compliance checks involving entry onto private property without an order of the court.

Now that the Commission has completed its review of the submissions it received along with the existing provisions relating to bail compliance checks in NSW, the key message of this Final Report is that the NSW Police Force should seek s 30 bail enforcement conditions from a court in **all** cases where it seeks to undertake curfew and residence compliance checks involving entry onto private property.

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Recommendations

Recommendation 1: To the Commissioner of Police, the NSW Police Force should seek enforcement conditions from courts under s 30 of the Bail Act in all matters where authority to conduct bail compliance checks on private property is sought and reliance on the doctrine of implied licence should be discontinued..... 30

Recommendation 2: To give effect to Recommendation 1, it is recommended to the Commissioner of Police that the Bail Compliance Check Standard Operating Procedures be amended to reflect the change in Recommendation 1..... 30

Recommendation 3: To the Attorney General, in the event that Recommendations 1 and 2 are not adopted, the Bail Act should be amended to make clear that the authority for police officers to undertake bail curfew and residential compliance checks on private property should be sought from a court under s 30 of the Bail Act and that the doctrine of implied licence is abrogated and has no application to bail compliance checks..... 30

1. Introduction

Decisions under the *Bail Act 2013* (NSW) ('Bail Act') are made daily by NSW courts in a wide variety of cases. There have been both general¹ and specific² reviews undertaken in the past concerning the bail law in this State.

The Law Enforcement Conduct Commission (the Commission) has a close interest in the policing context of the bail law.

In May 2024, the Commission published the *Bail compliance checks in NSW – Issues Paper* ('Issues Paper'). The Issues Paper should be read with this Report and, for ease of reference, is Annexure 1 to this Report.

The purpose of the Issues Paper was explained in the following way (footnotes omitted):³

This paper explores some of the issues the Commission has seen raised in complaints, along with the legislative framework governing the way police monitor bail compliance. In particular, it has been prepared to assist the Commission to consider the implications of bail compliance checks that are conducted in circumstances where there are no enforcement conditions.

This work falls within the objects of the *Law Enforcement Conduct Commission Act 2016* (LECC Act), specifically s3(d)(ii) which sets out the object of preventing officer misconduct and maladministration and agency maladministration within the NSW Police Force (NSWPF) by 'assessing the effectiveness and appropriateness of their procedures relating to the legality and propriety of activities of their members and officers.'

This Report is not a general report on the bail law in NSW. It focuses on an important area concerning bail conditions, the enforcement of bail conditions and the permissible limits of police activity as a means of monitoring compliance with bail conditions.

The Issues Paper invited interested parties to prepare a submission in response to 8 key issues, to help us assess whether the Bail Act is clear on its face in relation to the parameters for when police are authorised to conduct bail compliance checks.

There are different types of bail compliance checks which may be undertaken by police officers. In this Report, attention is given to bail compliance checks where the accused person is subject to a residential condition, frequently accompanied by a curfew condition which restricts when the accused person may be absent from the residence. The term 'bail compliance checks' in this Report relates to compliance with residential and curfew conditions where police enter onto private property to check compliance.

¹ NSW Law Reform Commission Report 133, *Bail*, April 2012.

² NSW Law Reform Commission Report 150, *Bail: Firearms and Criminal Associations*, October 2022.

³ Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper*, May 2024, p 7.

The Commission also wanted to understand whether current practices of the NSW Police Force when conducting bail compliance checks accord with the provisions of the Bail Act. With these considerations in mind, the 8 questions posed by the Commission in the Issues Paper were:

1. To what extent can the doctrine of implied licence be relied upon by police officers when undertaking bail compliance checks?
2. Does the Bail Act proscribe police from conducting bail compliance checks when police are operating outside of s 77 and in circumstances where there is no enforcement condition?
3. If the court fixes an accommodation or curfew condition, is a bail enforcement condition a necessary prerequisite to the conduct of any bail compliance checks that are undertaken outside of s 77 of the Bail Act?
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?
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?
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?
7. Should the Bail Act make provision for the carrying out of bail compliance checks, in the absence of a bail enforcement condition?
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?

1.1 Submissions

The Commission received a total of 18 submissions between 23 May 2024 and 28 October 2024 from various interested stakeholders, as well as from individuals who had personal experiences with police conducting bail compliance checks.

The submissions we received are reflected in Table 1.

Table 1: List of submissions received in response to the Commission’s public submissions process

Submission from	Date Received
Submission received (not published)	23 May 2024
Submission received (not published)	23 June 2024
University of New South Wales, Law & Justice Centre	23 July 2024

Submission from	Date Received
Mr Frank Gilroy	23 July 2024
Dharriwaa Elder's Group Yuwaya Ngarrali	24 July 2024
Submission received (not published)	24 July 2024
Shopfront Youth Legal Centre	25 July 2024
Inner City Legal Centre	25 July 2024
Justice & Equity Centre (formerly PIAC)	25 July 2024
The Law Society of New South Wales	26 July 2024
The Children's Court of New South Wales	31 July 2024
Legal Aid New South Wales	1 August 2024
O'Brien Criminal & Civil Solicitors	5 August 2024 (amended 30 September 2024)
University of Technology Sydney, Professor Thalia Anthony	5 August 2024
New South Wales Police Force	6 August 2024
New South Wales Bar Association	9 August 2024
Office of the Director of Public Prosecutions (ODPP)	19 August 2024
Aboriginal Legal Service (NSW/ACT)	25 October 2024

Each party was given the option to remain anonymous, or to have their submission made publicly available. Those submissions for which permission to publish was granted are accessible on the Commission's public website at <https://www.lecc.nsw.gov.au/news/submissions-received-on-bail-issues-paper>.

The Commission has undertaken a thorough review of the existing provisions surrounding bail in the Bail Act and has also carefully considered each of the submissions received.

A number of the submissions traversed topics extending beyond the 8 key issues, including broader questions concerning the bail law and its operation in NSW. The Commission is grateful for the detailed work reflected in the submissions. The submissions will assist the Government and interested persons in considering the operation of bail law. This Report confines attention to the 8 issues posed for submissions.

One of the submissions that the Commission received raised an issue about whether the Commission should investigate the NSW Police Force reliance on the doctrine of implied licence when conducting bail compliance checks as potential agency maladministration and/or serious misconduct as defined in the LECC Act. The Commission considers that the approach taken in both the Issues Paper and in this Final Report is the appropriate pathway to progress these important issues. The Commission prefers to highlight our concerns about police bail compliance practice by putting forward recommendations for improvement.

This report has been written considering all the submissions that we received in response to our call for submissions to the Issues Paper.

1.2 Key sections of the Bail Act relating to enforcement conditions

1.2.1 Section 20A

Section 20A of the Bail Act provides that bail **conditions can only be imposed** if there are identified bail concerns, and the proposed bail conditions are:

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

When considering this issue, it is important to think not only about each individual bail condition, but about the number of different conditions and the combined effect of all of them.

1.2.2 Section 30

Section 30 of the Bail Act describes enforcement conditions. Enforcement conditions are imposed for the purpose of monitoring or enforcing compliance with another bail condition (which is known as the underlying bail condition). Section 30(2) of the Bail Act says:

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).

An enforcement condition can only be imposed by a court, and only then, upon request of the prosecutor in the proceedings.⁴ If the court has in mind a particular enforcement condition not nominated by the prosecutor, the court should raise the matter for consideration by the prosecutor and the defence before imposing the condition. When an enforcement condition has been requested, it

⁴ *Bail Act 2013* (NSW) s 30(3).

can only be imposed if the court considers it is ‘reasonable and necessary in the circumstances’ having regard to:

- the history of the person granted bail (for example whether their criminal history involves serious offences or multiple offences)
- the likelihood or risk of the person committing further offences while on bail, and
- ‘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.’⁵

In terms of what the enforcement condition may direct the bailed person to do, s 30(4) of the Bail Act says:

- (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.

1.2.3 Section 77

Section 77 of the Bail Act is headed ‘Police officers may take actions to enforce bail requirements’. It gives police the power to take actions, up to and including arresting the person without warrant, if the officer believes the person is, or is about to fail to comply with a bail condition, but the officer must have reasonable grounds for that belief.⁶

While it is not an offence to fail to comply with a bail condition, the failure to comply with a bail condition does trigger the power for police to take action to arrest the bailed person, or apply for a warrant for that person’s arrest, so that the bailed person is then placed before the court. The prosecution can then apply to the court for bail to be revoked or varied. Alternatively, the court may decide to release the person on the original bail agreement.⁷

Section 81 of the Bail Act states that police can give a direction of a kind specified in the enforcement condition once a court had decided that the person should be subject to such directions (under s 30). Under s 81:

- the officer can issue a direction of the kind specified in the bail enforcement condition within the circumstances set out in that condition, or
- the officer can issue such a direction at any other time if the officer has a reasonable suspicion the person has contravened the underlying bail condition.

This is the only provision in the Bail Act that addresses the actions police may take in relation to an enforcement condition.

Further discussion about the history of bail enforcement conditions in New South Wales and the previous work of the Commission is contained in chapter 2 – ‘Bail Enforcement Conditions’ of this Report.

⁵ *Bail Act 2013* (NSW) s 30(5)(c).

⁶ Section 77 is considered in *Bugmy v Director of Prosecutions (NSW)* (2024) 113 NSWLR 567; [2024] NSWCA 70.

⁷ *Bail Act 2013* (NSW) s 78.

1.3 The importance of lawfulness and clarity in the exercise of police powers concerning bail

It is important that police practice for conducting bail compliance checks is lawful, and that the parameters of their authority to conduct bail compliance checks are clear. This ensures that police officers, those subjected to bail conditions and the public in general have clear expectations about how conditional bail is to be managed.

The NSW Police Force considers that bail compliance checks are utilised as a form of proactive policing. There is some controversy as to how this approach fits with the statutory scheme in the Bail Act and whether court approval is required where proactive policing is sought to be undertaken by way of bail compliance checks.

As outlined in the Issues Paper, the NSW Police Force considers that police are entitled to rely on the doctrine of implied licence to conduct bail compliance checks outside of the parameters of the enforcement scheme set out in the Bail Act. The NSW Police Force has referred to legal advice, not shared with the Commission, from the NSW Solicitor General, as support for this position.⁸

The NSW Police Force have informed the Commission that they do not regularly seek enforcement conditions attached to curfew or accommodation bail conditions because the law does not require an enforcement condition as a prerequisite for conducting bail compliance checks.⁹

The NSW Police Force have also told the Commission that enforcement conditions relating to curfew conditions are ‘largely unworkable’, and do not make it easier for police to check bail compliance.¹⁰

However, this approach appears to render the enforcement scheme, set out in ss 30 and 81 within the Bail Act, as completely optional. It effectively creates a parallel scheme for deciding whether enforcement is needed and how that enforcement ought to be conducted. In effect, this is determined by police without scrutiny from the judiciary as to whether enforcement of the underlying condition is reasonable and necessary in the circumstances, with regard to the accused person’s history, risk of offending while on bail and the impact of the enforcement on persons other than the accused person, such as others residing at the same address (factors which are explicitly outlined in s 30(5) of the Bail Act).

The purpose of the Bail Act is ‘to provide a legislative framework for a decision as to whether a person who is accused of an offence or is otherwise required to appear before a court should be detained or released, with or without conditions’.¹¹ This involves a process of risk assessment to be undertaken by a court as part of an elaborate statutory scheme, with areas of risk (bail concerns) being open to mitigation by imposition of conditions including enforcement conditions.¹²

⁸ NSW Police Force, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) p 2.

⁹ Law Enforcement Conduct Commission meeting with Assistant Commissioner, Southern Region, Corporate Sponsor Custody and Corrections, 5 July 2023; Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) p 31.

¹⁰ Law Enforcement Conduct Commission meeting with Assistant Commissioner, Southern Region, Corporate Sponsor Custody and Corrections, 5 July 2023; Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) p 31.

¹¹ *Bail Act 2013* (NSW) s 3(1).

¹² *Bail Act 2013* (NSW) ss 17 – 20A, 23 – 30A.

The Commission also considers that any practical limitations of enforcement conditions (outlined in detail in the Issues Paper and summarised in this Report at chapter 3.4) to effectively monitor compliance with underlying bail conditions are not remedied by the doctrine of implied licence.

As outlined in the chapters that follow, while there were differing perspectives in the submissions, a number considered that the regime established by ss 20A, 30, 77 and 81 of the Bail Act operate together to abolish the common law doctrine of implied licence, which may otherwise have operated to permit police to enter private property.

Given the background to the development of the enforcement provisions in the Bail Act, there is a powerful argument that the regime established under those sections was intended to 'cover the field' in terms of authorising bail compliance checks in circumstances outside of section 77 of the Bail Act (which is enlivened when officers believe on reasonable grounds that a bailed person has failed or is about to fail to comply with a bail condition).

In this Report, the Commission considers the appropriate way forward given the controversy which exists arising from the approach of the NSW Police Force to bail compliance checks concerning residential and curfew conditions.

2. Bail enforcement conditions

2.1 Bail and bail conditions

When a person is charged with a criminal offence in NSW, police may take the person into custody. Bail allows for the person who has been charged with an offence the authority to be ‘at liberty’ in the community on bail while they wait for a court to hear the charges against them. When a person is charged, a bail decision needs to be made. The bail decision may be one of the following:

- release the person without bail
- dispense with bail for the offence¹³
- grant bail (either with or without imposing conditions)
- refuse bail for the offence.¹⁴

In some circumstances, police can make a decision about whether bail can be granted.¹⁵ In other circumstances, only a court or authorised justice may decide if bail can be granted.¹⁶

When making a bail decision, police, the court or an authorised justice must assess any bail concerns. These are concerns that the accused person will, if released from custody:

- fail to appear at court to answer the charges
- commit a serious offence
- endanger the safety of victims, individuals or the community, or
- interfere with witnesses or with evidence.¹⁷

Bail conditions can only be applied if there are identified bail concerns. The conditions are designed to address those bail concerns.¹⁸ Bail conditions can be imposed when bail is granted or varied.¹⁹

2.1.1 Bail enforcement conditions

The history of the Bail Act and the introduction of the bail enforcement conditions scheme in s 30 was discussed at length in the Issues Paper.²⁰

The *Bail Amendment (Enforcement Conditions) Act 2012* introduced the power to impose enforcement conditions under the *Bail Act 1978*. Prior to this, the Supreme Court had held in *Lawson v Dunlevy*,²¹ that a breath test requirement of a bail condition was invalid. That decision questioned the power to impose bail enforcement conditions generally.

Given its significance to the proper construction of s 30 of the Bail Act and the statutory scheme for courts alone to fix bail enforcement conditions, it is appropriate to set out aspects of the legislative history in this Report.

¹³ A decision to dispense with bail can only be made by a court or an authorised justice and means the accused person may be at liberty in the same way as if bail had been granted. See *Bail Act 2013* (NSW) s 10.

¹⁴ *Bail Act 2013* (NSW) s 8.

¹⁵ *Bail Act 2013* (NSW) ss 43 – 47.

¹⁶ *Bail Act 2013* (NSW) ss 48 – 58.

¹⁷ *Bail Act 2013* (NSW) s 17.

¹⁸ *Bail Act 2013* (NSW) s 20A.

¹⁹ *Bail Act 2013* (NSW) s 23.

²⁰ Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024), pp 15 – 19.

²¹ [2012] NSWSC 48.

It is clear from the second reading speech for the *Bail Amendment (Enforcement Conditions) Act 2012* that the enactment of what became s 30 in the Bail Act was intended to have application to curfew compliance conditions. The then Minister for Police and Emergency Services, the Hon Michael Gallacher MLC, said concerning *Lawson v Dunlevy* (emphasis added):²²

On appeal the Supreme Court held that the breath test condition was not lawful under the current conditions of the Bail Act as it was inconsistent with the purposes for which bail conditions can be imposed and more onerous than required by the circumstances. Whilst it only considered the particular breath test condition before it, the judgement of the court made it clear that all enforcement conditions are unlawful under the current terms of the Act. **Enforcement conditions are a particularly useful tool for monitoring and enforcing compliance with bail, particularly for high-risk accused persons. They ensure that police can take steps to verify that an accused is complying with their bail conditions by, for example, directing the accused to present at the front door of their home to check that they are complying with a curfew condition.**

The NSW Police Force has advised the Government that the absence of enforcement conditions is negatively impacting on their ability to check that an accused person or accused persons are complying with their bail conditions. The Government is committed to ensuring that the NSW Police Force has all the tools necessary to properly enforce the law. Bail conditions are imposed on accused persons as part of a court order and it is expected that they be complied with. It is appropriate that police be able to take steps to check, and compliance and enforcement conditions facilitate the checking.

...

The bill incorporates safeguards to ensure that enforcement conditions are not imposed in inappropriate cases or in a way which makes compliance too onerous. For example, police will not have the power to impose enforcement conditions when they make a bail determination. Enforcement conditions will be imposed only by the courts. Further, the bill sets out considerations which must be taken into account before an enforcement condition can be imposed including considering the accused's criminal history and particularly whether they are a high-volume or serious offender. These considerations will ensure that enforcement conditions are targeted at accused persons who represent a risk of further offending in the community.

The relevant provision of the *Bail Act 1978* was incorporated as s 30 of the Bail Act when that statute was enacted in 2013.

The Second Reading Speech of the Minister may be taken into account²³ in construing s 30 of the Bail Act. This extrinsic material assists in identifying the purpose or object²⁴ of what is now s 30 of the Bail Act, which included extension of the bail enforcement condition provision to curfew checks requiring the accused person to present at the front door of premises at the direction of a police officer.

The new provisions introduced safeguards to avoid overuse of the enforcement condition provisions. One of these safeguards was that only courts could impose bail enforcement conditions – they could not be imposed by the police.

²² New South Wales, *Parliamentary Debates*, (Legislative Council), 24 October 2012, 16261, 16262 (The Hon Michael Gallacher).

²³ *Interpretation Act 1987* (NSW) s 34; *Shorten v David Hurst Constructions Pty Ltd* (2008) 72 NSWLR 211; [2008] NSWCA 134 at [18] – [27].

²⁴ *Interpretation Act 1987* (NSW) s 33.

As noted already, the provisions of the *Bail Act 1978* that related to enforcement conditions were subsequently brought across into the *Bail Act*.

Bail conditions may 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).’²⁵ An enforcement condition requires the bailed person to comply with one or more specified kinds of police directions that are given for the purpose of monitoring or enforcing compliance with the underlying bail condition.²⁶

Enforcement conditions can only be imposed by a court at the request of a prosecutor in the proceedings. Police cannot impose enforcement conditions.²⁷ Further, where a court has fixed enforcement conditions, an authorised justice must not vary enforcement conditions or impose new enforcement conditions, although an enforcement condition imposed by a court may be reimposed by an authorised justice who makes or varies a bail decision.²⁸

In these ways, the *Bail Act* confines to courts alone the power to impose and vary enforcement conditions.

2.1.2 Bail compliance checks under the *Bail Act*

As outlined in our Issues Paper, the NSW Police Force regularly conduct bail compliance checks as a means of monitoring that bailed people are complying with their bail conditions. Across NSW, police conduct more than 100,000 bail compliance checks per year.²⁹

Some of these checks will be conducted because an enforcement condition has specified that police can monitor an underlying condition. For example, a bail condition requiring that a person not consume alcohol may be accompanied by an enforcement condition which authorises police to conduct a breath test on the bailed person.

As discussed in the Issues Paper, police also regularly conduct bail compliance checks in circumstances where there are *no* bail enforcement conditions.³⁰

2.1.3 Implied licence and trespass

In the absence of an express statutory provision to enter private property to monitor bail compliance, police rely on the doctrine of implied licence to authorise such an entry.

The law will imply a licence to enter private property only in certain circumstances. A member of the public is permitted to go onto a path or driveway up to the residence and knock on the door if:

- the path or driveway leading to the entrance of a private residence is unobstructed and any entrance gate is unlocked, and
- if there is no notice or other indication that entry by visitors (or certain visitors) is forbidden.³¹

²⁵ *Bail Act 2013* (NSW) s 30(1).

²⁶ *Bail Act 2013* (NSW) s 30(2).

²⁷ *Bail Act 2013* (NSW) s 30(3).

²⁸ *Bail Act 2013* (NSW) s 58.

²⁹ Responses to supplementary Questions for Evidence to Portfolio Committee No. 5 – Regional NSW and Stronger Communities (Budget Estimates Inquiry), Parliament of New South Wales, Sydney, 31 August 2022, pp 57 – 59.

³⁰ Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) p 11.

³¹ *Robson v Hallet* [1967] 2 QB 939; *Halliday v Neville* (1984) 155 CLR 1, 7; *Roy v O’Neill* (2020) 272 CLR 291 [12].

A licence to enter onto private property will only be implied as a matter of law if there is nothing ‘in the objective facts which is capable of founding a conclusion that any such implied or tacit licence was negated.’³²

Even if the factual circumstances support implication of a licence to enter onto a property, there are limits to when entrance will be authorised on this basis. A police officer may only rely on implied licence to authorise walking up the path or driveway on private property:

- if they have a ‘legitimate purpose’ for that entry, and
- if that legitimate purpose does not involve any ‘interference with the occupier’s possession or injury to the person or property of the occupier, or the occupier’s guests’³³, and
- if they leave the property as soon as the occupier, by words or actions, revokes the implied licence for police to be on their property.

There is a more detailed discussion in the Issues Paper on each of these 3 requirements and on the law of implied licence and trespass in general, as applicable in the context of bail compliance checks.³⁴

2.2 Previous work by the Commission

2.2.1 Operation Tepito

The Commission receives complaints about the way in which the NSW Police Force conducts bail compliance checks and has also had the opportunity to consider further examples of bail compliance checks conducted upon young people who were the subject of a Suspect Targeting Management Plan (STMP) considered by the Commission under Operation Tepito.³⁵

The NSW Police Force has now stopped using STMP. However, the Commission’s Operation Tepito investigation highlighted a range of issues in relation to the way in which the NSW Police Force undertakes bail compliance checks. The findings and case studies from Operation Tepito are discussed in detail in the Issues Paper.³⁶

2.2.2 Operation Cusco

The Commission’s Operation Cusco investigation focused on the specific issue of police inadvertently doubling up when conducting bail curfew compliance checks. It related to specific issues that arose in a particular Local Area Command several years ago.

In the Commission’s Operation Cusco Report, some comments indicated that police are entitled to check curfew conditions, even in the absence of bail enforcement conditions, unless implied licence is revoked.³⁷

The Operation Cusco report, however, was written prior to the decision of the High Court of Australia in *Roy v O’Neill* (2020) 272 CLR 291. This case has developed the law in relation to the nature of a ‘legitimate purpose’ an officer has when entering property under implied licence.

³² *Halliday v Neville* (1984) 155 CLR 1, 7; *Roy v O’Neill* (2020) 272 CLR 291 [67] (Keane and Edelman JJ).

³³ *Halliday v Neville* (1984) 155 CLR 1, 7-8; *Kuru v New South Wales* (2008) 236 CLR 1, 15; *Roy v O’Neill* (2020) 272 CLR 291 [13].

³⁴ Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) pp 20 – 24.

³⁵ Law Enforcement Conduct Commission, *Operation Tepito – Final Report* (October 2023) p 111.

³⁶ Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) pp 25 – 28.

³⁷ Law Enforcement Conduct Commission, *Operation Cusco* (April 2020) section 7.17.

Given this, Operation Cusco did not consider some fundamental questions about the police practice for conducting bail compliance checks. Such questions include:

- whether it is a ‘legitimate purpose’ for a police officer to enter a person’s property for the purpose of directing them to come to the door where there is no bail enforcement condition (a ‘legitimate purpose’ is one of the thresholds permitting entry by implied licence under common law)
- whether officers entering property to conduct a bail compliance check are exercising a coercive power.

In summary, all members of the High Court concluded that the common law of implied licence to enter private property allows police officers to enter property for the purpose of undertaking enquiries as to whether a breach has occurred and/or an offence has been committed.³⁸

All the Justices also accepted that the common law will **not** imply a licence for police when entry is for the **sole purpose** of exercising coercive powers. That is, requiring the person to do something rather than simply knocking on the door and, if the person answers, asking that person some questions.³⁹ For example, Kiefel CJ held that entering onto property for the purposes of searching premises, or requiring a person to submit to a breath test, would not be legitimate purposes for the purpose of implied licence.⁴⁰

A more in-depth discussion of *Roy v O’Neill* is contained in the Issues Paper.⁴¹

³⁸ *Roy v O’Neill* (2020) 272 CLR 291, [15] (per Kiefel CJ), [34] (Bell and Gageler JJ), [77] (Keane and Edelman JJ).

³⁹ *Roy v O’Neill* (2020) 272 CLR 291, [15] (Kiefel CJ), [35] (Bell and Gageler JJ), [72] (Keane and Edelman JJ).

⁴⁰ *Roy v O’Neill* (2020) 272 CLR 291, [17] (Kiefel CJ).

⁴¹ Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) p 27.

3. Bail compliance checks and enforcement conditions in practice

In 2023 the NSW Police Force created some new instructions for police officers about the extent of their authority to enter private property in circumstances where there were no express statutory provisions authorising entry. The new chapter of the NSW Police Force *Police Handbook* (the Handbook) informs officers about the law and their expectations when entering private property. In short, it explains the principles of implied licence.

The NSW Police Force's submission has made it clear that police officers can rely on the doctrine of implied licence when conducting bail compliance checks.⁴²

3.1 Bail Compliance Checks Standard Operating Procedures

The NSW Police Force published new Bail Compliance Check Standard Operating Procedures (Bail SOPs) in November 2023, and introduced a risk-based priority assessment to inform officers about how frequently to conduct bail compliance checks.

The Bail SOPs indicate that officers can rely on implied licence to enter private property to conduct a bail compliance check, and instruct that:

- police should take the most direct route to the front door, should not shine torches through windows, bang on doors or windows
- if entry is barred, for example by a locked gate, there is no implied licence
- implied licence does not authorise a person to direct a person to come to the front door
- if there is an enforcement condition, the bailed person is required to comply with a police direction that has been specified by the court
- other people who reside at the address may revoke implied licence, and in such cases, police cannot enter the property to check compliance with the enforcement condition.

The Bail SOPs clearly indicate that NSW Police Force officers can conduct a bail compliance check in the absence of enforcement conditions.⁴³

3.2 The NSW Police Force Handbook

As mentioned, a new chapter on conducting bail compliance checks was inserted into the Handbook in March 2023. The Issues Paper outlines in detail these new instructions.⁴⁴

The new Handbook chapter informs officers about the law surrounding entry to private property, essentially, explaining the law of implied licence. The Commission's comments were incorporated in June 2023, and the updated content emailed to all NSW Police Force Commanders with the expectation that their staff would be alerted to the new instructions.

⁴² NSW Police Force submission, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) pp 1 – 2.

⁴³ Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) p 30.

⁴⁴ Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) p 29.

3.3 Seeking enforcement conditions

On 26 August 2024, the Commission asked the NSW Police Force:

- what factors are taken into consideration by the NSW Police Force when deciding whether to seek an enforcement condition from the Court, pursuant to s 30 of the Bail Act?
- what directions (if any) are given to police prosecutors in relation to seeking an enforcement condition from the court?
- is there a process that each Command is expected to follow to determine whether to seek an enforcement condition for each particular decision?⁴⁵

The response from the NSW Police Force about the factors taken into consideration when deciding whether to apply for an enforcement condition under s 30 of the Bail Act, quoted from the Handbook and the Police Prosecution Command SOPs:

Whenever a magistrate imposes a bail condition that requires an accused person (adult or young person/child) to comply with any form of curfew, consider requesting a related enforcement condition. Such an order may be appropriate if the accused has previously failed or is likely to fail to comply with a curfew condition, or the risks would be better addressed by such an order. The enforcement condition would identify the curfew as the underlying condition and include a direction to the accused person to present themselves at their front door on request of a police officer, in specified circumstances.⁴⁶

The response also stated that Police Prosecutors are ‘governed by the NSW Police Force Handbook in putting forward instructions to seek enforcement conditions and compliance with the Bail Act.’⁴⁷

This response does not make clear how Police Prosecutors or individual Commands determine that they will seek a s 30 Bail Act enforcement condition. The Police Prosecution Command SOPs use the phrasing ‘consider requesting a related enforcement condition’, but this does not provide any further information on when and why such a decision would be made.

The Commission is concerned that because the NSW Police Force regards enforcement conditions as optional for the purpose of authorising bail compliance checks in circumstances that fall outside those outlined in s 77 of the Bail Act, as a matter of routine, Police Prosecutors and Commands may not be turning their minds to the question of whether an enforcement condition ought to be sought from the court. There is no way to ascertain whether Police Prosecutors and Commands actively consider whether an enforcement condition ought to be sought, as records are not routinely kept about that consideration. As outlined in the Issues Paper, the proportion of adults and young people on bail with an enforcement condition has been very low over the past 3 years. The percentage of adults on bail with an enforcement condition is routinely under 7% and for young people, that percentage is consistently under 9%.

3.4 Challenges faced by police

Even where an enforcement condition is attached to an underlying curfew condition, police can face challenges in ascertaining compliance. The NSW Police Force previously told the Commission that

⁴⁵ Letter to NSW Police Force from Law Enforcement Conduct Commission, 26 August 2024.

⁴⁶ Letter to the Law Enforcement Conduct Commission from the NSW Police Force, 10 October 2024.

⁴⁷ Letter to the Law Enforcement Conduct Commission from the NSW Police Force, 10 October 2024.

enforcement conditions are not ordinarily sought, even in circumstances where it is likely it will conduct routine bail compliance checks because:

- the law does not require an enforcement condition as a prerequisite for conducting bail compliance checks, and
- enforcement conditions are largely unworkable, and do not make it any easier for police to check bail compliance.⁴⁸

For example, the NSW Police Force informed the Commission it is not possible to issue a direction even where there is an enforcement condition if:

- police knock and no one answers the door
- someone other than the bailed person comes to the door.

However, reliance on implied licence presents even greater difficulties for the NSW Police Force, even assuming for the moment it can be utilised at all in the absence of a s 30 bail enforcement condition. At any time, an occupier of premises may revoke implied licence. Once the licence is revoked, the licensee (the person attending the property) must leave as soon as reasonably practicable or they become a trespasser.⁴⁹ This revocation applies to police officers in the same way it does for any other person. Revocation may be communicated by words (no particular form is necessary), or by actions such as holding or pushing a door shut.⁵⁰

It appears to be the practical expectation of the criminal courts in NSW that an enforcement condition be sought if a curfew or residential condition is fixed, and police intend to check compliance with the condition. So much is clear from the Standard Conditions of Supreme Court Bail,⁵¹ Standard Conditions of Children's Court Bail⁵² and the Standard Conditions of Local Court Bail.⁵³

A standard enforcement condition used with respect to curfew checks is that the accused person present at the front door of the premises for the purpose of a bail check conducted by a police officer. Reference was made in paragraph 6.3 of the Issues Paper to a range of bail judgments in different Australian courts where enforcement conditions of this type have been imposed,⁵⁴ apparently without controversy as to the capacity of police to implement them. In addition to the cases referred to in the Issues Paper, there have been recent decisions in both NSW and Victoria where conditions of this type have been fixed.⁵⁵

As can be seen, the courts frequently fix enforcement conditions of this type when a s 30 application is made. The courts have not suggested that conditions of this type are unworkable. Where fixed, such enforcement conditions provide clear lawful authority for police to enter and

⁴⁸ Law Enforcement Conduct Commission meeting with Assistant Commissioner, Southern Region, Corporate Sponsor Custody and Corrections, 5 July 2023.

⁴⁹ *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605, 631 *Halliday v Neville* (1984) 155 CLR 1, 7; *Plenty v Dillon* (1991) CLR 635, 647; *Kuru v New South Wales* (2008) 236 CLR 1, 15; *Roy v O'Neill* (2020) 272 CLR 291, [12], [35], [74].

⁵⁰ *New South Wales v Koumdjiev* (2005) 63 NSWLR 353, 360.

⁵¹ Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) Appendix D.

⁵² Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) Appendix H.

⁵³ Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) Appendix J. See now enforcement conditions at Annexure 1 to the Local Court of NSW Practice Note – Bail Proceedings (Centralised Bail Courts) (amended on 14 March 2025).

⁵⁴ Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) p 44.

⁵⁵ See for example *Nikollaj v R* [2025] NSWCCA 31 at [93]; *Bazouni v Director of Public Prosecutions (NSW)* [2024] NSWSC 1431 at [16]; *R v BH* [2024] NSWSC 1577 at [38]; *R v TB* [2025] NSWSC 38 at [25]; *R v Stojanovski* [2025] NSWSC 149 at [30]; *Re Terei* [2024] VSC 294 at [89]; *Re Terei (No 2)* [2024] VSC 352 at [28].

remain on premises to check compliance by the accused person with the curfew or residential condition. A condition of this type was referred to by the Minister for Police and Emergency Services in the Second Reading Speech for the *Bail Amendment (Enforcement Conditions) Act 2012* (see paragraph 2.1.1 above). There was express reference to a 'present at front door' condition where the Minister noted police concern about the capacity to undertake compliance checks in the absence of a statutory enforcement condition. It appears that police practice at that time supported the enactment of a bail enforcement condition to permit curfew checks by way of a 'present at front door' condition.

4. What the submissions said

4.1 Issue 1 – reliance on implied licence

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

Eleven of the 18 submissions received addressed this issue and provided a detailed response.

4.1.1 The Bail Act covers the field

Submissions received from UNSW Law and Justice Centre, Justice and Equity Centre (previously the Public Interest Advocacy Centre), The Law Society of NSW, Legal Aid NSW, Aboriginal Legal Service (NSW/ACT) and the NSW Bar Association all argued that those provisions relating to bail compliance checks within the Bail Act⁵⁶ are intended to ‘cover the field’ and therefore any checks undertaken by police that fall outside of these provisions are unlawful. Bail checks should only be permitted where they are undertaken pursuant to, and in conformity with, the court-imposed enforcement conditions contained in s 30 of the Bail Act and the associated power to give directions in s 81.

4.1.2 Legitimate purpose

Submissions taking the view that the Bail Act covers the field also made the argument that conducting a bail compliance check without an enforcement condition is not a ‘legitimate purpose’ which is one of the requirements of the common law doctrine of implied licence.⁵⁷ If the person approaches the front door of a residence for a purpose that is not ‘legitimate’ then that person will be a trespasser in the eyes of the law.

A legitimate purpose has been found to include ‘lawful communication’ with an occupier.⁵⁸ And in *Roy v O’Neill*, the High Court held that in the case of police, lawful communication includes an ‘investigative purpose’, such as to make enquiries about whether a breach of the law has occurred, or an offence has been committed.⁵⁹

The UNSW Law and Justice Centre submission argued however, that this legitimate purpose does not require the occupant to answer the door or to speak with police. The doctrine of implied licence does not create a coercive power, nor can it be relied upon by police when entering private property for a coercive purpose.⁶⁰ The submission from Legal Aid NSW noted that bail compliance checks are ‘rarely’ carried out in such a limited way. The submission cited the following examples:

- if there is no immediate answer at the door, police walk around premises, knock on back doors and windows, telephone occupants and shine lights into the property to raise the attention of the occupants
- if residents do not appear or refuse to answer the door, police will often presume to give a verbal direction generally to other residents and occupants of the property that they must

⁵⁶ For the purposes of this Report see sections 30, 21A, 77 and 81.

⁵⁷ For further discussion on ‘legitimate purpose’, see the Issues Paper at p 21 [4.2.1].

⁵⁸ *Halliday v Neville* (1984) 155 CLR 1, 7; *Roy v O’Neill* (2020) 272 CLR 291 [11] (Kiefel CJ).

⁵⁹ *Roy v O’Neill* (2020) 272 CLR 291, [17] (Kiefel CJ), [34] (Bell and Gageler JJ), [77] (Keane and Edelman JJ).

⁶⁰ *Roy v O’Neill* (2020) 272 CLR 291.

bring the bailed person to the door to be 'sighted'. Sometimes this is accompanied by threats of action for non-compliance, such as arrest⁶¹

- bail compliance checks are being used by police to communicate further with the bailed person and/or other residents about the behaviour of the accused. Such conversations can often lead into police questioning the accused and then form part of an investigation. It is 'rarely' communicated to the bailed person that they are under no obligation to respond to the questions.⁶²

The submission from the Law Society of NSW emphasised that implied licence is not a doctrine that is well understood by the general public. In their view, it is 'inappropriate for the law to function in a way that enables police to employ coercive powers, including those associated with or flowing from bail compliance checks, but relying on the uninformed action, or lack of action, of civilians.'⁶³

The submission from the NSW Bar Association made the same point, citing the experiences of many barristers. That submission said:

The experience of many barristers is that their clients on bail, or other occupants of their household, considered themselves to be compelled to comply with police requests. This dynamic is heightened when bail compliance checks are being conducted in communities that are likely to experience greater imbalances of power when dealing with police, including communities with Aboriginal people and young people.⁶⁴

4.1.3 Revocation of implied licence

Some of the submissions that argued the Bail Act covers the field also spoke about the issues surrounding a revocation of implied licence. Legally any revocation of the implied licence, through either words or actions of the bailed person, means that the police must either not enter the property in the first instance, or leave immediately once being made aware that implied licence has been revoked. Failure to do so results in the officer becoming a trespasser on the land.

The submission from Legal Aid NSW made the point that 'many individuals' who are the subject of bail compliance checks are vulnerable or disadvantaged persons who are less likely to be aware of their legal rights and able to advocate for themselves.⁶⁵ This includes knowing their rights to refuse to comply with unlawful directions or by revoking an implied licence. Such an 'imbalance of power' can result in vulnerable people 'acquiescing' to conduct which is beyond the boundary of implied licence.⁶⁶

⁶¹ Legal Aid NSW, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) p 14.

⁶² Legal Aid NSW, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) p 15.

⁶³ The Law Society of NSW, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) p 2.

⁶⁴ The NSW Bar Association, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) p 3.

⁶⁵ Legal Aid NSW, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) p 18.

⁶⁶ Legal Aid NSW, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) p 19.

4.1.4 Whether implied licence can be relied upon to conduct bail compliance checks

Three submissions⁶⁷ took an alternative view to that outlined in 4.1.1. Those submissions preferred the view that implied licence allows the NSW Police Force to conduct bail compliance checks even in the absence of an enforcement condition.

The submission from the Office of the Director of Public Prosecutions (ODPP) conceded, however, that for this to be lawful police must not be solely exercising a coercive power.⁶⁸ The submission relied upon the judgment in *Roy v O'Neill* for this proposition. That submission did not address the question of whether or not the conducting of bail compliance checks constitutes the exercise of a coercive power.

The NSW Police Force submission did not deal with the issue of whether police officers entering premises for the purpose of a bail compliance check are exercising a coercive power. Instead, the submission relied upon the majority judgment in *Roy v O'Neill* to justify the position that if police are acting within the boundaries of the implied licence, and that licence has not been revoked, then they have the power to conduct a bail compliance check in the absence of an enforcement condition. The submission stated that 'it is settled law that police can rely on the common law doctrine of implied license [sic] to conduct bail compliance checks.'⁶⁹

4.2 Issue 2 – bail checks outside of section 77

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

Eleven of the 18 submissions received addressed this issue and provided a detailed response.

4.2.1 Implication of the Bail Act bail compliance regime

Of the 11 submissions that addressed the issue in detail, the consensus was that while the Bail Act does not expressly proscribe police from conducting bail compliance checks outside of the operation of s 77, it does so by implication.⁷⁰ The Bail Act limits the police to only 2 sources of power to monitor or enforce bail conditions imposed under section 20A⁷¹ – the power to fix bail enforcement conditions (s 30) and the related power to give directions under an enforcement condition (s 81), and if a breach is suspected, the power of arrest or its alternatives (s 77).

The intent of the legislation is to support the NSW Police Force to monitor bail compliance, especially of 'high risk' accused persons, in a way that is monitored and controlled by the courts. The fact that a court, not the police, may impose an enforcement condition strongly suggests that Parliament intended enforcement action would not be undertaken unless an enforcement condition was granted.

⁶⁷ The NSW Police Force, Mr Gilroy, and the Office of the Director of Public Prosecutions.

⁶⁸ Office of the Director of Public Prosecutions submission p 1.

⁶⁹ NSW Police Force, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) 2.

⁷⁰ See for example UNSW Law and Justice Centre, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) p 5.

⁷¹ Section 20A(3) provides that 'this section does not limit a power of the court to impose enforcement conditions' followed by a note that states 'Enforcement conditions are imposed for the purpose of monitoring or enforcing compliance with other bail conditions.'

The Law Society of NSW supported this interpretation, drawing upon the Second Reading Speech of the Hon Michael Gallacher MLC when enforcement conditions were first introduced into the *Bail Act 1978* by the *Bail Amendment (Enforcement Conditions) Act 2012* (NSW).⁷²

As noted earlier (at paragraph 2.1.1) and in the Issues Paper, the second reading speech supported the view that, without an enforcement condition, police do not have the power to direct a person to come to their front door so police can check that they are complying with a curfew condition.⁷³

Specific mention should be made to the submission dated 26 August 2024 from Judge Skinner, President of the Children's Court of NSW. Her Honour presides over a busy court in which bail determinations are made frequently and in complex cases.

Judge Skinner responded to Issue 2 in the following way:⁷⁴

The authorities suggest the Police can review compliance with bail when an occupier permits entry and the accused voluntarily responds to questions. It appears the power to conduct bail compliance checks exists only with the consent of the relevant people.

The fact that a Court (but not police) may impose an enforcement condition strongly suggests that parliament intended enforcement action (such as curfew checks) would not be undertaken unless an enforcement condition was imposed. This is in accordance with principle. The Court is often able to forecast which defendants are likely to comply with a condition, for example a curfew without enforcement conditions, and which defendants may require oversight. The Court, as the primary assessor of risk, is in the best position to make this assessment.

The considered view of the President of the Children's Court of NSW provides very considerable assistance to the Commission in reaching conclusions and recommendations in this Report.

4.2.2 The Bail Act does not remove implied licence

Again, 3 submissions took an alternative view.⁷⁵ The NSW Police Force did not consider that the framers of the *Bail Act* intended to remove an implied licence to enter land and speak with persons by introducing a regime that permitted legal demands to be placed on persons in those premises.⁷⁶

The police submission drew on the decision in *Dargin & Green v State of NSW*,⁷⁷ where the bailed person (Trent Dargin) and his wife sued the State for trespass in the situation where he had been subjected to many bail compliance checks without an enforcement condition attached. The Court of Appeal was asked to consider whether a bail compliance check can be conducted in the absence of an enforcement condition.

The Court concluded that it would be inappropriate to answer this question in the circumstances. However, the NSW Police Force pointed to the comment made by Sackville AJA that it was 'difficult to see how the answer could be anything other than 'yes, depending on the circumstances'.⁷⁸

⁷² Law Society of NSW, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) p 3.

⁷³ Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) p 18.

⁷⁴ Children's Court of New South Wales, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) p 3.

⁷⁵ Those from the NSW Police Force, Mr Gilroy, and the ODPP.

⁷⁶ NSW Police Force, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) [VII].

⁷⁷ [2019] NSWCA 47.

⁷⁸ [2019] NSWCA 47, [51].

4.3 Issue 3 – prerequisites to bail compliance checks undertaken outside of section 77

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

Eleven of the 18 submissions received addressed this issue and provided a detailed response.

The submissions were divided on this issue. While some of the responses⁷⁹ suggested that a bail enforcement condition **is** necessary to carry out a compliance check outside of s 77, others took the view that while it may be *preferable* to have an enforcement condition, it was not a prerequisite.⁸⁰

The NSW Police Force submission simply responded that it was **not** necessary to have an enforcement condition,⁸¹ while the ODPP suggested that legislative change is required to make it clear that bail compliance checks can be completed in the absence of an enforcement condition.⁸² That submission stated:

The current legislative regime requires review given the challenges that exist for police where there is no enforcement condition. Consideration should be given to a legislative amendment that clarifies the lawfulness of bail compliance checks in the absence of an express bail enforcement condition, and sets out any pre-requisites that must be satisfied before a compliance check can be lawfully undertaken.⁸³

4.3.1 Are bail enforcement conditions necessary outside of s 77?

The submissions that argued a bail enforcement condition **is** a prerequisite to carry out a bail compliance check suggested that it is inconsistent with the framework provided by enforcement conditions and the *Law Enforcement (Powers & Responsibilities) Act 2002* (NSW) (LEPRA) for police ‘to be empowered to engage in conduct that may amount to a significant intrusion upon the rights of an accused person.’⁸⁴

Submissions that supported this interpretation included the submission from Legal Aid NSW. That submission stated that the ‘legislative history and language of the statutory regime indicates that Parliament intended it to “cover the field”’. The submission continued by concluding that routine bail compliance checks that circumvent section 30 of the Bail Act are proscribed.⁸⁵

Another submission stated that the enforcement condition provisions of the Bail Act therefore put limits on police powers by ‘making such checks contingent on the terms of an enforcement

⁷⁹ UNSW Law and Justice Centre, Justice & Equity Centre, The Law Society of NSW, Legal Aid NSW, Aboriginal Legal Service (NSW/ACT) and the Bar Association of NSW.

⁸⁰ Shopfront Youth Legal Centre and the Children’s Court of NSW.

⁸¹ NSW Police Force, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 6.

⁸² Office of the Director of Public Prosecutions, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 2.

⁸³ Office of the Director of Public Prosecutions, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 2.

⁸⁴ UNSW Law and Justice Centre, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 6.

⁸⁵ Legal Aid NSW, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 20.

condition imposed by a judicial officer when bail is granted.⁸⁶ Without the limitations that are inherently imposed by the enforcement condition regime, there is risk that the exercise of bail compliance checks is done for a broader purpose of ‘surveillance and disruption’.⁸⁷

Once again, the Commission is assisted by the response to Issue 3 by Judge Skinner, which stated:⁸⁸

If the occupier and accused person consent, the Police may conduct bail compliance checks. There may be circumstances where the Police attend to conduct a bail compliance check, entry is refused, and they form a reasonable belief that a person is failing to comply with bail or is about to fail to comply with bail such that the bail compliance check is authorised by s 77.

As noted above at issue 2, the existence of the power to impose an enforcement condition suggests that Parliament did not intend for Police to conduct bail compliance checks in the absence of an enforcement condition. The current practice of compliance checks absent an enforcement condition extends beyond what is required to properly manage risk.

4.4 Issue 4 – crafting enforcement conditions that are not unreasonable

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?

Ten of the 18 submissions received addressed this issue and provided a detailed response.

In reference to the crafting of any enforcement orders, generally there was agreement across the entirety of the submissions that any enforcement condition imposed by the court needs to be reasonable and necessary, as is reflected by the wording of s 30 of the Bail Act.⁸⁹

An exception to this was the submission by the NSW Police Force, which stated that the NSW Police Force ‘does not accept the proposition’ that it is acting unreasonably. They further stated that any enforcement condition that is overly prescriptive as to when police can check on bail compliance increases risk to the community as it is then not possible to check on the bailed person ‘proactively’ outside of those enforcement condition stipulations.⁹⁰

The other submissions focused on the wording of s 30(5) of the Bail Act, and the high threshold that includes that the enforcement condition must be proportionate to the risk posed and having consideration for the impact on family members and co-habitants of the accused.

⁸⁶ UNSW Law and Justice Centre, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 7.

⁸⁷ UNSW Law and Justice Centre, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 8.

⁸⁸ Children’s Court of New South Wales, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) pp 3, 4.

⁸⁹ *Bail Act 2013* (NSW) s 30(5).

⁹⁰ NSW Police Force, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 6.

Judge Skinner said in response to Issue 4:

Bail enforcement action by Police increases compliance with conditions because people are less likely to breach a condition if they believe a breach will be detected. Active or visible policing can influence a bailed person's behaviour.

The Children's Court bail form specifies the times of day and the number of times and days per week that Police can conduct bail compliance checks. Although Police may be concerned that court restrictions on bail compliance checks might lead to breaches outside the specified times, it sets limits on Police access to property while reminding the young person their compliance is monitored. A curfew can be effective in changing habits to reduce the likelihood of young people being available to meet with peers during the night.

There was concern expressed by more than one submission that bail curfew checks are being used as a 'behaviour management tool'⁹¹ and are often a source of 'intimidation and harassment.'⁹²

However, submissions from this perspective agreed that s 30(5) on its face does not require amendment, provided that the courts customise the relevant enforcement condition to the particular bailed person. The importance of courts ensuring that police are not given 'carte blanche' to continue to use bail compliance checks as a behaviour modification tool was emphasised. The consensus in the submissions was that s 30(5), on its face, is sufficient in its current form.⁹³

4.5 Issue 5 – practical limitations to effectiveness of enforcement conditions

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?

Twelve of the 18 submissions received addressed this issue and provided a detailed response.

The submissions received on Issue 5 were divided over the effectiveness of a condition that requires a bailed person to present to the front door.

The NSW Police Force submission stated that any 'bail enforcement condition that requires a bailed person to present to the front door is completely ineffectual'⁹⁴ if someone other than the bailed person themselves answers the door. The police suggest that the only way to cure this problem is to provide police with a power of entry to the premises to look for the bailed person. The submission by Mr Gilroy goes even further suggesting that, if the bailed person fails to present to the front door, then police should have the capacity to seek a bail review (without the concerned party present) and then potentially have a warrant issued to return the bailed person to custody.⁹⁵

⁹¹ Shopfront Youth Legal Centre, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 6.

⁹² University of Technology Sydney (Professor Thalia Anthony), Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 4.

⁹³ UNSW Law and Justice Centre, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 9.

⁹⁴ NSW Police Force, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 6.

⁹⁵ Mr Gilroy, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 11.

Other submissions also acknowledged that practical limitations on the effectiveness of the bail regime do exist for police.⁹⁶ However, the Law Society of NSW pointed out that ‘monitoring bail compliance is one tool, amongst many, available to mitigate bail concerns and support community safety.’⁹⁷ Further, that submission added that, to better support bailed persons to fulfil their bail conditions, ‘it may be beneficial to consider directing resources into community initiatives, including community support for bailed persons, and functions of law enforcement other than bail compliance monitoring, to ensure the community is properly protected.’⁹⁸

4.6 Issue 6 –impact on other residents of the property

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?

Eleven of the 18 submissions addressed this issue and provided a detailed response.

All the submissions on Issue 6 agreed that police have no power to force other residents who reside at a property with a bailed person to do anything. Mr Gilroy’s submission suggested that people who live with the bailed person should inform the court, or the police, that they object to the application by the accused to live at their address while subject to a bail condition. The Commission notes, however, that under the Bail Act, other residents at the property where the bailed person resides have no standing to make representations to the court about the impact of intrusive bail compliance checks upon their lives. However, s 30(5)(c) does require a court, when considering imposition of a bail enforcement condition, to have regard to ‘the extent to which compliance with a direction of a kind specified in the condition may unreasonably affect persons other than the person granted bail.’

Apart from the submission of Mr Gilroy, there was consensus that police powers do not apply to persons, other than the bailed person, who are living at the premises. Persons who reside at those premises are under no obligation to assist police with monitoring of bail compliance. One submission expressed concern that any expansion of police powers to take further actions with respect to the people who live with a bailed person intrudes too far into the rights of those people to the quiet enjoyment of their property, privacy, and family life.⁹⁹

As the submission from the Justice and Equity Centre said, even if people living with the bailed person are not directly involved in the bail check, ‘regular police attendances at a residence can be disruptive and burdensome on a household.’¹⁰⁰ This also highlights the benefits of an enforcement condition, as it minimises the risk of inappropriate interference in the lives of those who live with a bailed person.¹⁰¹

⁹⁶ For example, Law Society of NSW Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 4.

⁹⁷ Law Society of NSW Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 4.

⁹⁸ Law Society of NSW, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 4.

⁹⁹ Justice and Equity Centre, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 19.

¹⁰⁰ Justice and Equity Centre, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 19. See also Law Enforcement Conduct Commission, *Operation Tepito – Final Report* (October 2023) part 7.1.3.

¹⁰¹ The Law Society of NSW, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 5.

4.7 Issue 7 – bail checks in the absence of an enforcement condition

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

Eleven of the 18 submissions received addressed this issue and provided a detailed response.

Eight of those submissions agreed that the Bail Act should not make provision for the carrying out of bail compliance checks in the absence of an enforcement condition.¹⁰²

Two submissions suggested that the Bail Act in its current form already allows for the carrying out of bail compliance checks, without enforcement conditions in place.¹⁰³ The submission from the ODPF was supportive of legislative change to clarify the circumstances in which a bail compliance check may be undertaken. The other submissions received by the Commission did not specifically address this issue.

The submission from the UNSW Law and Justice Centre made the point that s 30 of the Bail Act ‘should be regarded as the only legal framework that can authorise bail compliance checks,’¹⁰⁴ and that ‘police objections to the (reasonable) limitations on their powers constituted by s 30 do not constitute grounds for the creation of an alternative pathway.’¹⁰⁵ Shopfront Youth Legal Centre submitted that the Bail Act should be made more clear to emphasise that bail compliance checks can only be carried out if there is an enforcement condition imposed by the Court under s 30.¹⁰⁶

Judge Skinner said in response to the question posed in Issue 7:¹⁰⁷

No. As noted above, the decision to impose an enforcement condition is a part of the risk assessment and management exercise which has been entrusted to the Court. There are many cases in which a Court will be satisfied that the imposition of a bail condition sufficiently mitigates the risk, without an associated enforcement condition. Arbitrary imposition of bail compliance checks extends policing power, carrying the risk of damaging the relationship between police and the community, and causing distress and inconvenience to a defendant who may not have been, and may never be, found guilty of an offence.

The issue of risk assessment was also discussed in the submission from the NSW Bar Association. That submission made the point that:

statutory safeguards would be circumvented and undermined if police were able to, of their own motion and without oversight from the court, determine to conduct bail compliance checks. There would be no requirement for police officers to consider whether

¹⁰² UNSW Law and Justice Centre, Shopfront Youth Legal Centre, Justice & Equity Centre, The Law Society of NSW, Children’s Court of NSW, Legal Aid NSW, Aboriginal Legal Service (NSW/ACT) and the NSW Bar Association.

¹⁰³ The NSW Police Force and Mr Gilroy.

¹⁰⁴ UNSW Law and Justice Centre, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 10.

¹⁰⁵ UNSW Law and Justice Centre, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 10.

¹⁰⁶ The Shopfront Youth Legal Centre, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 7.

¹⁰⁷ Children’s Court of New South Wales, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 5.

the number and frequency of checks were appropriately tailored to a person's risk, nor whether the checks would unreasonably affect other occupants at an address.¹⁰⁸

4.8 Issue 8 – amendments to the Bail Act to clarify when bail compliance checks can be undertaken

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?

Ten of the 18 submissions received addressed this issue and provided a detailed response.

The submissions in relation to Issue 8 fell broadly into 3 categories:

- The Bail Act does not require any amendment as it is already clear that section 30 is the only mechanism whereby police can conduct bail compliance checks¹⁰⁹
- the Bail Act should be slightly amended to make it very clear that the only mechanism whereby police can conduct bail compliance checks is via s 30¹¹⁰
- the Bail Act does not require amendment because it is already clear (when considered along with the common law) that police are permitted to conduct bail compliance checks, even in the absence of a s 30 enforcement condition.¹¹¹

The ODPP submission suggested an amendment to the Bail Act to provide that, where police do not have reasonable grounds to suspect that bail conditions are being breached, police may only carry out bail compliance checks that are 'reasonable and proportionate.'¹¹²

Judge Skinner said concerning Issue 8:¹¹³

The legislation could specify the circumstances in which Police can stop a person or enter premises for the purpose of monitoring compliance with bail conditions and limit the times and occasions on which the power could be exercised. In particular, the Act should clearly state that a police officer may not conduct bail compliance checks that could be authorised by an enforcement condition, if such a condition has not been imposed (except in accordance with s 77).

Police routinely impose enforcement conditions on bail, despite not having the relevant power. There should be comprehensive and ongoing education for all Police Officers tasked with determining bail to ensure they act within their powers.

¹⁰⁸ The NSW Bar Association, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 5.

¹⁰⁹ UNSW Law and Justice Centre, Justice & Equity Centre, Legal Aid NSW.

¹¹⁰ Shopfront Legal Centre, The Law Society of NSW, Children's Court of NSW, Aboriginal Legal Service (NSW/ACT) and the NSW Bar Association.

¹¹¹ The NSW Police Force, Mr Gilroy.

¹¹² Office of the Director of Public Prosecutions, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 4.

¹¹³ Children's Court of New South Wales, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) pp 5, 6.

5. The Commission's position

In the Issues Paper, the Commission posed several questions to allow us to assess whether the legislation in NSW surrounding bail compliance checks and enforcement conditions is clear or whether legislative change may be required.

The NSW Police Force has informed the Commission that it has received advice from the Solicitor General about the issue of implied licence in relation to the practice of conducting bail compliance checks.¹¹⁴ While the Commission has not been provided with a copy of this advice, we assume that it concludes that the NSW Police Force are entitled to rely on the doctrine of implied licence to conduct bail compliance checks.

The Commission has now carefully considered all the submissions received in response to the Issues Paper, as well as current NSW Police Force practice in relation to bail compliance checks in the absence of an enforcement condition. We have also assessed the relevant legislative provisions contained in the Bail Act, the decision of the High Court in *Roy v O'Neill*¹¹⁵, as well as the case studies that were presented in the Issues Paper.

5.1 The Commission's view on the use of implied licence to conduct bail compliance checks

It is the Commission's view that there is a powerful argument that bail curfew and residential compliance checks involving entry onto private property may not be undertaken by the NSW Police Force in the absence of an enforcement condition fixed by a court under s 30 of the Bail Act. Given the potentially intrusive nature of bail curfew and residential compliance checks on persons including the family of an accused person, it is appropriate that they be undertaken only when authorised by a court.

In effect, that is the statutory scheme under the Bail Act. It is clear that courts are prepared to fix such conditions, and they do so regularly in the form of 'present at front door' enforcement conditions.

However, the NSW Police Force does not seek such enforcement conditions as a matter of regular and consistent practice. Reliance on the doctrine of implied licence is a fragile, vague and cancellable form of authority for police, if indeed it is not excluded on a proper construction of the statutory scheme in the Bail Act.

The Commission's primary position is that the NSW Police Force should seek s 30 bail enforcement conditions from a court in **all** cases where it is sought to undertake curfew and residence compliance checks involving entry onto private property.

As discussed in the Issues Paper¹¹⁶, police bail compliance checks occur frequently without the court being asked to impose an enforcement condition. The intent of the Bail Act is for the court to issue enforcement conditions allowing for the monitoring of bailed persons through bail compliance checks, considering the requirements contained in s 30(5). Whether or not this excludes the NSW Police Force from use of the doctrine of implied licence to conduct bail compliance checks has not been resolved

¹¹⁴ NSW Police Force, Submission to the Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) p 1.

¹¹⁵ *Roy v O'Neill* (2020) 272 CLR 291.

¹¹⁶ This is demonstrated in the case studies found in the Issues Paper. Law Enforcement Conduct Commission, *Bail compliance checks in NSW - Issues Paper* (2024) pp 26, 31 – 33.

by a court. There is, at least, a powerful argument that it is excluded as a matter of statutory construction.

In reaching this view, the Commission has necessarily considered the boundaries of implied licence. The Commission considers that implied licence would (if otherwise available) allow police to do **no more** than enter private property for the sole purpose of forming an opinion about whether the occupant is complying with a bail condition. Police would not be permitted to direct any occupant to do, or refrain from doing, anything, nor are they permitted to shine torches through windows or bang on doors to ‘rouse occupants.’¹¹⁷ If consent has been withdrawn by the occupant of the property, then police are not permitted to enter the property. This is all made clear in the Bail SOPs.¹¹⁸

As was highlighted in the case studies in our Issues Paper, the conduct of police in carrying out bail compliance checks in the absence of an enforcement condition at times goes beyond merely making enquiries¹¹⁹ and could be considered tantamount to exercising a coercive power akin to those provided for in sections 30 and 81 of the Bail Act.

The Commission is aware that proceedings are on foot in the Supreme Court of NSW which, if litigated to finality, are likely to determine the lawfulness of curfew bail compliance checks in the absence of s 30 enforcement conditions.¹²⁰ It is, of course, a matter for the Supreme Court to determine the question of lawfulness of police practice in this area. It is not for the Commission to seek to decide this legal issue. The Commission is exercising a type of administrative advisory function in this Report.

However, in the Commission’s view, there is proper foundation to warrant a recommendation being made in this Report that the NSW Police Force should consistently seek a bail enforcement condition to allow bail curfew compliance checks to be made which involve entry onto private property. If the court grants such a condition, there can be no doubt concerning the lawfulness of police action taken by way of bail compliance checks. In addition, the Commission recommends that the NSW Police discontinue its reliance upon the doctrine of implied licence as a means of undertaking bail curfew compliance checks.

5.2 The Commission’s view on the Bail Act enforcement condition provisions

The Commission considers that the Bail Act is clear on its face in terms of the procedure for seeking an enforcement condition and the powers that such an enforcement condition affords to the NSW Police Force. Sections 30(2), 30(3) and 30(4) provide that:

- (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 —

¹¹⁷ NSW Police Force Bail Compliance Check Standard Operating Procedures 4.2.

¹¹⁸ NSW Police Force Bail Compliance Check Standard Operating Procedures 4.1.2.

¹¹⁹ Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) pp 26, 31 – 33.

¹²⁰ Law Enforcement Conduct Commission, *Bail compliance checks in NSW – Issues Paper* (2024) p 7, footnote 1; *MA v State of NSW* [2024] NSWSC 1366; *JA v State of NSW* [2024] NSWSC 1367.

- (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.

Similarly, the Commission considers that s 77 of the Bail Act is clear, as it sets out the wide range of powers available to police if they have the requisite belief on reasonable grounds that the person has failed (or is about to fail) to comply with a bail condition:

- (1) Unless section 77A applies, a police officer who believes, on reasonable grounds, that a person has failed to comply with, or is about to fail to comply with, a bail acknowledgment or a bail condition, may –
 - (a) decide to take no action in respect of the failure or threatened failure, or
 - (b) issue a warning to the person, or
 - (c) issue a notice to the person (an **application notice**) that requires the person to appear before a court or authorised justice, or
 - (d) issue a court attendance notice to the person (if the police officer believes the failure is an offence), or
 - (e) arrest the person, without warrant, and take the person as soon as practicable before a court or authorised justice, or
 - (f) apply to an authorised justice for a warrant to arrest the person.

What remains unresolved by a court is whether Parliament intended for bail compliance checks to be undertaken **only** where there is an enforcement condition in place for the accused person. The submissions received on this issue demonstrated that there is a dispute on this question but with it being powerfully arguable that an enforcement condition is required and that the doctrine of implied licence is excluded as a matter of statutory construction.

Apart from this legal question, there are very strong practical reasons for reliance on statutory bail enforcement conditions and not the complex, vague and terminable doctrine of implied licence. Police officers who are routinely tasked to enter onto private property should have the certainty of legislative authority. For the same reason, clarity and certainty is in the public interest.

5.3 The Commission's Recommendations

The Commission considers that the NSW Police Force should utilise the available statutory scheme when compliance checks are sought to be undertaken concerning a curfew or residential condition. Section 30 provides a clear statutory pathway for this to be done by application to a court considering a bail application.

The appropriate use of s 30 is emphasised by the problematic pathway based upon the doctrine of implied licence. Reliance on this doctrine does not sit comfortably with the elaborate statutory scheme in the Bail Act nor the exercise of clear powers by police officers.

The Commission's primary recommendation is that the NSW Police Force seek enforcement conditions under s 30 where authority to conduct bail compliance checks is sought concerning curfew and residential bail conditions and that reliance on the doctrine of implied licence ought be discontinued. The NSW Police Force should amend Bail SOPs to reflect this change.

In the event that these recommendations are not adopted, the Commission recommends to the Attorney General that the Bail Act be amended to make clear that the authority to undertake bail curfew and residential compliance checks involving entry onto private property should be sought from courts under s 30 of the Bail Act and that the doctrine of implied licence is abrogated and has no application to bail compliance checks.

Recommendation 1: To the Commissioner of Police, the NSW Police Force should seek enforcement conditions from courts under s 30 of the Bail Act in all matters where authority to conduct bail compliance checks on private property is sought and reliance on the doctrine of implied licence should be discontinued.

Recommendation 2: To give effect to Recommendation 1, it is recommended to the Commissioner of Police that the Bail Compliance Check Standard Operating Procedures be amended to reflect the change in Recommendation 1.

Recommendation 3: To the Attorney General, in the event that Recommendations 1 and 2 are not adopted, the Bail Act should be amended to make clear that the authority for police officers to undertake bail curfew and residential compliance checks on private property should be sought from a court under s 30 of the Bail Act and that the doctrine of implied licence is abrogated and has no application to bail compliance checks.

Glossary

Glossary	Description
Bail Act	<i>Bail Act 2013 (NSW)</i>
Bail SOPs	Bail Compliance Check Standard Operating Procedures
BOCSAR	NSW Bureau of Crime Statistics & Research
COPS	Computerised Operational Policing System
Final Report	Bail compliance checks in NSW – Final Report (2025)
Issues Paper	Bail compliance checks in NSW – Issues Paper (2024)
LEPRA	<i>Law Enforcement (Powers & Responsibilities) Act 2002 (NSW)</i>
NSWLRC	New South Wales Law Reform Commission
PAC	Police Area Command
POI	Person of Interest
SOPs	Standard Operating Procedures
The Commission	The Law Enforcement Conduct Commission
YP	Young Person

Appendix 1

LECC

Law Enforcement
Conduct Commission

Bail compliance checks in NSW – Issues Paper

May 2024

LECC

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The Law Enforcement Conduct Commission acknowledges and pays respect to the Traditional Owners and Custodians of the lands on which we work, and recognises their continuing connection to the lands and waters of NSW. We pay our respects to the people, the cultures, and the Elders past and present.



Office of the Chief Commissioner

51341/241

21 May 2024

The Hon Ben Franklin, MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon Greg Piper, MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Mr Speaker

In accordance with s 138 of the *Law Enforcement Conduct Commission Act 2016* (the Act), the Commission provides you with a copy of its report *Bail Compliance Checks in New South Wales – Issues Paper*.

Under s 142(2) of the Act, I recommend that this report be made public immediately.

Yours sincerely



The Hon Peter Johnson SC
Chief Commissioner

Foreword

Bail serves an important function in our criminal justice system. It allows a person who has been charged with a criminal offence to remain at liberty in the community while they wait for court to hear the charges.

In NSW in the year to June 2023, 25% (38,859) of all bailed adults, and 46% of bailed people under the age of 18 (4,107) were granted bail with conditions.

This issues paper looks at the police practices for checking compliance with bail conditions. We are seeking public submissions, particularly on the topics of accommodation and curfew conditions and the way in which police check for compliance with these conditions.

We explore the issue of enforcement conditions imposed as part of bail, where the court can require the bailed person to comply with specified police directions so that police can check the bailed person is complying with the bail condition. This can include presenting at the front door at the direction of police during a curfew period. In NSW in the year to June 2023, around 6% of bailed adults and 9% of bailed people under 18 years of age were required to comply with an enforcement condition.

The NSW Police Force takes the approach that police may conduct bail compliance checks even if there is no enforcement condition. In fact, police procedures instruct officers that they may rely on implied licence to conduct bail compliance checks. The NSW Police Force does not regard enforcement conditions as a prerequisite to undertaking bail compliance checks.

The Commission is keen to assess the effectiveness and appropriateness of the NSW Police Force approach to conducting bail compliance checks. We propose to consider whether the legislative framework is sufficiently clear on how police can appropriately and lawfully conduct bail compliance checks.

The Commission seeks public submissions on a range of issues to assist our consideration of current practices under the legislative framework. We hope the legal profession and experts in legal and policing issues will contribute to our exploration of these issues.

Our call for submissions is open until 25 July 2024.

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Issues for consideration

- Issue 1: To what extent can the doctrine of implied licence be relied upon by police officers when undertaking bail compliance checks?
- 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?
- 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?
- 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?
- 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?
- 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?
- Issue 7: Should the Bail Act make provision for the carrying out of bail compliance checks, in the absence of a bail enforcement condition?
- 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?

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1. Introduction

1.1 The purpose of this Issues Paper

Over the years the Law Enforcement Conduct Commission (the Commission) has received complaints and heard concerns raised by external stakeholders about the legality of police conducting bail curfew compliance checks. Some have queried the practice of conducting bail curfew compliance checks when there is no bail enforcement condition imposed by the court. Some have questioned whether police can conduct checks when the bailed person or their family has indicated that they do not give permission for police to attend their property for bail checks.

This paper explores some of the issues the Commission has seen raised in complaints, along with the legislative framework governing the way police monitor bail compliance.¹ In particular, it has been prepared to assist the Commission to consider the implications of bail compliance checks that are conducted in circumstances where there are no enforcement conditions.

This work falls within the objects of the *Law Enforcement Conduct Commission Act 2016* (LECC Act), specifically s3(d)(ii) which sets out the object of preventing officer misconduct and maladministration and agency maladministration within the NSW Police Force (NSWPF) by ‘assessing the effectiveness and appropriateness of their procedures relating to the legality and propriety of activities of their members and officers.’

1.1.1 Call for submissions to inform public report

The Commission has had the opportunity to engage with the NSW Police Force about the information it provides officers about their authority to enter property, particularly the authority granted by the common law concept of implied licence.

We are now keen to hear the views of the community, particularly external stakeholders that have grappled with the way the legislative framework for bail monitoring has worked. We are also keen to understand if the legislative framework provides sufficient clarity about when and how bail monitoring can be conducted by police. This will assist the Commission to consider police practice against the legislative framework, and whether changes to either may be needed.

While there are many potential issues about bail that the community and stakeholders may be interested to comment upon, this issues paper is confined to consideration of bail compliance checks.

This paper lists 8 issues for consideration.

The Commission seeks written submissions on those issues.

The deadline for submissions is **25 July 2024**.

The Commission hopes that these submissions will assist us to form a view about those issues. Ultimately this work will culminate in a special report, under s 138 of the LECC Act.

¹ In late April 2024 the Commission learned that the Public Interest Advocacy Centre commenced proceedings against the State of NSW in the Supreme Court of NSW on behalf of two parents of young people on conditional bail. Those proceedings relate to the lawfulness of police bail compliance checks in the absence of enforcement conditions. See Michaela Whitbourn, “Police visited Megan’s home 153 times in less than two years” *Sydney Morning Herald*, 29 April 2024 <[Police visited Megan’s home 153 times in less than two years. Now she is fighting back \(smh.com.au\)](https://www.smh.com.au/news/police-visited-megan-s-home-153-times-in-less-than-two-years-now-she-is-fighting-back-20240429/polic-visited-megan-s-home-153-times-in-less-than-two-years-now-she-is-fighting-back-smh-com-au-20240429)>.

1.1.2 How to make a submission

To make a written submission please email or write to us:

Email: engage@lecc.nsw.gov.au

Post: GPO Box 3880
Sydney NSW 2001

1.1.3 How we treat your personal information

We treat all personal information in submissions in accordance with the *Privacy and Personal Information Protection Act 1998* and LECC's Privacy Statement. We remove email addresses, home or postal addresses and telephone numbers before publishing submissions. We will generally publish your name, your position (if relevant) and the name of your organisation (if relevant).

When making a submission to this issues paper, please tell us if you wish to make your submission anonymously.

1.1.4 How we will deal with submissions

We propose to publish written submissions on our website, however we do not promise to do so.

There is some material that we will not publish if it is in a submission, including:

- any submission we consider is defamatory or offensive or otherwise inappropriate to publish
- material that appears to be a complaint about particular police officers, or identifies particular officers, Commands or Police Districts
- personal addresses, phone numbers or other personal details of the submitter.

If a submission raises issues that appear to be a complaint about police, we will handle it in the usual way we handle complaints. See: www.lecc.nsw.gov.au/complaints.

We will publish the name of the submitter, unless the submission specifically asks that the submitter's name is kept anonymous.

If requested by a submitter, we will keep all or part of their submission confidential. The content of the submission may still inform the Commission's subsequent report.

Unless you request for your submission to be anonymous, or request that part or all of it is confidential, we will understand that to mean you agree to it being made public.

2. What are bail compliance checks and bail enforcement conditions?

2.1 Bail and bail conditions

When a person is charged with a criminal offence, police may take the person into custody. Bail allows a person who has been charged with an offence the authority to be 'at liberty' in the community on bail while they wait for a court to hear the charges. When a person is charged, a bail decision needs to be made. The bail decision may be one of the following:

- release the person without bail
- dispense with bail for the offence²
- grant bail (with or without imposing conditions)
- refuse bail for the offence.³

For some types of offences, police can make a decision about whether bail can be granted. For other offences, the court must decide if bail can be granted.

When making a bail decision, police or the court must assess any bail concerns. These are concerns that the accused person will, if released from custody:

- fail to appear at court to answer the charges
- commit a serious offence
- endanger the safety of victims, individuals or the community, or
- interfere with witnesses or with evidence.⁴

The *Bail Act 2013* (NSW) ('Bail Act') contains details about how the police or the court must assess these bail concerns, how the risk associated with these concerns ought to be considered, and how this will impact on the outcome of the bail decision.

Bail takes the form of a signed agreement between the bailed person and the authority that has granted bail. The agreement is that the bailed person will attend court to answer the charges for particular criminal offences. The bail agreement may include conditions which the bailed person agrees to comply with.

Bail conditions can only be applied if there are identified bail concerns. The conditions are designed to address those bail concerns.⁵ Bail conditions can be imposed when bail is granted or varied.⁶

The conditions may include conduct requirements, which require the bailed person to do or refrain from doing anything,⁷ for example, requiring a bailed person to refrain from drinking alcohol or

² A decision to dispense with bail can only be made by an authorised justice, and means the accused person may be at liberty in the same way as if bail had been granted. See *Bail Act 2013* (NSW) s 10.

³ *Bail Act 2013* (NSW) s 8.

⁴ *Bail Act 2013* (NSW) s17.

⁵ *Bail Act 2013* (NSW) s 20A.

⁶ *Bail Act 2013* (NSW) s 23.

⁷ *Bail Act 2013* (NSW) s 25.

associating with particular named people, or to reside at a particular address. A bail condition may also impose a curfew condition, requiring the bailed person to be at home at particular times.

Some bail conditions can impose a security requirement – which means that the accused person or another person must pay a specified amount of money if the accused person fails to appear at court to answer the charges against them.⁸ Some bail conditions may also include an accommodation requirement. These requirements can generally only be imposed on children or people who need to reside at a rehabilitation facility.⁹

This issues paper focusses on the way that police check compliance with conduct requirements, and on the operation of bail enforcement conditions that may be associated with those requirements. In particular, the issues paper looks specifically at residence conditions and curfew conditions, which are common forms of conduct conditions imposed on people bailed in NSW.

2.2 Bail enforcement conditions

Bail conditions may 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).’¹⁰

An enforcement condition requires the bailed person to comply with one or more specified kinds of police directions, that are given for the purpose of monitoring or enforcing compliance with the underlying bail condition.¹¹

Enforcement conditions can only be imposed by a court at the request of a prosecutor in the proceedings. Police cannot impose enforcement conditions.¹²

The enforcement condition must specify the kinds of directions that may be given to the bailed person and the circumstances in which the directions can be given (such as when or how often the directions may be given). The enforcement condition must be ‘reasonable and necessary’ in the circumstances,¹³ and compliance with the condition cannot be made to be ‘unduly onerous.’ The enforcement condition must specify the underlying bail condition with which it is connected.

The types of bail conditions that courts impose are discussed further at chapter 6. Appendix A also includes some examples of enforcement conditions that have been imposed by the Supreme Court in recent years to accompany underlying residence and curfew conditions.

2.3 Bail compliance checks

Police regularly conduct bail compliance checks as a means of monitoring that bailed people are complying with their bail conditions. Across the state, police conduct more than 100,000 bail compliance checks per year.¹⁴

Some of these bail compliance checks will be conducted because an enforcement condition has specified that police can monitor an underlying condition. For example, a bail condition requiring that

⁸ *Bail Act 2013* (NSW) s 26.

⁹ *Bail Act 2013* (NSW) s 28.

¹⁰ *Bail Act 2013* (NSW) s 30(1).

¹¹ *Bail Act 2013* (NSW) s 30(2).

¹² *Bail Act 2013* (NSW) s 30(3).

¹³ *Bail Act 2013* (NSW) s 30(5).

¹⁴ Responses to Supplementary Questions for Evidence to Portfolio Committee No. 5 – Regional NSW and Stronger Communities (Budget Estimates Inquiry), Parliament of New South Wales, Sydney, 31 August 2022, pp 57-59.

a person not consume alcohol may be accompanied by an enforcement condition which authorises police to conduct a breath test on the bailed person.

Police also regularly conduct bail compliance checks in circumstances where there are *no* bail enforcement conditions. In 2022 the then Minister for Police provided information to the NSW Budget Estimates Committee outlining how many bail compliance checks the NSWPF does in circumstances where there are no bail enforcement conditions.¹⁵ Table 1 outlines the information he provided:

Table 1. Bail compliance checks conducted by police where there are no bail enforcement conditions

Year	Number of bail compliance checks for Total population	Number of bail compliance checks for Aboriginal and Torres Strait Islander People	Number of bail compliance checks for People under the age of 18 years	Number of bail compliance checks on Aboriginal and Torres Strait Islander people under the age of 18 years
2021-2022	138,761 checks on 16,815 unique CNIs	70,264 checks on 7,058 unique CNIs	26,606 checks on 1,743 unique CNIs	20,182 checks on 1,124 unique CNIs (18,521 checks on 1,061 unique CNIs were before 9am and after 5pm) (17,723 checks on 1,021 unique CNIs were before 7am and after 7pm)
2020-2021	118,000 checks on 13,489 unique CNIs	63,197 checks on 5,848 unique CNIs	22,626 checks on 1,696 unique CNIs	15,201 checks on 982 unique CNIs (14,259 checks on 929 unique CNIs were before 9am and after 5pm) (13,719 checks on 910 unique CNIs were before 7am and after 7pm)
2019-2020	106,448 on 12,986 unique CNIs	59,107 checks on 5,672 unique CNIs	21,519 checks on 1,653 unique CNIs	15,206 checks on 1,014 unique CNIs (14,415 checks on 956 unique CNIs were before 9am and after 5pm) (13,934 checks on 933 unique CNIs were before 7am and after 7pm)
2018-2019	101,222 on 10,632 unique CNIs	58,311 checks on 4,890 unique CNIs	22,671 checks on 1,660 unique CNIs	17,352 checks on 1,095 unique CNIs (16,715 checks on 1,052 unique CNIs were before 9am and after 5pm) (16,257 checks on 1,038 unique CNIs were before 7am and after 7pm)

¹⁵ Responses to Supplementary Questions for Evidence to Portfolio Committee No. 5 – Regional NSW and Stronger Communities (Budget Estimates Inquiry), Parliament of New South Wales, Sydney, 31 August 2022, pp 57-59.

Chapter 3 of this issues paper considers what the Bail Act specifies about the enforcement of bail requirements.

For the purposes of this issues paper, unless otherwise specified, when we describe a bail compliance check, we mean a check that involves police officer(s):

- entering onto a bailed person's private property
- to determine whether that person is complying with a bail condition (usually a curfew condition)
- in the absence of a belief on reasonable grounds that the person has failed to comply with or is about to fail to comply with a bail condition.¹⁶

¹⁶ *Bail Act 2013* (NSW) s 77.

3. Bail compliance checks under the Bail Act

This chapter considers some of the key provisions about monitoring compliance with bail conditions. It also looks at the history of the provisions relating to enforcement conditions.

3.1 What does the Bail Act say about bail compliance checks?

Section 30 of the Bail Act describes enforcement conditions. Enforcement conditions are imposed for the purpose of monitoring or enforcing compliance with another bail condition (which is known as the underlying bail condition). Section 30(2) of the Bail Act says:

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).

An enforcement condition can only be imposed by a court, and only then, upon request of the prosecutor in the proceedings.¹⁷ The court, in considering bail conditions, cannot of its own volition add an enforcement condition. When an enforcement condition has been requested, it can only be imposed if the court considers it is ‘reasonable and necessary in the circumstances’ having regard to:

- the history of the person granted bail (for example whether their criminal history involves serious offences or multiple offences);
- the likelihood or risk that the person may commit further offences while on bail, and
- ‘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.’¹⁸

In terms of what the enforcement condition may direct the bailed person to do, s 30(4) of the Bail Act says:

(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.

Section 30 is reproduced at Appendix B.

Part 8 of the Bail Act sets out the provisions relating to the enforcement of bail requirements. This Part is also reproduced at Appendix B.

Section 77 is headed ‘Police officers may take actions to enforce bail requirements’. It gives police the power to take actions, up to and including arresting the person without warrant, if the officer believes the person is, or is about to fail to comply with a bail condition, but the officer must have reasonable grounds for that belief.¹⁹

¹⁷ *Bail Act 2013* (NSW) s 30(3).

¹⁸ *Bail Act 2013* (NSW) s 30(5)(c).

¹⁹ Section 77 is considered in *Bugmy v Director of Prosecutions* (NSW) [2024] NSWCA 70.

While it is not an offence to fail to comply with a bail condition, the failure to comply with a bail condition does trigger the power for police to take action to arrest the bailed person, or apply for a warrant for that person's arrest, so that the bailed person is then placed before the court. The prosecution can then apply to the court for bail to be revoked or varied. Alternatively, the court may decide to release the person on the original bail agreement.²⁰

Section 81 states that police can give a direction of a kind specified in the enforcement condition once a court had decided that the person should be subject to such directions (under s 30). Under s 81:

- the officer can issue a direction of the kind specified in the bail enforcement condition within the circumstances set out in that condition, or
- the officer can issue such a direction at any other time if the officer has a reasonable suspicion the person has contravened the underlying bail condition.

This is the only provision in the Bail Act that addresses the actions police may take in relation to an enforcement condition.

3.2 History of bail enforcement checks

3.2.1 Changes to enforcement practices in 2012

The predecessor to the Bail Act was the *Bail Act 1978* (NSW).

In June 2011, the then NSW Attorney General asked the NSW Law Reform Commission ('NSWLRC') to review bail law in NSW. The NSWLRC consulted widely, receiving 40 submissions and holding 19 consultation meetings.²¹ The NSWPF made submissions to that review and was consulted along with a range of representatives from courts, the office of the Director of Public Prosecutions, Juvenile Justice and Corrective Services, Bar Association and Law Society, defence lawyers, victims' groups, and government agencies. The final NSWLRC report was published in April 2012. It is discussed below.

Up until February 2012, it was common practice under the *Bail Act 1978* (NSW) for *both* police and courts to impose what would now be referred to as bail enforcement conditions. These were known as 'conduct requirements' imposed in support of residence or curfew requirements, to the effect that the bailed person present himself or herself to police, at the door of his or her place of residence, when requested to do so.²²

3.2.1.1 Lawson v Dunlevy – February 2012

In February 2012 the Supreme Court handed down the decision in *Lawson v Dunlevy*.²³

Mr Lawson had been granted bail, on the condition among other things, that he 'not ... consume alcohol for any reason' and that he 'submit to a breath test when requested by a police officer'. Mr Lawson commenced proceedings in the Supreme Court to try to quash the provision that required him to submit to a breath test.

Under the *Bail Act 1978* (NSW), section 37 provided:

37 Restrictions on imposing bail conditions

²⁰ *Bail Act 2013* (NSW) s 78.

²¹ NSW Law Reform Commission, *Bail* (Report No 133) April 2012, p xvii.

²² NSW Law Reform Commission, *Bail* (Report No 133) April 2012, p 247 [16.12].

²³ *Lawson v Dunlevy* [2012] NSWSC 48.

(1) Bail shall be granted unconditionally unless the authorised officer or court is of the opinion that one or more conditions should be imposed for the purpose of:

- (a) promoting effective law enforcement, or
- (b) the protection and welfare of any specially affected person, or
- (c) the protection and welfare of the community, or
- (d) reducing the likelihood of future offences being committed by promoting the treatment or rehabilitation of an accused person.

(2) Conditions shall not be imposed that are any more onerous for the accused person than appear to the authorised officer or court to be required:

- (a) by the nature of the offence, or
- (b) for the protection and welfare of any specially affected person, or
- (c) by the circumstances of the accused person.

Justice Garling held that the breath test requirement of the bail condition imposed on Mr Lawson was not a valid condition under the *Bail Act 1978* (NSW), because:

- it could not fulfil any of the purposes in section 37(1)(a)-(d)
- it was vague and meaningless, because
 - the test was not described with sufficient specificity, and
 - the requirement was unduly onerous as it did not contain any limits as to how frequently police could issue a direction that the breath test be undertaken.²⁴

3.2.1.2 NSW Law Reform Commission – report on bail

Shortly after this decision was handed down, the NSWLRC report on bail noted that the decision in *Lawson v Dunlevy* threw into question the validity of conduct requirements which required the bailed person to present to police at the door when requested to do so. This was particularly the case because those conduct requirements usually did not include any limitations on the frequency with which police could visit, or the times at which a person could be required to present.²⁵

The NSWLRC noted concerns from stakeholders about the ‘extent of police monitoring of bail conditions’, particularly in relation to young people.²⁶ It concluded that:

...there is a strong case for looking closely at the justification for imposing conditions and conduct requirements. There are cases where the imposition of stringent conditions and conduct requirements are necessary. In such cases, proper enforcement is required. But intensive enforcement of routinely imposed conditions is creating unnecessary public costs and unnecessary hardship, particularly for young people, without apparent benefit to the community.²⁷

The NSWLRC noted concerns raised by the legal community about 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.²⁸

Given *Lawson v Dunlevy*, the NSWLRC questioned whether the new Bail Act should expressly permit the imposition of enforcement conduct directions. The NSWLRC emphasised that if the new Bail Act

²⁴ *Lawson v Dunlevy* [2012] NSWSC48 at pars 58-69.

²⁵ NSW Law Reform Commission, *Bail* (Report No 133) April 2012, p 247 [16.12-16.13].

²⁶ NSW Law Reform Commission, *Bail* (Report No 133) April 2012, p 200 [12.34].

²⁷ NSW Law Reform Commission, *Bail* (Report No 133) April 2012, p 212 [12.75].

²⁸ NSW Law Reform Commission, *Bail* (Report No 133) April 2012, p 248 [16.17].

permitted police to give conduct directions, it would be important 'to provide a clear legislative solution that would preclude the unreasonable imposition, or exercise, of any such direction.'²⁹

The NSWLRC reasoned that:

If conduct directions are limited and properly targeted to risk, then there is a stronger case for ensuring that police have adequate powers to monitor and enforce their compliance. We recognise that enforcement conduct directions requiring submission to alcohol or drug analysis, or demonstrated presence at a particular residence, or during a curfew period, may need to be imposed by a bail authority (whether police or a court) in cases where the released person is assessed, by reference to their history or the special needs of the case, as presenting a significant risk of non-compliance, or where police would otherwise be unable to detect a breach, or where monitoring by other means would be unnecessarily costly or ineffective. In any such case, it should be necessary for police to justify the imposition of any such enforcement conduct direction to the Court on review of police bail, or on any other application to the court.

We consider that there is also a role for safeguards to be built into the use of enforcement conduct directions. Adequate specification of the circumstances in which the power can be exercised would be desirable, including the imposition, in suitable cases, of some reasonable limits on the frequency, location or time of any compliance check, or alcohol or drug test to ensure that the direction is not overly onerous. Possibly it should also depend on the presence of a reasonable suspicion that the released person is failing to comply with the relevant direction.³⁰

Importantly, the NSWLRC noted that 'the enforcement of conduct directions that are being imposed give police powers in aid of law enforcement that otherwise they would not have, or that would, if permitted be constrained by safeguards.'³¹

For example, the NSWLRC noted that the powers under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA) are 'not exercisable at large' and usually could only be exercised upon reasonable suspicion or belief about the commission of an offence or some other event which justified their use:

... police do not normally have an unlimited power, under the common law or statute, to compel a person to disclose his or her identity or whereabouts, or to provide information; or to enter on enclosed lands to check whether a person is present; or to require a person to submit to random or targeted alcohol or drug testing or to provide a forensic sample unless specifically authorised by legislation. When such a power exists, it is limited, regulated and subject to procedural and other safeguards.

...The exercise by police of a power to subject bailed people to random or targeted alcohol or drug testing, or to enter onto the lands where they reside to confirm their presence, or to detect their absence, whenever they choose to do so, is not conditioned on the presence of any reasonable suspicion or belief that a person is breaching the relevant conduct requirement, or that he or she has committed or is preparing to commit some fresh offence. It represents the exercise of a power that would not otherwise be available, and it is not subject to the safeguards that otherwise attach to the exercise of regular law enforcement powers.³²

The NSWLRC also made passing reference to the relevance of implied licence. It noted that:

... If a residence/curfew conduct direction is accompanied by a requirement for the bailed person to present himself or herself at their place of residence to police on request, there is a question as to whether an implied licence for police to enter on those lands (if they are enclosed lands) arises. If so, there is a further question as to whether the owner or occupier of those premises could revoke such licence, and with what consequences for the bailed person.³³

²⁹ NSW Law Reform Commission, *Bail* (Report No 133) April 2012, p 251 [16.23].

³⁰ NSW Law Reform Commission, *Bail* (Report No 133) April 2012, p 251 [16.28-16.29].

³¹ NSW Law Reform Commission, *Bail* (Report No 133) April 2012, p 248 [16.19].

³² NSW Law Reform Commission, *Bail* (Report No 133) April 2012, p 249-250 [16.20] and [16.22].

³³ NSW Law Reform Commission, *Bail* (Report No 133) April 2012, p 250 [16.21].

We discuss implied licence further at chapter 4.

The NSWLRC recognised that ‘too often such requirements have been imposed as a matter of routine rather than as a result of a close consideration of their need in the individual case, and that there have been occasions where curfew monitoring in particular has been excessive or unreasonable.’³⁴

The NSWLRC recommended that the Government consult with stakeholders on the need for a mechanism for imposing enforcement conduct directions and provided a proposed framework. The NSWLRC recommended that the NSWPF develop Standard Operating Procedures (SOPs) for monitoring release, compliance and enforcement which recognised the requirements for the imposition of enforcement conduct directions.³⁵

3.2.1.3 Amendments to the Bail Act

In November 2012 the NSW Parliament passed the *Bail Amendment (Enforcement Conditions) Act 2012* (the 2012 Act) which introduced bail enforcement condition provisions into the *Bail Act 1978*.

In the Second Reading Speech to the 2012 Act, the then Minister for Police and Emergency Services provided explanatory commentary about the intention behind the new provisions. While these comments were made in relation to the introduction of s 37AA of *Bail Act 1978*, they are relevant to the interpretation of s 30 and 81 of *Bail Act* because those provisions are substantively the same.³⁶ Accordingly, reference to the Second Reading Speech and the NSWLRC Bail Report is both permissible and appropriate in construing provisions in the *Bail Act*.³⁷

The Second Reading Speech to the 2012 Act made clear that the legislation was introduced in response to the decision in *Lawson v Dunlevy*, as ‘the judgement [sic] of the court made it clear that all enforcement conditions are unlawful under the current terms of the Act.’³⁸ The Minister explained that the purpose of the Act was to ‘authorise the imposition of enforcement conditions on a grant of bail.’³⁹ He defined an enforcement condition as ‘a bail condition requiring the accused whilst at liberty on bail to comply with certain directions issued by police for the purpose of monitoring or enforcing compliance with an underlying bail condition.’⁴⁰

The Minister explained that the inclusion of bail enforcement conditions in the *Bail Act 1978* was to ensure police could ‘take steps to verify that an accused is complying with their bail conditions by, for example, directing the accused to present at the front door of their home to check that they are complying with a curfew condition.’ In particular, the Minister noted that:

The NSW Police Force has advised the Government that the absence of enforcement conditions is negatively impacting on their ability to check that an accused person or accused persons are complying with their bail conditions. The Government is committed to ensuring that the NSW Police Force has all the tools necessary to properly enforce the law. Bail conditions are imposed on accused persons as part of a court order and it is expected that they be complied with. It is

³⁴ NSW Law Reform Commission, *Bail* (Report No 133) April 2012, p 250 [16.25].

³⁵ NSW Law Reform Commission, *Bail* (Report No 133) April 2012, p 251 -252 [Recommendation 16.1].

³⁶ This was noted in the Second Reading Speech to the *Bail Act 2013* (NSW).

³⁷ *Interpretation Act 1987* (NSW) ss 33 and 34.

³⁸ New South Wales, *Parliamentary Debates*, (Legislative Assembly), 24 October 2012, 16261 (The Hon. Michael Gallacher).

³⁹ New South Wales, *Parliamentary Debates*, (Legislative Assembly), 24 October 2012, 16261 (The Hon. Michael Gallacher).

⁴⁰ New South Wales, *Parliamentary Debates*, (Legislative Assembly), 24 October 2012, 16261 (The Hon. Michael Gallacher).

appropriate that police be able to take steps to check, and compliance and enforcement conditions facilitate the checking (emphasis added).⁴¹

These comments 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.

The Second Reading Speech also suggests that in 2012 the NSWPF considered that the absence of bail enforcement conditions **limited** police ability to check a person was complying with their bail conditions.

The Commission also notes that in 2007 the NSWPF Commander of Police Prosecutions instructed police prosecutors, whenever a curfew condition was imposed, to always seek a bail enforcement condition (equivalent) requiring that person to present themselves at the front door on request of a police officer.⁴²

3.2.1.4 New bail enforcement conditions introduced

The bail enforcement conduct provisions created a mechanism for police to issue directions to people for the purpose of monitoring bail compliance. In doing so, they also introduced safeguards to avoid overuse of the powers. Many of these responded to issues raised by the NSWLRC's report.

One such safeguard was that only courts could impose bail enforcement conditions – they could not be imposed directly by police. Additionally, s 37AA (now s 30(5)) contained threshold considerations so that bail enforcement conditions would not be imposed routinely. The Minister noted:

These considerations will ensure that enforcement conditions are targeted at accused persons who represent a risk of further offending in the community.

...a court may impose an enforcement condition only at the request of the prosecution. This will ensure that enforcement conditions are not imposed in cases where police do not require them.⁴³

The Second Reading Speech to the 2012 Act notes that the NSWPF would 'develop standard operating procedures for monitoring bail conditions and enforcement that recognise the requirements set out in the bill.'⁴⁴

Parliament also required that if a court decided to impose such a condition, the court had to specify, and therefore limit, the circumstances in which police could issue directions pursuant to that condition. This would ensure that 'compliance with the condition is not unduly onerous' (s 37AA(3)(b) and s 30(4)(b)).

The safeguards addressed the impact of bail compliance checking practices on both the bailed person and those who lived with them. The Minister explained that in deciding whether to impose a bail enforcement condition:

The court is also to have regard to...the extent to which compliance with a direction specified in the condition may unreasonably affect persons other than the accused person. This latter consideration

⁴¹ New South Wales, *Parliamentary Debates*, (Legislative Assembly), 24 October 2012, 16261 (The Hon. Michael Gallacher).

⁴² *Bail Compliance Checks*, Direction from Commander, Police Prosecutions Command, 27 December 2007, <https://eagle.police.nsw.gov.au/Citrix/NSWPoliceWeb/clients/HTML5Client/src/SessionWindow.html?launchid=1684812784740>

⁴³ New South Wales, *Parliamentary Debates*, (Legislative Assembly), 24 October 2012, 16261 (The Hon. Michael Gallacher).

⁴⁴ New South Wales, *Parliamentary Debates*, (Legislative Assembly), 24 October 2012, 16261 (The Hon. Michael Gallacher).

addresses stakeholder concerns about the impact complying with the enforcement conditions may have on those persons with whom the accused resides.

The provisions introduced in 2012 did provide police with some discretion as to the issuing of directions for the purpose of bail checks, in s 37AA(6)(b) (now s 81(b)). However, this discretion was only enlivened:

1. if a court had already imposed a bail enforcement condition, **and**
2. if the officer had a reasonable suspicion that an underlying bail condition had been contravened.

In relation to these provisions, the Minister explained:

For example, if the court has imposed an enforcement condition requiring that the accused present at the front door of their premises when directed to by a police officer for a curfew check but has restricted the times at which such a direction may be given, the police will be able to direct the accused to present outside those times but only where they reasonably suspect the accused is in breach of his or her curfew. These provisions will ensure that the court can set limits on the enforcement condition but if a reasonable suspicion is formed then action can be taken by police. This approach means that police can check whether or not the accused is complying before commencing breach action.⁴⁵

The last sentence in the paragraph above strongly suggests that the Minister did not envisage that police could ‘check whether or not the accused is complying before commencing breach action’ without a bail enforcement condition having been imposed.

3.2.1.5 Enforcement conditions under the Bail Act

The provisions of the *Bail Act 1978* (NSW) that related to enforcement conditions were brought across into the Bail Act.

Section 37AA in the 1978 Act is replicated in ss 30 and 81 of the Bail Act.

⁴⁵ New South Wales, *Parliamentary Debates*, (Legislative Assembly), 24 October 2012, 16261 (The Hon. Michael Gallacher).

4. Implied licence and trespass

This chapter considers the circumstances where police can enter private property. Implied licence is relevant to the consideration of monitoring bail compliance, because in the absence of an express statutory provision to enter private property to monitor bail compliance, police rely on implied licence to authorise such entry.

The NSWPF has informed the Commission that it received advice from the Solicitor General about the issue of implied licence in relation to the practice of conducting bail compliance checks.

4.1 The law of trespass

The law is well settled when it comes to what constitutes trespass. No person shall enter private property without the consent of the occupier unless he or she is justified by law. This principle applies to everyone, including police officers.

This means that a police officer who enters private property without the consent of the occupier is a trespasser unless their entry is authorised or excused by law. Police officers have no special rights to enter private land unless they are granted a power to do so by statute or by the common law.

In the case of each entry onto private premises, the onus is on the police officers who entered the property to establish that they had either the consent (or 'licence') of the occupier to enter the property, or other lawful authority to do so.

Police have statutory powers which authorise them to enter private premises in certain circumstances. If the requirements of those sections are met, the officers are entitled to enter onto private premises to exercise those powers. These powers include:

- in relation to a domestic violence incident (See Part 6 LEPR), specifically s 82)
- to prevent a breach of the peace (LEPR s 9)
- to effect an arrest pursuant to s77(1)(e) Bail Act (based on belief on reasonable grounds that a person has failed to comply, or is about to fail to comply, with a bail condition)
- to arrest a person (LEPR s 10)
- to execute a search warrant
- to conduct a Child Protection Register inspection (*Child Protection (Offenders Registration) Act 2000* s 16C).

4.2 Implied licence to enter onto private property

An occupier may expressly give licence to police to enter onto their private property (for example if police ring the person ahead of their visit and discuss their intention to visit them at a certain time, and the person agrees).

Even if express licence has not been given, the law may imply that an occupier of property has given licence to others (including police) to enter their property if certain factual circumstances are present. Specifically, the law will imply that the occupier has granted a licence for any member of the public to go on that path or driveway up the residence and knock on the door if:

- the path or driveway leading to the entrance of a private residence is unobstructed and any entrance gate is unlocked, and

- if there is no notice or other indication that entry by visitors (or certain visitors) is forbidden.⁴⁶

A licence to enter onto private property will only be implied as a matter of law if there is nothing ‘in the objective facts which is capable of founding a conclusion that any such implied or tacit licence was negated.’⁴⁷

For example, if there is a sign on a person’s fence, gate, or door saying ‘no visitors’, ‘police not welcome’ or ‘police keep out’, police will not be able to rely on implied licence to authorise entry on to the premises.⁴⁸ Also, if a person contacts their local police station to say that they do not want police officers to come to their home, that will preclude any reliance on implied licence.⁴⁹

Even if the factual circumstances support implication of a licence to enter onto a property, there are limits to when entrance will be authorised on this basis. A police officer may only rely on implied licence to authorise walking up the path or driveway on private property:

1. if they have a ‘legitimate’ purpose for that entry, and
2. if that legitimate purpose does not involve any ‘interference with the occupier’s possession or injury to the person or property of the occupier, or the occupier’s guests’⁵⁰ and
3. if they leave the property as soon as the occupier, by words or actions, revokes the implied licence for police to be on their property.

Each of these are discussed below.

4.2.1 Legitimate purpose

Lawful communication with a person in the house is a ‘legitimate’ purpose to justify approaching that house and knocking on the door.⁵¹ In the case of police, this includes entering onto property for the purpose of undertaking enquiries of an occupier as to whether a breach of bail conditions has occurred and/or an offence been committed.⁵²

However, even though it is a legitimate purpose for police officers to enter onto a person’s land and walk up to their door and knock for the purpose of making enquiries, the implied licence does not mean that the occupant has any obligation to answer that knock. Unless there is some other legal obligation that applies to the person (for example, a bail enforcement condition) the occupants can choose not to answer the knock, or not to answer any questions the police officers ask, and can tell the officers to leave, at which point they must do so. As Bell and Gageler JJ explained in *Roy v O’Neill*:

The implied licence is therefore available to be invoked by a police officer to walk up my path, stand at my doorstep and knock on my door, and then to continue to stand at my doorstep and talk to me at my door if I am home and if I choose to answer the knock...

The police officer can ask me any questions he or she wants to ask while standing at my doorstep. I have a choice to answer or not answer. What is more, the implied licence that the police officer has to stand at my doorstep and talk to me is immediately revoked if I choose at any time to say, “go

⁴⁶ *Robson v Hallett* [1967] 2 QB 939, 950-51; *Halliday v Neville* (1984) 155 CLR 1, 7; *Roy v O’Neill* (2020) 272 CLR 291, 302 [12].

⁴⁷ *Halliday v Neville* (1984) 155 CLR 1, 7; *Roy v O’Neill* (2020) 272 CLR 291, 317 [67] (Keane and Edelman JJ).

⁴⁸ *Halliday v Neville* (1984) 155 CLR 1, 8; *Roy v O’Neill* (2020) 272 CLR 291, 308 [35] (Bell and Gageler JJ), 321 [77] (Keane and Edelman JJ).

⁴⁹ *Roy v O’Neill* (2020) 272 CLR 291, 308 [35] (Bell and Gageler JJ).

⁵⁰ *Halliday v Neville* (1984) 155 CLR 1, 7-8; *Kuru v New South Wales* (2008) 236 CLR 1, 15; *Roy v O’Neill* (2020) 272 CLR 291, 302-303 [13].

⁵¹ *Halliday v Neville* (1984) 155 CLR 1, 7.

⁵² *Roy v O’Neill* (2020) 272 CLR 291, 303 [15], 304 [18] (per Kiefel CJ), 307-308 [34], 310 [43] (Bell and Gageler JJ), 141 [77]-[78] (Keane and Edelman JJ).

away”, following which the police officer will become a trespasser if the police officer does not leave within a reasonable time.⁵³

The High Court has concluded that a police officer entering premises for the sole purpose of exercising a coercive power will not be able to rely on implied licence.⁵⁴ For example, entering onto property for the purpose of searching premises, or requiring a person to submit to a breath test, would not be legitimate purposes for the purposes of implied licence.⁵⁵

4.2.2 No interference with the occupier’s possession or injury to the person or property of the occupier or their guests

The second limitation for entry based on implied licence is that it must not involve ‘interference with the occupier’s possession or injury to the person or property of the occupier, or the occupier’s guests’.⁵⁶ ‘Injury’ in this context is defined broadly and may include ‘an affront to a person’s dignity’ or apprehension of harm.⁵⁷ Its meaning should be informed by the purpose underpinning the law of trespass, which is to protect the possession of property and the privacy and security of the occupier.⁵⁸

The second limitation requires consideration of ‘the effects of the purpose carried out upon the occupier’s rights and its impact on those present’.⁵⁹

The timing and frequency of visits by police officers to a person’s home may be relevant to an assessment of whether they involved interference with possession or injury to the occupier or their guests. The timing and frequency may raise questions about whether such visits exceed the limitations of implied licence, and whether those visits were unlawful:

- visits by police officers at very late or very early hours, and/or multiple times a day or night, may constitute an affront to those persons’ dignity
- visits late at night or early in the morning which result in the person or their family members being woken up by police may impact on a person’s dignity.

The conduct of a police officer upon entering onto a person’s property may also be relevant. As Chief Justice Kiefel noted in *Roy v O’Neill*, it would be an interference with an occupier’s possession if police entered for the purpose only of searching the premises.⁶⁰

Other behaviour may also constitute interference with possession or injury to the occupier or their guests, depending on the circumstances.

In April 2020 the Commission published a report, *Operation Cusco*, which considered some of the issues relating to police entering private property under implied licence.⁶¹ That report focused on the specific issue of police inadvertently doubling-up when conducting bail curfew compliance checks.

The Commission reported that officers conducting bail curfew checks late at night engaged in practices such as:

⁵³ *Roy v O’Neill* (2020) 272 CLR 291, 307-308 [34-35] (Bell and Gageler JJ).

⁵⁴ *Roy v O’Neill* (2020) 272 CLR 291, 303-304 [16-17] (per Kiefel CJ), 308-309 [36-40] (Bell and Gageler JJ), 323-324 [81-83] (Keane and Edelman JJ).

⁵⁵ *Roy v O’Neill* (2020) 272 CLR 291, 304 [17] (Kiefel CJ).

⁵⁶ *Kuru v State of New South Wales* (2008) 236 CLR 1, 15 [45].

⁵⁷ *Roy v O’Neill* (2020) 272 CLR 291, 303-304 [16].

⁵⁸ *Plenty v Dillon* (1991) CLR 635, 647; *New South Wales v Ibbett* (2006) 229 CLR 638, 646-647.

⁵⁹ *Roy v O’Neill* (2020) 272 CLR 291, 302-303 [13].

⁶⁰ *Roy v O’Neill* (2020) 272 CLR 291, 304 [17] (Kiefel CJ).

⁶¹ Law Enforcement Conduct Commission, *Operation Cusco* (April 2020).

- knocking on windows if a knock at the door elicited no response,
- shining a light through windows, and walking around to a side door or window and knocking on that.

In relation to bail compliance checks in *Operation Cusco*, the Commission commented that the implied licence is limited to ‘the reasonable conduct of checks both as to time and number’ and that while there is no ‘bright line’ as to what constitutes reasonable conduct, several times in one night or early morning would not be reasonable without a basis of reasonable suspicion. The Commission pointed to faults that existed within the bail check system and a lack of communication between police on different shifts as the reasons for the unreasonable nature of bail checks in the specific situation that arose in *Operation Cusco*.⁶²

In a more recent example, an officer attended the property in which a 16-year-old Aboriginal young person lived with his mother, at 11:30pm for the purpose of conducting a bail curfew check. After knocking on the front door and receiving no response, the officer walked around to the side of the house and tapped or banged on the window. He then pulled a couch out and pulled cushions off it to stand on the couch to look into the window, and then placed a broom in front of the front door to block the entrance.

These actions clearly exceed the limits of the implied licence. In that matter the NSWPF found this behaviour amounted to unprofessional conduct by the officer.

As the Court of Appeal commented in *New South Wales v Dargin*:

... it is readily seen that it is one thing for a landowner impliedly to permit a person to enter land and knock on the front door to make an inquiry; it is another to walk around the curtilage of a building making noise and shining lights in the middle of the night. There may well be circumstances where the former conduct is lawful, and the latter is tortious.⁶³

4.2.3 Revocation of implied licence

An occupier may, by words or actions, revoke any implied licence at any time. Once the licence is revoked, the licensee (the person attending the property) must leave as soon as reasonably practicable, or they become a trespasser.⁶⁴ This revocation applies to police officers in the same way it does for other people.

Revocation of the implied licence does not require any particular form of words to be effective. In one case police being told to ‘get outside’ was sufficient.⁶⁵ Also, the fact that the intent to revoke permission may be expressed in abusive terms does not mean it is ineffective; ‘vulgar and vigorous injunctions to depart’ may suffice.⁶⁶ Revocation may also be communicated by action,⁶⁷ for example holding or pushing a door shut.⁶⁸

In this section we will assume the licensee is a police officer. The test for whether revocation has occurred is:

⁶² Law Enforcement Conduct Commission, *Operation Cusco* (April 2020) 31, [8.16].

⁶³ *New South Wales v Dargin* [2019] NSWCA 47, [15].

⁶⁴ *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605, 631; *Halliday v Neville* (1984) 155 CLR 1, 7; *Plenty v Dillon* (1991) CLR 635, 647; *Kuru v New South Wales* (2008) 236 CLR 1, 15; *Roy v O’Neill* (2020) 272 CLR 291, 302 [11], 308 [35], 317 [67].

⁶⁵ *Plenty v Dillon* (1991) CLR 635, 647 (citing *Davis v. Lisle* [1936] 2 KB 434).

⁶⁶ *Halliday v Neville* (1984) 155 CLR 1, 19.

⁶⁷ *Halliday v Neville* (1984) 155 CLR 1, 7.

⁶⁸ *New South Wales v Koumdjiev* (2005) 63 NSWLR 353, 360.

1. Has there been communication to the police officer by words or actions?
2. Was the content of the communication such that the police officer understood it to be revocation of the implied licence, and if not, would a reasonable person in the position of the officer understand it as revocation?
3. Did the police officer understand the communication as coming from a person with authority to revoke the licence (i.e. an occupier), and if not, would a reasonable person in the position of the officer understand the communication as coming from an occupier?⁶⁹

In relation to this third question, if the communication comes from a person apparently in occupation of the land in question, this will generally be enough to convey to a licensee or to a reasonable person in the position of the licensee that it is from a person with the authority to revoke the licence.⁷⁰

If the answer to the above questions is yes, then at the point of the communication, the implied licence was revoked.

⁶⁹ *Wilson v New South Wales* (2010) 207 A Crim R 499, 524 ([51]).

⁷⁰ *Wilson v New South Wales* (2010) 207 A Crim R 499, 524 ([51]).

5. Police practice - bail compliance checks

5.1 Previous work by the Commission

The Commission has received complaints about the way the NSWPF conducts bail compliance checks and has had the opportunity to consider further examples of bail compliance checks conducted upon young people that were in the cohort of Suspect Targeting Management Plan (STMP) targets the Commission reviewed under Operation Tepito.⁷¹

5.1.1 Bail compliance checks as a targeting strategy under the STMP

While the NSWPF has now stopped using the STMP on young people, that investigation highlighted, amongst other things, a range of issues and police practices in relation to the way police undertake bail compliance checks. These issues included:

- bail compliance checks were a very common strategy used by police to monitor the young people selected as targets under the STMP⁷²
- a high rate of arrests for technical breaches of bail - this means police chose to arrest the young people for breaching a bail condition, for example a curfew, but these young people had not committed any offence
- multiple officers conducting bail compliance checks in one night either very late at night or in the early hours of the morning, including one case study that involved police conducting 11 checks in a 7-day period on one young person, which included 4 bail compliance checks in a single 24 hour period⁷³
- using bail compliance checks as a targeting strategy under the STMP may have led to unreasonable conduct if officers were unclear about the purpose of their attendance at the premises – particularly in circumstances where bail compliance checks were done in combination with other checks (such as home visits)
- the way in which police conducted bail compliance checks showed a lack of understanding by officers about the limits of implied licence (noting that some new instructions issued in March 2023 may assist in addressing this – see chapter 5.2 below).

⁷¹ Law Enforcement Conduct Commission, *Operation Tepito – Final Report*, (October 2023)

⁷² The Target Action Plans of 82 (62%) young people included ‘bail compliance’ as a targeting strategy, and none referred to the relevant legislation. Law Enforcement Conduct Commission, *Operation Tepito – Final Report*, (October 2023), section 8.1.2.

⁷³ Law Enforcement Conduct Commission, *Operation Tepito – Final Report*, (October 2023), p 111.

A 14-year-old Aboriginal young person from Inner West Sydney was a STMP III target from December 2020 to January 2022. Her Target Management Strategy was 'Prevention' with the Objective to 'engage the young person ('YP') in Priority One program and youth support services at PCYC.'⁷⁵ However, her Target Action Plan included all 3 Toolkits: Prevention, Youth and Disruption, including the following Disruption toolkit policing actions:

- bail compliance checks
- search powers
- general disruption strategies.

For the period April to July 2021, her Target Action Plan stated, 'bail compliance checks at the forefront of the strategies to be utilised.' Her enforcement conditions varied during this period. Our review found that between January and October 2021, police undertook 84 bail compliance checks, and that she was arrested 7 times for 'technical breaches of bail.' Six of these arrests followed a similar pattern:

- police attend young person's residence to conduct a bail compliance check
- young person was not home, in breach of curfew bail conditions
- police return later that day, or a few days later, and find the young person is home
- police arrest the young person for an earlier occasion when she was not home.

On 3 April 2021 at 22:20, police from the Inner West Police Area Command attended the young person's home to conduct a curfew bail compliance check. The young person was not home. Her mother told police she 'sent the young person down the road to get some food.' When police attended 2 days later, the young person said she believed her bail conditions allowed her to get food, and that she returned after police left. Even so, police arrested the young person and took her to Newtown Police Station, where she was charged with breach of bail. Police then took the young person to a juvenile justice centre.

Further details of the bail compliance checks on this young person are at Appendix C.

5.1.2 Operation Cusco - an investigation relating to entry to property under implied licence

As indicated above, the Commission's Operation Cusco report focused on the specific issue of police inadvertently doubling-up when conducting bail curfew compliance checks.

In that report, the Commission did make some comments indicating that police are entitled to check curfew conditions, even in the absence of bail enforcement conditions unless implied licence is revoked.⁷⁶ It also stated:

⁷⁴ Law Enforcement Conduct Commission, *Operation Tepito – Final Report*, (October 2023), case study 18, p 113, and Appendix F, p 160.

⁷⁵ Police & Citizens Youth Club.

⁷⁶ For example, Law Enforcement Conduct Commission, *Operation Cusco*, (April 2020) section 7.17.

- police cannot conduct bail compliance checks, even if there is an enforcement condition, if the occupier revokes implied licence⁷⁷
- if an occupant other than the bailed person answers the door to police, that occupant cannot be directed (as distinct from requested) to fetch the bailed person⁷⁸
- a bail direction under s 30 does not affect rights of property and does not give police a right of entry onto property in the absence of an implied licence to do so⁷⁹
- when a court orders a curfew as a condition of bail it is expected police will check that condition is being observed⁸⁰
- while checks at irregular times may be appropriate, the frequency of bail checks must be reasonable in the circumstances.⁸¹

However, the Operation Cusco report pre-dated *Roy v O'Neill*, which has developed the law precisely in relation to the nature of the 'legitimate purpose' an officer has when entering property under implied licence. Accordingly, Operation Cusco did not consider some fundamental questions about the police practice for conducting bail compliance checks, such as:

- whether entry by a police officer onto a person's property for the purpose of directing them to come to the door so police can verify bail in circumstances where there is no bail enforcement condition can be considered a 'legitimate purpose' (being one of the thresholds permitting entry by implied licence) under common law
- whether officers entering property to conduct a bail compliance check can be considered to be exercising a coercive power.

Roy v O'Neill concerned police officers in the Northern Territory entering the property to check on whether a person was complying with a Domestic Violence Order (DVO) and to check on the welfare of the other occupant of the property. When checking, police called the appellant to the door and conducted a breath test. While relevant legislation required a person under a DVO to comply with a reasonable direction by police to submit to a breath test, it did not authorise entry onto premises for that purpose.

In proceedings brought for breach of the DVO, evidence from the breath test was excluded on the ground that it was obtained unlawfully. The trial judge held that the police did not have the power to attend at the unit to check the appellant's compliance with the DVO because the officer did not hold the requisite belief. The officer appealed to the Supreme Court, and then to the Court of Appeal, which held that the officer had an implied licence to enter the property. The appellant appealed to the High Court. The question for the High Court was whether police had an implied licence to enter the property.

A majority of the court (Bell and Gageler JJ dissenting) held that the officers had an implied licence to enter the property. All members of the High Court concluded that the common law implied licence to enter property allows police officers to enter property for the purpose of undertaking enquiries as to whether a breach has occurred and/or offence been committed.⁸²

⁷⁷ Law Enforcement Conduct Commission, *Operation Cusco*, (April 2020) at 7.17.

⁷⁸ Law Enforcement Conduct Commission, *Operation Cusco*, (April 2020) at 7.18.

⁷⁹ Law Enforcement Conduct Commission, *Operation Cusco*, (April 2020) at 7.19.

⁸⁰ Law Enforcement Conduct Commission, *Operation Cusco*, (April 2020) at 7.17.

⁸¹ Law Enforcement Conduct Commission, *Operation Cusco*, (April 2020) at 8.17-18.

⁸² *Roy v O'Neill* (2020) 285 A Crim R 120, 127 [15], 128 [18] (per Kiefel CJ), 130 [34], 132 [43] (Bell and Gageler JJ), 141 [77]-[78] (Keane and Edelman JJ).

All of the Justices accepted that the common law will not imply a licence for police when entry is for the *sole purpose* of exercising coercive powers (e.g. requiring the person to do something, rather than just knocking on the door and, if the person chooses to answer, asking the person some questions).⁸³ For example, entering onto property for the purpose of searching premises, or requiring a person to submit to a breath test, would not be legitimate purposes for the purposes of implied licence.⁸⁴

Justices Bell and Gageler (in dissent) held that if police have both a legitimate purpose and a purpose to exercise coercive powers, then the latter renders them trespassers.⁸⁵

The dissenting judgement also considered the line between police having a purpose of merely making enquiries, and police having a purpose of exercising a coercive power:

The implied licence is therefore available to be invoked by a police officer to walk up my path, stand at my doorstep and knock on my door, and then to continue to stand at my doorstep and talk to me at my door if I am home and if I choose to answer the knock. The police officer can do all of that in the context of investigating a crime, even if I am a suspect...

The police officer can ask me any questions he or she wants to ask while standing at my doorstep. I have a choice to answer or not answer. What is more, the implied licence that the police officer has to stand at my doorstep and talk to me is immediately revoked if I choose at any time to say, "go away", following which the police officer will become a trespasser if the police officer does not leave within a reasonable time...

But the licence to "knock and talk" implied from the fact that I have a path and a doorstep and a door is surely not a licence to compel me to do anything... If you want to walk up my path and stand at my doorstep and knock on my door so that you can order me to do something, and you do not have my express permission to come to my home, then you need to be specifically authorised by statute or the common law not just to give me the order but also to enter upon my land to give me that order.

The implied licence to "knock and talk" is accordingly confined by reference to the "purpose" of the visit, in the sense that the status of an uninvited visitor as either a licensee or a trespasser depends on what the visitor is seeking to achieve at my home by walking up my path, standing at my doorstep and knocking on my door. If the purpose is just to talk to me, and in talking simply to ask for permission to come inside or to go elsewhere on my land or simply to ask for my voluntary cooperation in pursuing some inquiry, the totality of the conduct is within the scope of the licence. If the purpose is just to coerce me, the totality of the conduct is outside the scope of the licence; it is a trespass.

...

the answer lies in identifying the limits of the permission granted by the implied licence to "knock and talk". The preferable view is that a police officer who walks up my path, stands at my doorstep and knocks on my door exceeds the limits of the permission granted by the implied licence, and is therefore a trespasser, if the police officer has any conditional or unconditional intention of ordering me to do anything.⁸⁶

⁸³ *Roy v O'Neill* (2020) 285 A Crim R 120, 127-8 (per Kiefel CJ), 131-132 (Bell and Gageler JJ), 142-145 (Keane and Edelman JJ).

⁸⁴ *Roy v O'Neill* (2020) 285 A Crim R 120, 127-128 (Kiefel CJ).

⁸⁵ *Roy v O'Neill* (2020) 285 A Crim R 120, [43-45].

⁸⁶ *Roy v O'Neill* (2020) 285 A Crim R 120, [34]-[37] and [40] (citations omitted).

5.2 New instructions for officers

In 2023 the NSWPF created some new instructions for police officers about the extent of their authority to enter property in circumstances where there were no express statutory provisions authorising entry.

5.2.1 Entry to property

The NSWPF introduced a new chapter to its *Police Handbook* in March 2023. This chapter informs officers about the law and their expectations when entering private property. In short, it explains the principles of implied licence.

The NSWPF gave the Commission an opportunity to comment on the information contained in that chapter and our comments were incorporated.

In June 2023, the NSWPF told the Commission it had emailed all Commanders to let them know that the chapter had been created.⁸⁷ Commanders were expected to alert their staff to the new instructions.

It is very important that officers understand the law relating to implied licence, to avoid trespassing on private property. The Court expects officers to be aware of the law relating to implied licence. In a recent case, *Romani v State of New South Wales*,⁸⁸ the Supreme Court awarded aggravated and exemplary damages to the plaintiff after officers trespassed on her property. Police had entered the property despite a locked gate and signage which declared that entry to the property was by invitation only and all other persons entering would be considered trespassers. After they entered, a person on the property had asked police to leave. Exemplary damages were awarded because the officers were 'high handed and showed contempt' for the occupier and wrongly asserted their entitlement to enter the property even during the court proceedings.⁸⁹ Exemplary damages were also awarded because the court could see no evidence that the officers had received training or instruction about lawful entry to property after the incident.⁹⁰ Cases such as this highlight the importance of making all officers aware of the legal principle of implied licence.

The Commission carefully considers complaints that raise issues of trespass, to ensure that officers are acting lawfully, and that they have been properly made aware of the limits of their authority to enter property.

5.2.2 Bail compliance checks Standard Operating Procedures

In 2022 the NSWPF began developing Standard Operating Procedures for bail compliance checks (Bail Compliance SOPs). The Bail Compliance SOPs were published in November 2023 and have introduced a risk-based priority assessment to inform officers about how frequently to conduct bail compliance checks.

The NSWPF also has other SOPs and instructions relating to bail determinations and the imposition of bail conditions, such as the *Bail Law Reform SOPs*.

The Bail Compliance SOPs are an important response to the issues identified by the Commission in Operation Cusco. They contain provisions which should limit inadvertent doubling up of bail compliance checks by different units within a command, or across different specialist units. This

⁸⁷ Letter from NSW Police Force, Assistant Commissioner Southern Region, Corporate Sponsor Custody and Corrections, 20 June 2023.

⁸⁸ *Romani v State of New South Wales* [2023] NSWSC 49.

⁸⁹ *Romani v State of New South Wales* [2023] NSWSC 49, [78].

⁹⁰ *Romani v State of New South Wales* [2023] NSWSC 49, [78].

makes good sense in terms of the use of police resources and should minimise inadvertent multiple checks of a bailed person.

The Bail Compliance SOPs indicate that officers can rely on implied licence to enter private property to conduct a bail compliance check, and instruct that:

- police should take the most direct route to the front door, should not shine torches through window, bang on doors or windows
- if entry is barred, for example by a locked gate, there is no implied licence
- implied licence does not authorise a person to direct a person to come to the front door
- if there is an enforcement condition, the bailed person is required to comply with a police direction that has been specified by the court
- other people who reside at the address may revoke implied licence, and in such cases police cannot enter the property to check compliance with the enforcement condition.

The Bail Compliance SOPs clearly indicate that NSWPF officers can conduct bail compliance checks in the absence of enforcement conditions.

5.3 Examples of bail compliance checks

The Commission understands that police commonly conduct bail compliance checks on curfew conditions in the absence of enforcement conditions.

This understanding has been informed by:

- the Bail Compliance SOPs which indicate that bail compliance checks may occur without an enforcement condition being in place, relying on implied licence
- discussions with senior police
- police records which indicate that bail compliance checks have been undertaken in circumstances where there are no enforcement conditions
- data from the Bureau of Crime Statistics and Research (BOCSAR) confirming that bail compliance checks occur without bail enforcement conditions.

The NSWPF does not regard enforcement conditions as a prerequisite to undertaking a bail compliance check.

It appears that police will generally only seek enforcement conditions in circumstances where they consider that compliance with underlying conditions cannot otherwise be checked, or when police would need to give the bailed person a direction to ensure they are complying with a conduct requirement. For example, if the underlying condition is that the bailed person is not to be under the influence of drugs or intoxicating liquor, police may seek an enforcement condition that requires the bailed person to present to the door and submit to a drug or alcohol test.

Police do not ordinarily seek an enforcement condition as an adjunct to an accommodation or curfew condition. Instead, they rely on implied licence to enter the property and request the bailed person to present at the front door.

5.3.1 Challenges faced by police

Even where an enforcement condition is attached to an underlying curfew condition, police can face challenges in ascertaining compliance. The NSWPF has told the Commission that it does not ordinarily

seek enforcement conditions even in circumstances where it is likely it will conduct routine bail compliance checks, because:

- the law does not require an enforcement condition as a pre-requisite for conducting bail compliance checks, and
- enforcement conditions are largely unworkable, and do not make it any easier for police to check bail compliance.⁹¹

Below we explore some of the challenges that police face when trying to check compliance during a routine bail compliance check at a person's residence, particularly in relation to checking compliance with accommodation and curfew conditions.

For example, the NSWPF has told the Commission it is not possible to issue a direction even where there is an enforcement condition if:

- police knock and no-one comes to door,
- someone other than the bailed person answers the door.

This chapter contains several case studies to illustrate the practices of police in undertaking bail compliance checks in circumstances where there is no enforcement condition.

The Commission has not checked whether police at the time of the compliance checks had allocated a particular risk rating to the bailed person. However, in the examples illustrated by the case studies, it appears that the checks were 'routine' and were not responses to any reasonable suspicion that the bailed person had breached bail. This is because the relevant Computerised Operational Policing System ('COPS') records do not contain information which indicates that police were conducting the bail compliance checks on the basis of any such reasonable suspicion.

5.3.2 Unable to determine bail compliance

One challenge police face when trying to determine if a bailed person is complying with their bail conditions is they may be unable to verify if the person is complying with the condition, as they have no power to issue a direction to the bailed person to check if they are complying with the condition.

Case Study 2 is an example of a bail compliance check conducted in the absence of an enforcement condition. Police were unable to get anyone to answer the door despite hearing people inside.

Case study 2: Unable to determine bail compliance

Police from the Proactive Crime Team in a metropolitan PAC attended the home of a young person (under 18 years) who was on bail with a curfew condition that required him to be at home between 6pm until 6am unless in the company of his mother or adult named in writing by his mother. No enforcement condition was in place. Police records do not indicate any suspicion that the young person was breaching bail.

The COPS entry for the incident notes that 'Police knocked on the door where they could hear people talking on the other side of the door, however nobody opened the front door. Police continued to knock at the location and call out to no response and the person inside went silent. Whilst at the location police could see the curtains moving however did not sight any person. Due to the above reason's police are unable to determine if the bailee is complying with his bail'.

⁹¹ Law Enforcement Conduct Commission meeting with Assistant Commissioner, Southern Region, Corporate Sponsor Custody and Corrections, 5 July 2023.

Under the Bail Act, the enforcement condition applies only to the bailed person. The types of direction that police can impose are contained in the enforcement condition itself, and therefore apply to the bailed person, not others at the premises.

If police knock and no one answers, or someone other than the bailed person answers and does not agree to asking the bailed person to come to the door, police may be left in a position where they cannot tell if the underlying curfew condition has been complied with, but neither are they able to ascertain if bail has been breached. Police may ask the person at the door to get the bailed person but cannot direct that they do so.⁹² As a consequence, it appears that police consider the presence of an enforcement condition, such as one requiring the bailed person to present themselves at the front door, as no more effective (in terms of ascertaining if the underlying curfew condition has been breached) than if they were to rely on implied licence to enter the property and ask the person at the door to get the bailed person.

Obtaining an enforcement condition also requires additional steps. To get an enforcement condition, police must apply to the court when bail is issued. They must convince the court that the enforcement condition is reasonable and necessary in the circumstances, having regard to the factors outlined in s 30(5) of the Bail Act.

Additionally, where an enforcement condition is issued, it may place limits on the frequency of bail checks that police can undertake, or timeframes within which bail checks can be conducted. Police are concerned a bailed person may modify their behaviour to breach a curfew condition or commit offences after the quota of compliance checks for the night or the week is met.

Clearly these checks are done outside the framework for monitoring that has been explicitly set out in the Bail Act. The question this raises is whether it is lawful or not, and whether the framework for bail compliance monitoring set out under the Bail Act was intended to cover the field.

5.3.3 Asking others to verify bail compliance

Case study 3 illustrates how police have asked others to verify if the bailed person is complying with their conditions.

Case study 3: Verifying bail compliance by contacting other people

Police conducted 'routine' compliance checks on a person who had a bail curfew condition which required that he remain at his home on a 24-hour curfew, except for the times 7:45am – 8:15am and 4:45pm – 5:15pm to collect his children to and from their day care. However, the condition did permit him to leave his home in the presence of named persons. One of the people he was permitted to leave his home with was his wife, the others were his parents.

The bailed person was subject to 133 bail compliance checks in an 11-month period, although there was no enforcement condition in place. In that period police did not make any arrests of the bailed person.

On 2 occasions, it appears that after trying the bailed person's intercom and getting no response, police rang the bailed person's wife to try to check his whereabouts. On both occasions she did not answer. On the second occasion the police left a message on the wife's phone. The bailed person called them back, verifying that he was with his wife. According to the COPS Event report 'the Person Of Interest ('POI') was highly agitated with police calling a known associate of his to verify he is complying with his bail conditions. The POI stated, Police do not have the right to contact his partner to verify if he is following his bail conditions while being out with his partner. Police stated they're verifying his bail compliance, to wit he was'.

⁹² Law Enforcement Conduct Commission, *Operation Cusco* (April 2020) at 7.18.

5.3.4 Multiple checks

Case study 4 shows police conducting bail compliance checks after an enforcement condition had been removed.

Case study 4: Checks after enforcement condition removed

A young person, who was being monitored by police under the STMP, was given a bail condition in October 2021 requiring that he not be in a public place. Initially, that bail condition had an enforcement condition which allowed police to check compliance 'no more than two times per week'. In January 2022 the bail condition was varied to be a curfew condition 10pm to 6am. At the same time, the enforcement condition was removed.

Police continued to do bail checks after the enforcement condition had been removed, including multiple checks in a week, and multiple times within 24 hours. On occasions, checks were conducted outside the hours of 10pm and 6am. During these checks, police spoke to the young person, or his sister, younger brother or his parents, who also resided at the premises. When the bail checks were conducted outside the time of the curfew, the bailee's family members told police that he continued to reside at the premises and explained his whereabouts (such as being at work). On one occasion, during his curfew hours, the bailee's parents woke him so he could come to the door to speak to police.

The NSWPF Bail Compliance Check SOPs include a risk assessment system, so it is possible that the multiple 'routine' checks within 24 hours or within a week that took place for the bailed person in Case Study 4 will no longer occur, unless police have assessed the bailee's risk to be of such significance to warrant multiple checks.

However, there is nothing in the Bail Compliance Check SOPs to instruct officers that they cannot conduct routine checks after an enforcement condition has been removed. The Bail Compliance Check SOPs simply state that police are permitted to conduct checks in the absence of an enforcement condition, relying on implied licence.

5.3.5 Inconsistencies in bail conditions

Where a bailed person may have multiple, conflicting sets of bail conditions in place at the same time it may be difficult for the person to know what they must comply with. Similarly, it may be difficult for police to know what checks are justified and where a breach has occurred.

Case study 5: Inconsistent bail conditions and bail enforcement conditions

One young Aboriginal person from Western Sydney had been charged with multiple offences and was nominated for the STMP in April 2021. This young person's Target Action Plan listed 'bail compliance checks' as a targeting action and instructed officers 'to conduct bail checks as per bail curfew'.

The Commission's review found that in the 8-month period between February 2021 and November 2021, police completed 74 bail compliance checks on this young person. Police from different teams or commands were often tasked to complete the checks, and in some cases, police records referred to the young person's STMP status.⁹³

In the same period, the young person was charged with multiple offences and appeared before the Children's Court to have these matters heard. Various, conflicting, enforcement conditions

were imposed and it was not always clear from the COPS records which charges attending officers relied upon to conduct checks.

On 6 October 2020,⁹⁴ the Children's Court imposed the following conditions:

To live at: [address]. with mother and spend each night at that address.

Not leave home at [address] between 6 pm and 6 am except with your mother, or an adult approved of in writing by your mother.

*To comply with the following **curfew enforcement condition**:*

You are to go to the front door of your home at [address] for a curfew check if told to do so by a police officer, between the hours of 6 pm and 1 am, no more than 1 time per day and / or no more than 2 times per week.

On 19 April 2021,⁹⁵ the Children's Court imposed the following conditions:

To live at: [address].

*To comply with the following **curfew enforcement condition**:*

The young person is not to be absent from [address], the address at which he is required to live:

- a. unless in company of a responsible adult, which can include [name], [name], or a case worker from Juvenile Justice or the Red Cross*
- b. he is to travel to and from school in the company of a responsible adult.*

To present himself at the front door at the direction of any police officer to confirm compliance with the curfew condition. Such direction may only be given by a police officer who believes on reasonable grounds that it is necessary to do so, having regard to the rights of other occupants of the premises to peace and privacy.

On 11 October 2021,⁹⁶ the Children's Court imposed the following conditions:

To live at: [address] with mother and spend each night at that address. Do what your parents or carers reasonably tell you to do.

Not leave home at [address] between 9:00PM and 5:00AM except with your parent or an adult approved in writing by your parent.

*To comply with the following **curfew enforcement condition**:*

⁹⁴ For one charge the court continued these conditions (with same enforcement condition) on 15 Oct 2020, 6 December 2020, 12 January 2021, 19 January 2021, 22 January 2021, 17 March 2021, 29 April 2021, 21 June 2021, 9 July 2021 and 15 July 2021).

⁹⁵ For 5 other charges the court continued this bail enforcement condition on 7 May 2021. These conditions were added for a new charge on 28 May 2021, and the court continued these bail conditions on 1 July 2021 and 13 July 2021 (refused bail on 21 July).

⁹⁶ For 4 other charges.

You are to go to the front door of your home at [address] for a curfew check if told to do so by a police officer, between the hours of 10:00PM and 12 Midnight, no more than one times per day and / or no more than 2 times per week.

Noting the 24-hour curfew imposed by the Court in April 2021, enforcement conditions imposed on this young person on 6 and 11 October prevented police from conducting ‘more than one bail enforcement check per day, and no more than 2 bail enforcement checks per week. After the 11 October conditions were imposed, checks should have occurred between 10pm and midnight. However, we found police conducted checks outside of these conditions, as follows:

- 4 checks were undertaken between 29 April 2021 to 2 May 2021
- 4 checks were undertaken between 12 May 2021 to 15 May 2021
- 7 checks were undertaken 24 May 2021 to 28 May 2021, including multiple checks on the same day for 2 separate days
- 5 checks were undertaken between 22 June 2021 and 27 June 2021, including multiple checks on the same day for one day
- 2 checks were undertaken on 16 October 2021
- 2 checks were undertaken, including one outside of the curfew times of 10:00PM and 12 Midnight on 6 November.

5.3.6 Enforcement conditions with limits on timeframes

Senior police have indicated to the Commission that when enforcement conditions place limits on the frequency or timeframe in which police can conduct bail compliance checks, bailed persons are likely to modify their behaviour to commit offences after the quota of compliance checks for the night/week is met.

This may be a further reason why police avoid seeking enforcement conditions when they feel they can use implied licence to authorise entry to property to conduct bail compliance checks.

5.4 Proportion of bail granted with enforcement conditions

BOCSAR publishes information about the bail process for people charged with a criminal offence proceeding through the NSW criminal courts. This includes information about bail decisions at first court appearance and bail breaches which have been established by the court.⁹⁷ Key data for financial years 2021-2023 is presented at Appendix E.

In the 12 months to June 2023 there were 154,357 bail decisions made about adults. Of those, bail was granted in 25% or 38,859 decisions.⁹⁸

It is not possible to calculate the proportion of these bail decisions which included a bail condition, as individuals may have multiple conditions. However, it is possible to count the number of accommodation, curfew or other types of condition imposed by either the police or court. In the 12 months to June 2023 there were 20,629 adults with an accommodation requirement bail condition and 4,085 with a curfew condition.⁹⁹

⁹⁷ BOCSAR, *Bail in NSW* (5 September 2023) <https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Bail.aspx>.

⁹⁸ BOCSAR, *Bail in NSW* (5 September 2023) Table 1
<https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Bail.aspx>.

⁹⁹ See BOCSAR, *Bail in NSW* (5 September 2023)
<https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Bail.aspx> Table 3.

In the 12 months to June 2023, there were 8,905 bail decisions about people under 18 years. Bail was granted in 46% or 4,107 decisions.¹⁰⁰ In that period, 1,754 young people had a curfew condition and 2,652 had an accommodation condition.

5.4.1 Bail conditions

Here we explore the number of curfew and accommodation conditions issued to people granted bail in the 2 years to June 2023. It is important to note that some people may have had more than one condition imposed at the same time.

In 2022-2023:

- there were 38,859 adults on bail, and of these 8096 were Aboriginal¹⁰¹
- curfew conditions were issued to 4,085 adults. Of these 1,238 curfew conditions were issued to Aboriginal people
- accommodation conditions (that an accused must reside at a specific address) were issued to 20,629 adults, and of these, 5,014 were Aboriginal
- there were 2,382 adults issued with an enforcement condition.¹⁰²

This equates to 6.1% of adults on bail in 2022-2023 with an enforcement condition imposed by the courts.

In 2022-2023:

- there were 3,956 young people on bail, and of these 2,126 were Aboriginal
- curfew conditions were issued to 1,754 young people, and of these 1,096 were Aboriginal
- accommodation conditions were issued to 2,652 young people and of these 1,540 were Aboriginal
- there were 356 enforcement conditions issued to young people, and 270 of these young people were Aboriginal.¹⁰³

This equates to 8.9% of young people on bail in 2022-2023 with an enforcement condition.

In 2021-2022:

- there were 36,289 adults on bail and of these 7,306 were Aboriginal
- 4,436 adults had a curfew condition and of these 1,121 were Aboriginal
- 19,623 adults had an accommodation condition and of these 4,634 were Aboriginal
- of the adults bailed 2,556 had an enforcement condition, and of these 587 were Aboriginal.

This equates to 7% of adults bailed in 2021-2022 with an enforcement condition.

In 2021-2022:

¹⁰⁰ See BOCSAR, *Bail in NSW* (5 September 2023)

<https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Bail.aspx> Table 3.

¹⁰¹ See BOCSAR, *Bail in NSW* (5 September 2023)

<https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Bail.aspx> Table 1.

¹⁰² See BOCSAR, *Bail in NSW* (5 September 2023)

<https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Bail.aspx> Table 3.

¹⁰³ See BOCSAR, *Bail in NSW* (5 September 2023)

<https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Bail.aspx> Table 3.

- there were 3,607 young people on bail and of these 1,775 were Aboriginal¹⁰⁴
- 1,495 young people had curfew conditions and of these 862 were Aboriginal
- 2,247 young people had accommodation conditions and of these 1,208 were Aboriginal
- of the young people bailed, 244 had an enforcement condition and of these 149 were Aboriginal.¹⁰⁵

This equates to 7% of young people bailed in 2021-2022 with an enforcement condition.

5.4.2 Enforcement conditions attached to curfew and accommodation conditions

We also looked at enforcement conditions associated with different types of underlying condition. Data provided by BOCSAR shows the proportion of bail decisions at first court appearance that included enforcement conditions – the full table is produced at Appendix F. Each person may receive more than one bail condition by police or courts, so it is not possible to calculate total conditions.

Of particular interest was the connection between curfew and accommodation conditions and enforcement conditions, as these underlying conditions appear to be commonly associated with bail compliance checks conducted by police attending a person's home to 'check' compliance.

Where curfew conditions were imposed at bail, a relatively low proportion also had enforcement conditions attached. For bail conditions with an underlying curfew condition issued to people under 18 years, in 2021-2022, 15.1% had an enforcement condition, and in 2022-2023, 18.8% had an enforcement condition.¹⁰⁶ For adults with an underlying curfew condition, in 2021-2022, 37.9% had an enforcement condition and in 2022-2023 this figure was 36.1%.¹⁰⁷

Where an accommodation requirement was imposed (such as a requirement to reside at a particular address) for both youths and adults there was an even lower proportion of bail conditions which included an enforcement condition. In 2021-2022, for youths with an underlying accommodation requirement 9.8% included an enforcement condition, and in 2022-2023 this figure was 12.5%.¹⁰⁸ For adults with an underlying accommodation requirement, in 2021-2022 12.4% had an enforcement condition, and in 2022-2023 this was 10.8%.¹⁰⁹

The above statistics suggest that even where there are curfew or accommodation requirements, the NSW Police Force does not commonly seek enforcement conditions from the court.

5.4.3 Bail breaches

One of the reasons that the NSWPF conducts bail compliance checks at a person's home is to ensure that curfew and accommodation conditions (amongst others) are being observed. Data from BOCSAR shows the proportion of bail conditions breached due to police detecting a new offence committed by the bailed person, as opposed to a technical breach, such as failing to observe a bail condition like a curfew.¹¹⁰ This data is presented at Appendix G.

¹⁰⁴ See BOCSAR, *Bail in NSW* (5 September 2023)

<https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Bail.aspx> Table 1.

¹⁰⁵ See BOCSAR, *Bail in NSW* (5 September 2023)

<https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Bail.aspx> Table 3.

¹⁰⁶ BOCSAR data, Reference: ac23-22857, 27 September 2023.

¹⁰⁷ BOCSAR data, Reference: ac23-22857, 27 September 2023.

¹⁰⁸ BOCSAR data, Reference: ac23-22857, 27 September 2023.

¹⁰⁹ BOCSAR data, Reference: ac23-22857, 27 September 2023.

¹¹⁰ See BOCSAR, *Bail in NSW* (5 September 2023)

<https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Bail.aspx> Table 6.

In 2022-2023, the courts found that 9,615 adults breached bail due to technical breach, and 2,582 for a new offence. This means only 21.2% of breaches were due to the detection of a new offence. It is worth noting that for those who were found to have committed a technical breach, bail was continued in 80% of matters, and for those found to have committed a new offence, bail was continued in 65.8% of matters.

In 2021-2022 the figures were similar. The courts found that 9,408 adults breached bail due to a technical breach, and 2,727 for a new offence. This means only 22% of breaches were due to the detection of a new offence. Bail was continued in 79% of technical breaches and 63% of matters where a new offence was detected.

In 2022-2023, the courts found 1,755 people under 18 years breached bail due to a technical breach and 463 due to a new offence. In 2021-2022, the courts found 1,549 young people breached bail due to a technical breach and 414 due to a new offence. The proportion of bail breaches due to detection of a new offence was similar to the breaches by adults – at 20.9% and 21.1% for the 12 months to 2023 and 2022 respectively.

Police may have detected these breaches either during a bail compliance check at a person's home, or by detecting the person committing the breach at some other location.

6. Use of bail enforcement conditions in the courts

6.1 Different forms of bail enforcement conditions

Section 30(4) of the Bail Act states that if a court imposes a bail enforcement condition, the 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.

These requirements were inserted into the Act to mitigate against invalidity of conditions that are vague and unspecific, like those imposed in *Lawson v Dunlevy*. In *Lawson v Dunlevy* the condition in dispute in the Supreme Court was one that required the bailee ‘to submit to a breath test when requested by a police officer.’¹¹¹ Garling J held that this condition was unlawful because, among other things, ‘the terms of it are not capable of any enforcement because they are vague and, in a legal sense, meaningless.’¹¹²

The Commission has seen bail enforcement conditions expressed in many different forms.

One form of enforcement condition specifies a timeframe within which police may conduct a bail compliance check as well as an upper limit to the number of times per day and per week that police can give the direction.

Three examples are set out below:

- ‘You are to go to the front door of your home at [address] for a curfew check if told to do so by a police officer, between the hours of 7 pm and 6 am, no more than 1 times per day and / or no more than 2 times per week.’¹¹³
- ‘You are to go to the front door of your home at [suburb] for a curfew check if told to do so by a police officer, between the hours of 7:00pm and 10:00pm, no more than 2 times per day and/or no more than 8 times per week.’
- ‘You are to go to the front door of your home at [address] for a curfew check if told to do so by a police officer, between the hours of 6:00 pm and 1:00 am, no more than 1 times per day and / or no more than 5 times per week.’

The above examples were all bail enforcement conditions set by the Children’s Court. These conform to the standard conditions discussed below at 6.2.2.

We have also seen examples of bail enforcement conditions which place a limit on the number of police checks that may occur in a week, without imposing a timeframe within which checks may occur. For example:

¹¹¹ *Lawson v Dunlevy* [2012] NSWSC 48, [9].

¹¹² *Lawson v Dunlevy* [2012] NSWSC 48, [55].

¹¹³ Condition imposed on 6 July 2021.

- 'To present to the front door up to 2 times a night or 3 times a week.'

6.1.1 Bail enforcement conditions with broad/discretionary limits

Other forms of bail enforcement conditions specify the circumstances for s 30(4)(b) in broader terms. Such conditions may create uncertainty (for both police and the bailed person) about how frequently police are permitted to conduct bail compliance checks. For example:

- 'To present himself at the front door at the direction of any police officer to confirm compliance with the curfew condition. Such direction may only be given by a police officer who believes on reasonable grounds that it is necessary to do so, having regard to the rights of other occupants of the premises to peace and privacy.'
- 'The Applicant is to present at the door of the premises during the curfew hours as above mentioned, if requested so to do by a police officer, officer of Corrective Services or Probation & Parole, in circumstances where such request is not made with unreasonable frequency on any night or without a genuine belief on reasonable basis that there is non-compliance with the curfew.'

Under the second bail enforcement condition outlined above, police records noted the following about bail compliance checks they undertook:

7 December 2021 at 23:01: The POI is to reside at the LOC¹¹⁴ between the hours of 12am - 12am, and present himself to police when they attend. At the above TOI¹¹⁵ police knocked on the POI front door. The door went unanswered however there was a light on in the bedroom of the LOC. Police were unable to raise anyone. Bail unable to be determined.

8 December 2021 at 22:40: The POI is to reside at the LOC between the hours of 12am - 12am, and present himself to police when they attend. At the above TOI police knocked on the POI front door. The POI answered the front door wearing black shorts and a black t-shirt. Bail complied with.

9 December 2021 at 22:33: BAIL: The POI is to reside at the LOC between the hours of 12am - 12am, and present himself to police when they attend. At the above TOI police knocked on the POI front door. The POI answered the front door wearing black hoodie and dark tracksuit pants. It should be noted that the POI answered the phone door while filming Police saying that constant bail checks is harassment. Police inquired as to how it constituted harassment to which the POI stated that Police have come on two consecutive nights. The POI went on to tell Police that he's spoken to his lawyer about this issue previously. The POI was very uncooperative with Police and argumentative.

On 11 December 2021 at 23:18: BAIL: The POI is to reside at the LOC between the hours of 12am - 12am and present himself to police when they attend. At the above TOI police knocked on the POI front door. When the POI opened the front door, he seemed to be recording the conversation as he was holding his phone out in his hand. The POI began complaining to police on the amount of Bail compliance checks being done. The POI informed police that he had already been visited twice within the week and has never had this many checks when he has been in other towns.

The POI asked police if they have any reason to suspect the POI is not home or is not complying. Police tried to explain the process and reasoning of Bail compliance checks to which he responded saying it is harassment and has spoken with legal advice in relation to it. The POI mentioned that the reason he is getting charged is because an officer in Dubbo. Police were unsure of the relevance to the statement he made but reiterated the reason for the bail checks. The POI was unhappy with what police informed him and police left the location.

On 14 December 2021 at 21:00: BAIL: The POI is to reside at the LOC between the hours of 12am - 12am, and present himself to police when they attend. At the above TOI police knocked on the POI

¹¹⁴ Location.

¹¹⁵ Time of incident.

front door. The POI answered the front door and asked why police were coming to his residence so frequently. Police wanted to confirm bail conditions that are set upon the POI. Bail complied with.

6.1.2 Bail enforcement conditions with no limits

The Commission found some examples of bail enforcement conditions imposed that did not include any limits on when the person was required to go to the front door of his home. There is a question whether such conditions can be valid given the requirement in s 30(4)(b) of the Bail Act.

For example:

1. Young person A

On 16 December 2020 bail conditions imposed by Children's Court for one charge:

To live at:

[address] and spend each night at that address.

See curfew conditions below.

To comply with the following curfew enforcement condition:

You are to go to the front door of your home at [address] for a curfew check if told to do so by a police officer.

Not to leave home at all except with your parent or carer at all times, or an adult approved of in writing by your parent or carer unless going directly to and from school, work or scheduled health or legal appointments or bone fide job interviews.

Do what your parents or carers reasonably tell you to do.

2. Young Person B

On 24 April 2021, the POI was issued a bail condition by the Children's Court with the following enforcement condition:

that the accused enter into an agreement to observe the following specified requirement(s) as to conduct while at liberty on bail:

To live at:

[address], with father and remain at that address.

Remain at [address], unless in company of father to attend Court.

To comply with the following curfew enforcement condition:

You are to go to the front door of your home at [address] for a curfew check if told to do so by a police officer.

There is a question as to whether such open-ended enforcement conditions are valid under the provisions of the Bail Act. Section 30(4) provides specifics that must be included in any enforcement condition, with the express requirement that compliance with the condition not be 'unduly onerous'.¹¹⁶ It may be that in these examples the court expected police to ensure that compliance was not 'unduly onerous', but it appears that s 30(4) requires the condition itself to specify how compliance will avoid being unduly onerous.

¹¹⁶ *Bail Act 2013* (NSW) s 30(4)(b).

6.2 Standard conditions

Some courts have published standard bail conditions to help applicants and legal practitioners in preparing bail applications. While not prescriptive they give a strong indication of the types of bail conditions, and enforcement conditions that are commonly issued by the court.

Appendix A sets out a range of bail conditions and bail enforcement conditions determined by the court in NSW in recent years, insofar as they are available in Caselaw. The details of bail conditions and enforcement conditions are not always included in Caselaw.

Of note, in the examples found by the Commission the enforcement conditions accompanying an underlying accommodation and curfew condition set by the Supreme Court includes a requirement that the bailed person present at the front door when asked by police. No limits on the timeframes or frequency of such police requests are set in the enforcement condition.

6.2.1 Supreme Court

Appendix D sets out the standard conditions of bail as published by the Supreme Court of NSW.

The Supreme Court notes that enforcement conditions can only be imposed at the request of the prosecutor and must make clear the ‘underlying bail condition’. The standard conditions also emphasise that the enforcement condition ‘must specify the circumstances in which each kind of direction may be given ensuring that compliance is not unduly onerous and making clear the “underlying bail condition”’.¹¹⁷

The 2 standard enforcement conditions published by the Supreme Court are:

The applicant is to present herself/himself at the front door of the address where the applicant will reside at the direction of any police officer who believes on reasonable grounds that the direction is necessary to confirm compliance with the:

- a) curfew condition
- b) drug abstention condition
- c) alcohol abstention condition

and

The applicant is to undertake any non-invasive testing required of the applicant at the direction of any police officer who believes on reasonable grounds that the direction is necessary to confirm compliance with the:

- a) drug abstention condition
- b) alcohol abstention condition.¹¹⁸

6.2.2 Childrens’ court

In 2023 the Childrens’ Court of NSW created a form which sets out standard bail conditions and bail enforcement conditions, ‘Summary of Reasons for Bail Decision of Court’. It is presented at Appendix H.

In terms of enforcement conditions, it suggests the following format:

¹¹⁷ Supreme Court of NSW, *Standard Conditions of Bail*, p 6.

¹¹⁸ Supreme Court of NSW, *Standard Conditions of Bail*, p.6.

Enforcement Condition – Curfew - You are to go to the front door of your home at for a curfew check if told to do so by a police officer, between the hours of am/pm and am/pm, no more than times per day and/or no more than times per week.

Enforcement condition – Drug or Alcohol testing – You are to go to the front door of your home at and provide a sample for the purpose of a test if told to do so by a police officer. This condition is subject to the following restrictions:.....

Enforcement Condition - other -

The Childrens’ Court has also issued Bail Guidelines, reproduced at Appendix I. In terms of bail conditions, the Guidelines recommend they should be no more onerous than is necessary to address the bail concerns, and it must be reasonably practicable for the young person to comply with.¹¹⁹

The Guidelines also suggest the court seeks the input of the young person’s support person or legal adviser to assist in crafting appropriate conditions.¹²⁰

The Guidelines state:

6.1 Bail conditions can often go a long way towards mitigating bail concerns, such that they are no longer unacceptable. However, “*Bail conditions are calculated to mitigate risk. Their imposition does not create an occasion for attempts at social engineering or paternalistic interventions in parenting decisions*”: *R v Connor Fontaine (a pseudonym)* [2021] NSWSC 177.¹²¹

The Guidelines point out that bail conditions “are not a behaviour management tool”.¹²² Specifically in relation to curfew conditions, the Guidelines say:

curfews should only be imposed where there would otherwise be an unacceptable risk of endangering safety or committing further serious offences specifically within the hours of the proposed curfew. For example, a night-time curfew should not ordinarily be imposed if there is no evidence of serious offences having been committed, or likely to be committed, at night.

If it is appropriate to impose a curfew, then consideration should be given to the form of the curfew condition. If the bail concern is that the young person will commit further serious offences in public at night, then a form of curfew condition that requires the young person not to be in a public place between certain hours will generally be sufficient to mitigate the risk. It would be unnecessary to mandate that the young person be at home within those hours.

Similarly, careful thought should be given to the hours specified in the curfew; they should be set only by reference to the mitigation of risk. A curfew cannot be used as a substitute for what may be thought to be inadequate parenting. In modern life, young people often have legitimate reasons to be out late into the evening, with no increase in risk.

The Guidelines note that ‘the Bail Act is not concerned with the risk of committing further offences; only of the risk of committing further serious offences or endangering the safety of the community etc’. For this reason, the guidelines say that a condition requiring that a young person must not commit any further offence is inconsistent with the Bail Act.¹²³

6.2.3 Local Court

In the Local Court, a form sets out how bail decisions are to be summarised (see Appendix J). The form does not suggest a format for the way enforcement conditions should be worded.

¹¹⁹ Children’s Court of New South Wales, *The Children’s Court of NSW Bail Guidelines*, para 2.6.

¹²⁰ Children’s Court of New South Wales, *The Children’s Court of NSW Bail Guidelines*, para 3.4.

¹²¹ Children’s Court of New South Wales, *The Children’s Court of NSW Bail Guidelines*, para 6.1.

¹²² Children’s Court of New South Wales, *The Children’s Court of NSW Bail Guidelines*, para 6.2.

¹²³ Children’s Court of New South Wales, *The Children’s Court of NSW Bail Guidelines* at 6.4.

6.3 Bail enforcement conditions requiring presentation at the front door

As outlined in 5.3.1, the NSWPF has concerns that bail conditions requiring the bailed person to ‘present at the front door of a premises’ do not provide police with certainty that they can check compliance. If the door is answered by someone other than the bailed person, police cannot direct them to tell the bailed person to present at the front door.

Notwithstanding this concern, enforcement conditions that require a bailed person to present themselves to the front door have been considered appropriate and apparently workable in NSW before the Bail Act. For example:

- *R v Ibrahim* [2009] NSWSC 1181 at [47] (Johnson J)
- *R v RS* [2011] NSWSC 103 at [1], [27] (Buddin J).

Appendix A lists a number of matters in which enforcement conditions requiring the bailed person to present at the front door were issued by the court.

Some Victorian cases where ‘present at the front door of a premises’ conditions have been fixed include:

- *Bail application by Che Ashton* [2020] VSC 231 at [78] (Elliott J)
- *Re applications for bail by AP and Others* [2020] VSC 730 at [132] (Coghlan JA)
- *Re IM* [2023] VSC 260 at [117] (Champion J)
- *Re SQA; Re MG* [2023] VSC 359 at [145] (Champion J)
- *Re Lawn* [2023] VSC 390 at [120] (Champion J)
- *Re Green* [2023] VSC 393 at [131] (Champion J)
- *Re Carr* [2023] VSC 564 at [80] (Kaye JA)
- *Re Firebrace* [2023] VSC 137 at [137] (Incerti J)
- *Re Mangion* [2024] VSC 23 at [92] (Champion J)

In the ACT, some examples of cases where ‘present at the front door of a premises’ conditions have been fixed include:

- *In the matter of an application for bail by Le Clair* [2014] ACTSC 245 (19 September 2014)
- *In the matter of an application for bail by Slobodan Novakovic (a.k.a. Daniel Noland) (No 3)* [2022] ACTSC 292 (21 September 2022)
- *In the matter of an application for bail by Samnang Oeur* [2011] ACTSC 108 (10 June 2011)

In South Australia, an example of a case where ‘present at the front door of a premises’ conditions have been fixed is:

- *R v Sumner* [2020] SASC 231 (4 December 2020)

In Western Australia, some examples of cases where ‘present at the front door of a premises’ conditions have been fixed include:

- *Kickett v the State of Western Australia* [2020] WASC 110 (3 April 2020)

- *Austic v the State of Western Australia* [2020] WASC 211 (9 June 2020)
- *The State of Western Australia v Samura* [2019] WASC 210 (20 June 2019).

7. Issues for consideration

The Commission seeks submissions from the public, and in particular, community stakeholders with experience and expertise in relation to the application and policing of bail conditions and enforcement conditions.

The Commission welcomes submissions that would assist in understanding how compliance with bail conditions ought to be checked, and how to ensure that any approach taken by police for checking compliance can be both lawful and reasonable.

The Commission asks for responses to the following questions.

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

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?

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?

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?

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?

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?

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

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?

The Commission will consider responses to this Issues Paper and the above questions to inform a further public report on this matter.

Appendix A: Examples of bail enforcement conditions

This table presents a selection of cases from the NSW Supreme Court since 2015, in which the judgements include the details of either a residence condition or curfew condition imposed on the bailed person, and where applicable, the detail of any bail enforcement condition imposed by the court.

The listed cases are drawn from the limited number of bail decisions which are published on Caselaw. The vast majority of bail decisions of Judges in the Common Law Division are not placed on Caselaw. It is not a complete list of such matters but serves as a snapshot of how different Justices have framed bail conditions and bail enforcement conditions.

Case	Judge	Date	Residence condition	Curfew condition	Enforcement condition
<i>R v Lago</i> [2014] NSWSC 660	Hamill J	22/5/14	Yes	Yes	Yes
<i>R v Hawi</i> [2014] NSWSC 837	Harrison J	23/6/14	Yes	Not be absent from residence between 8 pm and 6 am	Present himself at front door at direction of any police
<i>R v Kugor</i> [2015] NSWCCA 14	Hoeben CJ at CL R A Hulme J RS Hulme AJ	23/2/15	Yes	Not to be absent from residence between 8 pm and 6 am	Present himself at front door at direction of any police. Such direction may only be given by a police officer who believes on reasonable grounds that it is necessary to do so having regard to the rights of other occupants of the premises to peace and privacy
<i>R v Boyd</i> [2015] NSWSC 1065	Hamill J	14/7/15	Yes	Not be absent from residence between 8 pm and 6 am	Present himself at front door at direction of any police. Such direction may only be given by a police officer who believes on reasonable grounds that it is necessary to do so, having regard to the rights of other occupants of the premises to peace and privacy.

<i>JM v R</i> [2015] NSWSC 978	Garling J	22/7/15	Yes	Not be absent from residence between 8 pm and 7 am	Present himself at front door at direction of any police
<i>R v Mawad</i> [2015] NSWSC 1237	Hamill J	23/7/15	Yes	Not be absent from residence between 8 pm and 6 am	Present himself at front door at direction of any police
Mawad bail refused by Court of Criminal Appeal on 21/8/15: <i>DPP (NSW) v Mawad</i> [2015] NSWCCA 227					
<i>R v Moore</i> [2015] NSWSC 1262	Hamill J	6/8/15	Yes	Not be absent from residence between 7 pm and 7 am	Present himself at front door at direction of any police
<i>R v Xi</i> [2015] NSWSC 1575	Hamill J	26/10/15	Yes	Not leave residence except for specified reasons	Present himself at front door at direction of any police
<i>R v Melmeth</i> [2015] NSWSC 1762	Schmidt J	24/11/15	Yes	Not be absent from residence between 6 pm and 8 am	Present himself at front door at direction of any police. to confirm compliance with the curfew condition. Such direction may only be given by a police officer who believes on reasonable grounds that it is necessary to do so, having regard to the rights of other occupants of the premises to peace and privacy.
<i>R v AC (No 3)</i> (Detention application) [2016] NSWSC 209	Hamill J	8/3/16	Yes	Not leave residence except for specified reasons	Present himself at front door at direction of any police
<i>Singh v R</i> [2015] NSWCCA 257	Macfarlan JA	8/6/16	Yes	Not be absent from residence between 8 pm and 6 am	Present himself at front door at direction of any police
<i>R v Elzamtar</i> [2017] NSWSC 275	Harrison J	21/3/17	Yes	Not be absent from residence between 9 pm and 6 am	Present himself to front door if reasonably required by police between 9pm and 6am
<i>Tsintzas v DPP (NSW)</i> [2017] NSWCCA 172	Bathurst CJ McCallum J N Adams J	21/7/17	Yes	Yes	Yes

<i>Lin v DPP (Cth)</i> [2017] NSWSC 312	Beech-Jones J	31/3/17	Yes	Not be absent from residence between 8 pm and 7 am with exceptions	Present himself to front door at direction of a police officer
<i>R v Ewen</i> [2017] NSWSC 1328	Beech-Jones J	28/9/17	Yes	Not be absent from residence between 10 pm and 5 am	Present himself to front door at direction of a police officer
<i>R v Bunt</i> [2019] NSWSC 915	Harrison J	17/7/19	Yes	Not be absent from residence between 9 pm and 7 am	N/A
<i>Rakielbakhour v DPP</i> [2020] NSWSC 323	Hamill J	31/3/20	Yes	Not be absent from residence except for specified reasons	Present himself to front door at direction of a police officer
<i>R v Choi</i> [2020] NSWSC 1586	Adamson J	11/11/20	Yes	Not be absent from residence between 8 pm and 6 am unless for specified reasons	Present himself to front door at direction of a police officer
<i>R v Connor Fontaine</i> [2021] NSWSC 177	Hamill J	3/3/21	Not stated (but implied)	Remain at residence between 6 pm and 7 am	Not stated
<i>Simpson v R</i> [2021] NSWCCA 264	Harrison J Davies J Dhanji J	10/11/21	Yes	Not be absent from residence unless in company of parents	Present himself to front door at direction of a police officer
<i>DPP (Cth) v Habkhouk</i> [2022] NSWSC 98	Dhanji J	9/2/22	Yes	Not be absent from residence except for specified reasons	Present himself to front door at direction of a police officer. Such direction may only be given by a police officer who believes on reasonable grounds that it is necessary to do so, having regard to the rights of other occupants of the premises to peace and privacy
<i>R v Chen</i> [2022] NSWSC 113	Harrison J	15/2/22	Yes	Remain at residence between 8 pm and 8 am (with exceptions)	N/A

<i>R v Hamilton</i> [2022] NSWSC 127	Beech-Jones CJ at CL	16/2/22	Not stated (but implied)	Remain at residence between 7 pm and 6 am	Not stated
<i>JD v Commissioner of Police</i> [2022] NSWSC 911	Ierace J	8/7/22	Yes but not specified	Not stated	Not stated
<i>R v Sparos</i> [2022] NSWSC 1129	Harrison J	7/9/22	Yes	Not leave residence except for specified reasons	Present himself to front door at direction of a police officer
<i>Anwar v DPP (NSW)</i> [2022] NSWCCA 226	Davies J Hamill J McNaughton J	21/10/22	Yes	Not leave residence except for specified reasons	Present himself to front door at direction of a police officer
<i>R v Isaac</i> [2023] NSWSC 22	Yehia J	31/1/23	Yes	Not leave residence except for specified reasons	Present himself to front door at direction of any police officer
<i>R v Smith</i> [2023] NSWSC 36	Yehia J	3/2/23	Yes	Not leave residence except for specified purposes	Present herself to front door at request of police
<i>R v JC</i> [2023] NSWSC 111	Cavanagh J	14/2/23	Yes	Not leave residence between 9 pm and 7 am except in case of medical emergency	Present himself to front door at direction of a police officer
<i>R v JB</i> [2023] NSWSC 94	Yehia J	15/2/23	Yes	Not leave residence except for specified purposes	Nil
<i>R v JH</i> [2023] NSWSC 93	Yehia J	15/2/23	Yes	Not leave residence between 6 pm and 6 am unless in company with Life Without Barriers	Nil
<i>WR v DPP</i> [2023] NSWCCA 38	Beech-Jones CJ at CL Davies J McNaughton J	7/3/23	Yes	Nil	Nil

<i>R v GW</i> [2023] NSWSC 664	Yehia J	16/6/23	Not stated	Yes	Not stated
<i>R v Weatherall</i> [2023] NSWSC 710	Weinstein J	20/6/23	Yes	Not leave residence between 9 pm and 6 am	Present himself to front door at direction of police to confirm compliance with specified conditions
<i>R v Sparos</i> [2023] NSWSC 833	Chen J	17/7/23	Yes	Not leave residence except for specified purposes	Present himself to front door at direction of police to confirm compliance with curfew

Appendix B: Relevant excerpts from the *Bail Act 2013 (NSW)*

30 Bail conditions may include enforcement conditions

- (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.

...

Part 8 Enforcement of bail requirements

...

77 Police officers may take actions to enforce bail requirements

- (1) Unless section 77A applies, a police officer who believes, on reasonable grounds, that a person has failed to comply with, or is about to fail to comply with, a bail acknowledgment or a bail condition, may —
- (a) decide to take no action in respect of the failure or threatened failure, or
 - (b) issue a warning to the person, or
 - (c) issue a notice to the person (an application notice) that requires the person to appear before a court or authorised justice, or

- (d) issue a court attendance notice to the person (if the police officer believes the failure is an offence), or
- (e) arrest the person, without warrant, and take the person as soon as practicable before a court or authorised justice, or
- (f) apply to an authorised justice for a warrant to arrest the person.

(2) However, if a police officer arrests a person, without warrant, because of a failure or threatened failure to comply with a bail acknowledgment or a bail condition, the police officer may decide to discontinue the arrest and release the person (with or without issuing a warning or notice).

(3) The following matters are to be considered by a police officer in deciding whether to take action, and what action to take (but do not limit the matters that can be considered) —

- (a) the relative seriousness or triviality of the failure or threatened failure,
- (b) whether the person has a reasonable excuse for the failure or threatened failure,
- (c) the personal attributes and circumstances of the person, to the extent known to the police officer,
- (d) whether an alternative course of action to arrest is appropriate in the circumstances.

(4) An authorised justice may, on application by a police officer under this section, issue a warrant to apprehend a person granted bail and bring the person before a court or authorised justice.

(5) If a warrant for the arrest of a person is issued under this Act or any other Act or law, a police officer must, despite subsection (1), deal with the person in accordance with the warrant.

Note —

Section 101 of the Law Enforcement (Powers and Responsibilities) Act 2002 gives power to a police officer to arrest a person in accordance with a warrant.

(6) The regulations may make further provision for application notices.

77A Courts may take action to enforce bail requirement to appear

(1) This section applies where bail has been granted in relation to a person who has been sentenced to imprisonment and the execution of the sentence has been stayed under any of the following provisions —

- (a) section 63(2)(c) of the Crimes (Appeal and Review) Act 2001,
- (b) section 17C(2)(a) of the Crimes (Sentencing Procedure) Act 1999,
- (c) section 69C(2)(a) of the Supreme Court Act 1970.

(2) If the person has failed to appear before a court in accordance with the person's bail acknowledgment, a court may issue a warrant to apprehend the person and bring the person before a court specified in the warrant.

78 Powers of bail authorities

(1) A relevant bail authority before which an accused person is brought or appears may, if satisfied that the person has failed or was about to fail to comply with a bail acknowledgment or a bail condition —

- (a) release the person on the person's original bail, or
- (b) vary the bail decision that applies to the person.

Note —

The power to vary a bail decision includes a power to revoke the bail decision and substitute a new bail decision — section 4 (3) (a).

(2) (Repealed)

(3) Part 3 applies to the exercise by the bail authority of its functions under this section.

(4) However, a bail authority may revoke or refuse bail under this section even if the offence is an offence for which there is a right of release under Part 3. An offence ceases to be an offence for which there is a right to release if bail is revoked or refused under this section.

(5) This section does not give an authorised justice power to vary enforcement conditions or impose new enforcement conditions. However, an enforcement condition imposed by a court may be reimposed by an authorised justice.

(6) In this section, a relevant bail authority means —

- (a) an authorised justice, or
- (b) the Local Court, or
- (c) a court before which the person is required to appear by his or her bail acknowledgment.

79 Offence of failing to appear

(1) A person who, without reasonable excuse, fails to appear before a court in accordance with a bail acknowledgment is guilty of an offence.

(2) The onus is on the person granted bail to prove reasonable excuse.

(3) The maximum penalty for an offence against this section (a fail to appear offence) is the maximum penalty for the offence for which bail was granted, subject to this section.

(4) A penalty of imprisonment for a fail to appear offence is not to exceed 3 years and a monetary penalty for an offence against this section is not to exceed 30 penalty units.

80 Proceedings for fail to appear offence

(1) Proceedings for a fail to appear offence may be commenced at any time.

(2) Proceedings for a fail to appear offence are to be dealt with summarily —

- (a) by the court dealing with the offence for which the person failed to appear, constituted in the same way, or
- (b) where the court referred to in paragraph (a) is the Court of Criminal Appeal, the Supreme Court, the Land and Environment Court or the District Court — by that Court constituted in any other way, or
- (c) in any case — by the Local Court.

(3) A fail to appear offence, if dealt with by the Court of Criminal Appeal, is to be disposed of in accordance with —

- (a) such rules made under the Supreme Court Act 1970 as are expressed to apply to offences against this section, and
- (b) subject to paragraph (a), Part 5 of Chapter 4 of the Criminal Procedure Act 1986 (as if references to the Supreme Court were references to the Court of Criminal Appeal).

Note —

The Criminal Procedure Act 1986 makes provision for the summary disposal of matters by the Local Court, the District Court and the Supreme Court.

(4) A person convicted by the Supreme Court, the Land and Environment Court or the District Court of a fail to appear offence is taken, for the purposes of section 5 (1) of the Criminal Appeal Act 1912, to have been convicted of the offence on indictment. Accordingly, an appeal to the Court of Criminal Appeal is available under that section.

81 Giving of directions under enforcement conditions

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.

Appendix C: Bail checks and arrest details for young person in case study 1

This Appendix contains details of bail compliance checks and arrests on the young person referenced in case study 1.

25 January 2021

At 19:38, police attended the young person's address to conduct a bail compliance check. They spoke with the young person's mother who said she was at a friend's house and had attempted to contact her. Police recorded the young person in COPS as 'wanted for breaching bail.'

26 January 2021

At 08:20, police went to the young person's address to arrest her for breach of bail. The young person's mother advised she was still at her friend's house but had no concerns as she was 'just at a friend's house.'

29 January 2021

At 08:00, police attended the young person's address and questioned her about her whereabouts on 25 January. She told police she stayed at her cousin's place that night. Police determined 'this was not a sufficient reason to breach her bail conditions' and placed her under arrest. They took her to Newtown Police Station where she was placed into custody and then before the courts.

February and March 2021

The young person was subject to 11 bail compliance checks. Police sighted the young person at her address on 8 of these occasions and recorded 'bail complied in COPS.'

3 April 2021

At 22:20, police attended the young person's address to conduct a bail compliance check. The young person's mother advised she had just sent her down the road to get some food with her brother and a friend. Police asked the mother to call the young person, but she did not answer. Police told the mother to bring the young person to a police station as soon as she was sighted. Police listed the young person as 'wanted for breach of bail.'

5 April 2021

Police attended the address at 09:00, the young person said she had gone out to buy food with her brother and friend as instructed by her mother. She believed this was allowed by her bail conditions and she returned home after police left. Police did not accept this given the bail conditions state 'she had to remain at her address unless in the company of her mother and not her brother.' Police arrested the young person and took her to Newtown Police Station where she was charged with breach of bail. Police then took her to Reiby Juvenile Justice Centre.

Remainder of April 2021

Police attended the young person's address 9 times to conduct bail compliance checks, which included 5 consecutive days of bail checks.¹²⁴ Police determined the young person

¹²⁴ Police conducted bail checks on 13, 14, 15, 16 and 17 April 2021.

complied with her bail conditions on all but one occasion where police recorded ‘bail undetermined.’

5 May 2021

Police attended the young person’s address at 20:14 to conduct a bail compliance check.¹²⁵ The young person’s brother answered the door and told police she was in bed asleep. Police asked him to wake her up so they could sight her. The young person’s mother then came to the door and told police she did not know where the young person was, stating she left the previous night and had not returned. Police left and recorded the young person as ‘wanted for breaching her bail’ in COPS.

8 May 2021

At 07:40, police attended the address to arrest the young person for breach of bail. The young person told police she was at her friend’s house at the time. Police arrested her and took her to Newtown Police Station where she was put before the court.

Over the next 6 weeks, the young person was subjected to 10 bail compliance checks. Police recorded ‘bail complied’ on all occasions.

20 June 2021

When police attempted to conduct a bail compliance check at 22:33,¹²⁶ the young person’s brother said the young person had not been home since 17:00 and he did not know where she was. Police listed the young person as ‘wanted for breaching her bail.’

23 June 2021

Police questioned the young person at her address. The COPS Event narrative recorded that she provided ‘several different versions suggesting she was complying with her bail conditions.’ Police arrested the young person and took her to Newtown Police Station where they charged her for the matter.

26 June 2021

Police attended the young person’s address at 20:40 to conduct a bail compliance check.¹²⁷ The young person’s mother advised she was not home and had left at 16:00.

27 June 2021

At 10:30, the young person’s mother told police she had not yet returned.

29 June 2021

At 10:30, police attended the young person’s address and questioned her. She told police she was at her cousin’s house that night. Police arrested her and took her to Mascot Police Station.

Over the next month, police conducted 9 bail compliance checks on the young person, who was at home on all occasions. On 3 different instances, police conducted 2 bail compliance checks in one night.¹²⁸

28 July 2021

¹²⁵ The young person was subject to curfew from 18:00 and 06:00.

¹²⁶ The young person was subject to curfew from 18:00 to 06:00.

¹²⁷ The young person was subject to curfew from 18:00 to 06:00.

¹²⁸ On 2 July 2021 at 19:05 and 20:15; on 3 July 2021 at 19:00 and 20:00; On 23 July 2021 at 20:05 and 22:00.

At 20:05 when police attempted to conduct a bail compliance check,¹²⁹ the young person's mother advised she had left home earlier that day and had not returned.

29 July 2021

At 19:20, police questioned the young person who claimed she was with her mother. The young person's mother confirmed police conducted the check the previous night and she was not home. Police then arrested the young person for breach of bail and took her to Newtown Police Station.

August – September 2021

Police conducted 11 bail compliance checks on the young person.

17 October 2021

The young person was not home when police attended at 21:20 to conduct a bail compliance check.¹³⁰ Police created a charge for breach of bail.

21 October 2021

At 21:30, the young person's mother told police she had still not returned home but believed she was with her cousins.

27 October 2021

Police found the young person at IBIS Hotel when they attended for an unrelated matter. Police then arrested her and put her before Surry Hills Children Court.

¹²⁹ The young person was subject to curfew from 18:00 to 06:00.

¹³⁰ The young person was subject to curfew from 19:00 to 06:00.

Appendix D: Supreme Court of NSW – standard conditions of bail



Supreme Court
of New South Wales

STANDARD CONDITIONS OF BAIL

These draft conditions of bail that have been provided by the Court for the benefit of applicants and practitioners in preparing applications for bail. These draft conditions should not be taken as exhaustive or prescriptive. Applicants and practitioners should consider what conditions they propose to meet the identified bail risks including whether additional or differently worded conditions are appropriate. These draft conditions do not bind or limit the presiding judge who will determine the application and, if granted, will determine the precise conditions imposed, if any. Applicants and practitioners should not assume that the presiding judge will accept that any of the possible suggested exceptions to a bail condition will be allowed.

Division 3 *Bail Act 2013* (NSW)

A. Conditions pursuant to ss 25, 27 and 29: Conduct, Accommodation and Pre-release Conditions

Conduct, Accommodation and Curfew Conditions

- | | | |
|---|--|--------------------------|
| 1 | The applicant is to be of good behaviour | <input type="checkbox"/> |
| 2 | The applicant is to appear at the [Children's/Local/District/Supreme] Court at [place] on [insert date/s] , and thereafter as directed. | <input type="checkbox"/> |
| 3 | The applicant is to live at [insert address] and nowhere else. | <input type="checkbox"/> |
| 4 | The applicant is to report to the Officer in Charge at [insert station] Police Station each:

a) Day
b) Monday
c) Tuesday
d) Wednesday
e) Thursday
f) Friday
g) Saturday
h) Sunday | <input type="checkbox"/> |

between the hours of **[insert time]am** and **[insert time]pm**.

- 5a The applicant is to comply with a curfew: not to leave the premises at which the applicant is required to live between the hours of **[insert time]pm** and **[insert time]am** except in the following circumstance(s) **[delete the following or insert conditions such as]**: ☐
- when in the company of **[insert name/s]**; **AND / OR** ☐
 - for the purposes of reporting to the police; **AND / OR** ☐
 - to attend **[pre-arranged]** conferences with their legal representatives; **AND / OR** ☐
 - to attend court; **AND / OR** ☐
 - to obtain **[emergency]** medical treatment; **AND /OR** ☐
 - to attend their place of employment between **[am/pm]** and **[am/pm]**.. ☐
- 5b The applicant is to comply with a home detention condition: not to leave the premises at which the applicant is required to live except in the following circumstance(s) **[delete the following or insert conditions such as]**:
- when in the company of **[insert name/s]**; **AND / OR** ☐
 - for the purposes of reporting to the police; **AND / OR** ☐
 - to attend **[pre-arranged]** conferences with their legal representatives; **AND / OR** ☐
 - to attend court; **AND / OR** ☐
 - to obtain **[emergency]** medical treatment; **AND /OR** ☐
 - to attend their place of employment between **[am/pm]** and **[am/pm]**.. ☐
6. The applicant is not to be in the company of any person aged under 18 years **[unless in the company of [insert name/s]**. ☐
- 7 The applicant is to attend school at **[insert name of school and school's address]** on each school day, unless illness prevents it. In the event of non-attendance due to illness, a medical certificate must be provided to **[insert name of officer]** within 24 hours of the first day of such non-attendance. ☐
- 8 The applicant is not to occupy the driver's seat of any motor vehicle/motorcycle. ☐

9. The applicant is to comply with the terms of any apprehended domestic violence order or apprehended violence order made against them.

☐

10 The applicant may only travel away from the **[Correctional Centre/Juvenile Detention]** Centre from which the applicant is to be released on bail when in the company of **[insert names]**.

☐

Drug and Alcohol Abstinence Conditions

11 The applicant is not to drink alcohol or enter any premises in which alcohol is sold, [other than a licensed restaurant].

☐

12 The applicant is not to take any illegal or prescription drugs other than a drug prescribed to the applicant by a medical practitioner.

☐

Witness Protection Conditions

13 The applicant is not to approach or communicate with, or attempt to make contact with, **[insert name/s of person/s]** by any means, including telephone and internet social media platforms, or through another person, other than a legal representative.

☐

14 The applicant is not to approach or communicate with, or attempt to make contact with, any prosecution witness [any person who the applicant has been notified as a prosecution witness] other than a serving police officer, by any means, including telephone and internet social media platforms, or through a third party, other than a legal representative.

☐

15 The applicant is not to go within **[insert distance]** of **[insert place]**.

☐

Attendance at Rehabilitation Facility

16 The applicant is to undertake a course of rehabilitation at **[insert name of facility]**. The applicant is not to leave that institution until the rehabilitation programme is completed, other than for the purpose of complying with reporting conditions, for pre-arranged conferences with lawyers, or attending court.

☐

17 If the applicant is refused admission, leaves, or is expelled from the rehabilitation centre at which the applicant is to reside, **s/he** is to travel directly to the nearest police station and surrender **her/himself** as being unable to comply with bail.

☐

- 18 The applicant is to obey any reasonable direction given to **her/him** by: ☐
- a) the person in charge from time to time of the rehabilitation facility at which the applicant is to reside
 - b) the applicant's parents
 - c) guardian
 - d) case worker
 - e) an officer of the Community Corrections Office
 - f) an officer of the Juvenile Justice Office
- 19 The applicant is to comply with any regime of medical treatment recommended by a medical practitioner, namely **[insert name]**, including taking medication as prescribed. ☐

Travel and Passport Conditions

- 20 The applicant is not to go within 500 metres of any point of international departure from the Commonwealth of Australia. ☐
- 21 The applicant is to surrender any passport to **[insert name and station of police officer/court]** within **[insert number]** hours following release to bail and is not to apply for a new passport or other travel document. ☐

Pre-Release Condition – Passport

22. The applicant is to cause his/her passport to be surrendered to **[insert name and station of police officer/court]** prior to being released to bail, and is not to apply for a new passport or other travel document. ☐

Conditions Restricting Access to Technology

- 23 The applicant is to not to use or be in possession of more than one mobile telephone service and SIM card, and is to provide the password or PIN code, service and IMEI numbers of that telephone to **[insert officer's name]** within ____ hours of taking or resuming possession of any such service. ☐
- 24 The applicant is not to use or be in possession of any mobile telephone which is a SMART telephone or is otherwise an internet capable mobile device. ☐

- 25 The applicant is not to use or possess any encrypted device or any means of communicating via encrypted applications, including but not limited to WhatsApp, Snapchat, Wickr, Viber, KIK Messenger, Zoom, Discord, WeChat or Telegram. ☐
- 26 The applicant is to provide access to any internet capable device in the applicant's possession to **[insert officer's name]** on demand and provide any password or PIN code for the device to that person to facilitate access to it. ☐

B. Conditions pursuant to s 26: Security Requirements

Security and Involvement of Acceptable Person

- 27 The applicant is to enter into an agreement under which the applicant agrees to forfeit the sum of **[\$[insert amount]]** if s/he fails to appear before court in accordance with the bail acknowledgment. ☐
- 28 The applicant is to deposit cash / security **[cross out whichever is inapplicable]** in the amount of **[\$[insert amount]]** and agree to forfeit that sum if the applicant fails to appear before court in accordance with the bail acknowledgement. ☐
- 29 **[Either say "An" or specify number]** acceptable person[s] is/are to enter into an agreement under which that person(s) agrees to forfeit the sum of **[\$[insert amount]]** if the applicant fails to appear before court in accordance with the bail acknowledgment. ☐
- 30 **[Either say "An" or specify number]** acceptable person[s] is/are to deposit cash / security **[cross out whichever is inapplicable]** in the sum of **[\$[insert amount]]** and agree to forfeit that sum if the applicant fails to appear before court in accordance with the bail acknowledgment. ☐

C. Conditions pursuant to s 27: Character Acknowledgments

Character Acknowledgment

- 31 An acceptable person is to provide a character acknowledgment which complies with the *Bail Act 2013* (NSW), and the *Bail Regulations 2014* (NSW). ☐

Note: see s 27(4) - not to be imposed unless of the opinion that the purpose for which the acknowledgment is required is not likely to be achieved by imposing one or more conduct requirements.

D. Conditions pursuant to s 30: Enforcement Conditions

Enforcement Conditions

Note: See s 30(3)(b) – such conditions can only be imposed at the request of the prosecutor and must make clear the “underlying bail condition”, and s 30(4)(b) – the condition must specify the circumstances in which each kind of direction may be given ensuring that compliance is not unduly onerous, and making clear the “underlying bail condition”

- 32 The applicant is to present **herself/himself** at the front door of the address where the applicant will reside at the direction of any police officer who believes on reasonable grounds that the direction is necessary to confirm compliance with the:

☐

- a) curfew condition
- b) drug abstention condition
- c) alcohol abstention condition

- 33 The applicant is to undertake any non-invasive testing required of the applicant at the direction of any police officer who believes on reasonable grounds that the direction is necessary to confirm compliance with the:

☐

- a) drug abstention condition
- b) alcohol abstention condition

Appendix E: Bail data 2021-2023

The tables in this Appendix have been produced from the information on the BOCSAR Bail page, with the data last updated on 5 September 2023. For more information, including for other timeframes, go to the BOCSAR Bail Page.¹³¹

Table E1: Bail status at first court appearance – Adults

Comparison between Aboriginal and Non-Aboriginal Adults

Year	Bail Dispensed With			Bail Granted			Bail Refused			Grand Total
	Aboriginal	Non-Aboriginal /Unknown	Total	Aboriginal	Non-Aboriginal /Unknown	Total	Aboriginal	Non-Aboriginal /Unknown	Total	
June 2022	14,221	76,059	90,280	7,402	29,384	36,786	4,883	11,267	16,150	143,216
June 2023	15,465	82,279	97,744	8,096	30,763	38,859	5,625	12,129	17,754	154,357
Total	29,686	158,338	188,024	15,498	60,147	75,645	10,508	23,396	33,904	297,573

Table E1.1: Bail status at first court appearance – Youth

Comparison between Aboriginal and Non-Aboriginal Youth

Year	Bail Dispensed With			Bail Granted			Bail Refused			Grand Total
	Aboriginal	Non-Aboriginal /Unknown	Total	Aboriginal	Non-Aboriginal /Unknown	Total	Aboriginal	Non-Aboriginal /Unknown	Total	
June 2022	1,475	2,000	3,475	1,775	1,832	3,607	700	426	1,126	8,208
June 2023	1,623	1,964	3,587	2,201	1,906	4,107	828	383	1,211	8,905
Total	3,098	3,964	7,062	3,976	3,738	7,714	1,528	809	2,337	17,113

¹³¹ BOCSAR, *Bail in NSW* (5 September 2023) <https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Bail.aspx>

Table E2: Breakdown of bail status at first court appearance by bail decision and offence type

Comparison between Aboriginal and Non-Aboriginal Adults

Most serious offence	Year	Bail dispensed with			Bail granted			Bail refused			Grand Total
		Aboriginal	Non-Aboriginal /Unknown	Total	Aboriginal	Non-Aboriginal /Unknown	Total	Aboriginal	Non-Aboriginal /Unknown	Total	
Homicide and related offences	Jun-23	3	37	40	2	34	36	16	94	110	186
Homicide and related offences	Jun-22	2	36	38	1	19	20	15	110	125	183
Acts intended to cause injury	Jun-23	1,932	9,137	11,069	3,630	15,296	18,926	1,705	3,199	4,904	34,899
Acts intended to cause injury	Jun-22	1,851	8,510	10,361	3,177	14,162	17,339	1,488	2,946	4,434	32,134
Sexual assault and related offences	Jun-23	38	362	400	120	1,209	1,329	128	682	810	2,539
Sexual assault and related offences	Jun-22	24	323	347	119	1116	1,235	116	629	745	2,327
Dangerous or negligent acts endangering persons	Jun-23	244	2,295	2,539	97	358	455	127	232	359	3,353
Dangerous or negligent acts endangering persons	Jun-22	231	2,316	2,547	89	409	498	119	263	382	3,427
Abduction, harassment and other offences against the person	Jun-23	80	459	539	80	456	536	94	277	371	1,446
Abduction, harassment and other offences against the person	Jun-22	66	461	527	93	409	502	86	245	331	1,360
Robbery, extortion and related offences	Jun-23	19	21	40	50	135	185	184	302	486	711
Robbery, extortion and related offences	Jun-22	13	23	36	40	118	158	174	290	464	658
Unlawful entry with intent/ burglary, break and enter	Jun-23	152	362	514	269	688	957	613	882	1,495	2,966
Unlawful entry with intent/ burglary, break and enter	Jun-22	145	301	446	271	674	945	494	829	1,323	2,714
Theft and related offences	Jun-23	2,416	7,506	9,922	677	1,548	2,225	813	1391	2,204	14,351
Theft and related offences	Jun-22	1,737	5,972	7,709	568	1451	2,019	675	1065	1,740	11,468
Fraud, deception and related offences	Jun-23	492	2,002	2,494	174	550	724	271	498	769	3,987

Most serious offence	Year	Bail dispensed with			Bail granted			Bail refused			Grand Total
		Aboriginal	Non-Aboriginal /Unknown	Total	Aboriginal	Non-Aboriginal /Unknown	Total	Aboriginal	Non-Aboriginal /Unknown	Total	
Fraud, deception and related offences	Jun-22	398	1,847	2,245	171	590	761	209	409	618	3,624
Illicit drug offences	Jun-23	1,463	9,380	10,843	163	1,478	1,641	125	1,164	1,289	13,773
Illicit drug offences	Jun-22	1,495	9,241	10,736	195	1,431	1,626	134	1,169	1,303	13,665
Prohibited and regulated weapons and explosives offences	Jun-23	576	2,465	3,041	115	429	544	83	235	318	3,903
Prohibited and regulated weapons and explosives offences	Jun-22	566	2,632	3,198	84	432	516	56	209	265	3,979
Property damage and environmental pollution	Jun-23	532	2,217	2,749	260	920	1,180	80	181	261	4,190
Property damage and environmental pollution	Jun-22	562	2,076	2,638	252	874	1,126	104	208	312	4,076
Public order offences	Jun-23	750	2,543	3,293	484	1,483	1,967	296	572	868	6,128
Public order offences	Jun-22	640	1,957	2,597	445	1,319	1,764	290	539	829	5,190
Traffic and vehicle regulatory offences	Jun-23	5,178	37,618	42,796	194	918	1,112	73	264	337	44,245
Traffic and vehicle regulatory offences	Jun-22	4,693	32,899	37,592	161	914	1,075	57	276	333	39,000
Offences against justice procedures, government security and government operations	Jun-23	1,472	51,25	6,597	1,769	5,160	6,929	1,014	2,110	3,124	16,650
Offences against justice procedures, government security and government operations	Jun-22	1,375	5,005	6,380	1,659	5,008	6,667	828	1,882	2,710	15,757
Miscellaneous offences	Jun-23	118	750	868	12	101	113	3	46	49	1,030
Miscellaneous offences	Jun-22	423	2,460	2,883	77	458	535	38	198	236	3,654

Table E2.1: Breakdown of bail status at first court appearance by bail decision and offence type

Comparison between Aboriginal and Non-Aboriginal Youth

Most serious offence	Year	Bail dispensed with			Bail granted			Bail refused			Grand Total
		Aboriginal	Non-Aboriginal /Unknown	Total	Aboriginal	Non-Aboriginal /Unknown	Total	Aboriginal	Non-Aboriginal /Unknown	Total	
Homicide and related offences	Jun-23	0	1	1	0	1	1	4	6	10	12
Homicide and related offences	Jun-22	0	1	1	1	4	5	3	11	14	20
Acts intended to cause injury	Jun-23	375	395	770	704	714	1,418	106	78	184	2,372
Acts intended to cause injury	Jun-22	327	390	717	557	643	1,200	129	87	216	2,133
Sexual assault and related offences	Jun-23	8	24	32	26	110	136	11	9	20	188
Sexual assault and related offences	Jun-22	8	34	42	29	146	175	9	22	31	248
Dangerous or negligent acts endangering persons	Jun-23	35	132	167	14	22	36	3	3	6	209
Dangerous or negligent acts endangering persons	Jun-22	32	113	145	17	25	42	10	1	11	198
Abduction, harassment and other offences against the person	Jun-23	7	17	24	17	13	30	2	7	9	63
Abduction, harassment and other offences against the person	Jun-22	6	14	20	15	19	34	9	10	19	73
Robbery, extortion and related offences	Jun-23	7	12	19	126	165	291	81	53	134	444
Robbery, extortion and related offences	Jun-22	7	17	24	92	167	259	53	66	119	402
Unlawful entry with intent/burglary, break and enter	Jun-23	104	44	148	267	106	373	217	47	264	785
Unlawful entry with intent/burglary, break and enter	Jun-22	106	55	161	211	110	321	153	51	204	686
Theft and related offences	Jun-23	385	242	627	448	191	639	227	79	306	1,572
Theft and related offences	Jun-22	328	292	620	338	183	521	180	89	269	1,410
Fraud, deception and related offences	Jun-23	45	51	96	76	36	112	61	25	86	294

Most serious offence	Year	Bail dispensed with			Bail granted			Bail refused			Grand Total
		Aboriginal	Non-Aboriginal /Unknown	Total	Aboriginal	Non-Aboriginal /Unknown	Total	Aboriginal	Non-Aboriginal /Unknown	Total	
Fraud, deception and related offences	Jun-22	37	52	89	63	51	114	43	24	67	270
Illicit drug offences	Jun-23	61	92	153	15	53	68	6	8	14	235
Illicit drug offences	Jun-22	50	120	170	12	45	57	4	6	10	237
Prohibited and regulated weapons and explosives offences	Jun-23	59	83	142	28	27	55	10	5	15	212
Prohibited and regulated weapons and explosives offences	Jun-22	52	74	126	26	21	47	8	7	15	188
Property damage and environmental pollution	Jun-23	140	169	309	84	67	151	21	6	27	487
Property damage and environmental pollution	Jun-22	143	112	255	97	43	140	18	3	21	416
Public order offences	Jun-23	171	167	338	216	167	383	47	29	76	797
Public order offences	Jun-22	148	126	274	150	139	289	41	25	66	629
Traffic and vehicle regulatory offences	Jun-23	123	423	546	7	6	13	1	0	1	560
Traffic and vehicle regulatory offences	Jun-22	147	433	580	9	8	17	3	3	6	603
Offences against justice procedures, government security and government operations	Jun-23	99	109	208	172	225	397	31	28	59	664
Offences against justice procedures, government security and government operations	Jun-22	70	124	194	140	210	350	29	20	49	593
Miscellaneous offences	Jun-23	4	3	7	1	3	4	0	0	0	11
Miscellaneous offences	Jun-22	14	43	57	18	18	36	8	1	9	102

Table E3: Breach of bail established in court by whether bail was revoked or continued - Adults

Comparison between Aboriginal and Non-Aboriginal Adults

Year	Bail Continued			Bail Revoked			Grand Total
	Aboriginal	Non-Aboriginal	Total	Aboriginal	Non-Aboriginal	Total	
June 2022	2,841	7,485	10,326	1,095	2,216	3,311	13,637
June 2023	3,097	7,448	10,545	1,127	2,040	3,167	13,712
Total	5,938	14,933	20,871	2,222	4,256	6,478	27,349

Table E3.1: Breach of bail established in court by whether bail was revoked or continued - Youth

Comparison between Aboriginal and Non-Aboriginal youth

Year	Bail Continued			Bail Revoked			Grand Total
	Aboriginal	Non-Aboriginal	Total	Aboriginal	Non-Aboriginal	Total	
June 2022	1,051	753	1,804	296	135	431	2,235
June 2023	1,372	726	2,098	320	108	428	2,526
Total	2,423	1,479	3,902	616	243	859	4,761

Table E4: Breach of bail established in court by whether revoked or continued, by bail breach type - Adults

Year	Bail Continued – Further offence			Bail Continued – Breach of Bail			Grand Total
	Aboriginal	Non-Aboriginal	Total	Aboriginal	Non-Aboriginal	Total	
June 2022	663	1,053	1,716	1,888	5,554	7,442	9,158
June 2023	672	1,026	1,698	2,141	5,549	7,690	9,388
Total	1,335	2,079	3,414	4,029	11,103	15,132	18,546

Year	Bail Revoked – Further Offence			Bail Revoked – Breach of Bail			Grand Total
	Aboriginal	Non-Aboriginal	Total	Aboriginal	Non-Aboriginal	Total	
June 2022	434	577	1,011	569	1,397	1,966	2,977
June 2023	406	478	884	617	1,308	1,925	2,809
Total	840	1,055	1,895	1,186	2,705	3,891	5,786

Table E5: Breach of bail established in court by whether revoked or continued, by bail breach type - Youth

Year	Bail Continued – Further offence			Bail Continued – Breach of Bail			Grand Total
	Aboriginal	Non-Aboriginal	Total	Aboriginal	Non-Aboriginal	Total	
June 2022	195	86	281	727	556	1,283	1,564
June 2023	224	107	331	980	529	1,509	1,840
Total	419	193	612	1,707	1,085	2,792	3,404

Year	Bail Revoked – Further Offence			Bail Revoked – Breach of Bail			Grand Total
	Aboriginal	Non-Aboriginal	Total	Aboriginal	Non-Aboriginal	Total	
June 2022	99	34	133	173	93	266	399
June 2023	106	26	132	179	67	246	378
Total	205	60	265	352	160	512	777

Appendix F: Bail conditions and associated underlying conditions

The tables in this Appendix have been produced from the information on the BOCSAR Bail page, with the data last updated on 5 September 2023. For more information, including from other timeframes, go to the BOCSAR Bail Page.¹³²

Table F1: Bail granted at first court appearance by bail conditions imposed (either by police or court), age of defendant, and whether or not an enforcement condition was imposed

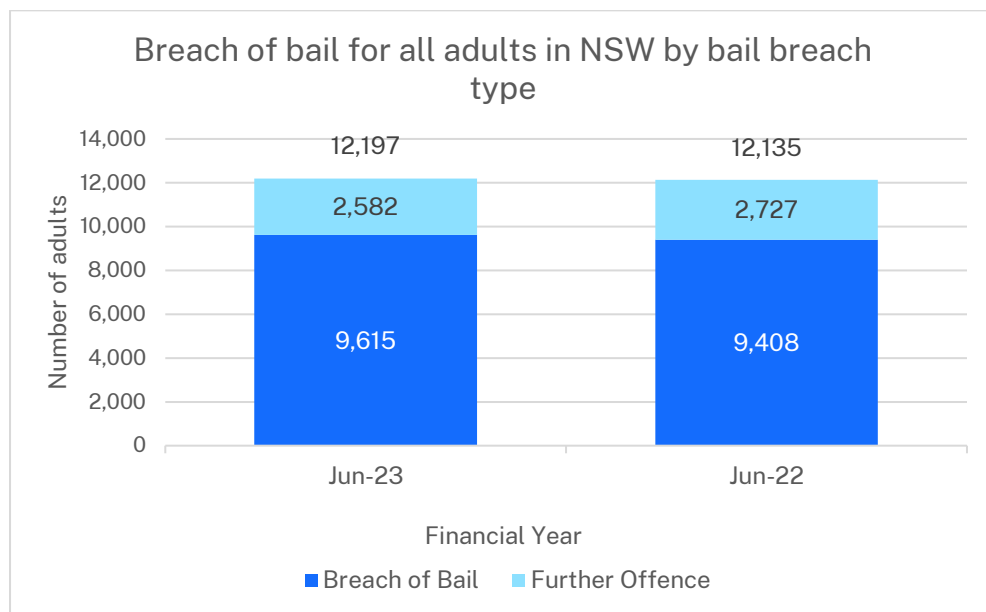
Condition type	Was an enforcement condition also imposed?	Under 18		Adult		Unknown	
		Jun-21 to Jun-22	Jun-22 to Jun-23	Jun-21 to Jun-22	Jun-22 to Jun-23	Jun-21 to Jun-22	Jun-22 to Jun-23
Curfew	Yes	226	329	1681	1476	24	33
	No	1,269	1,425	2,755	2,609	42	79
	% w. enforcement condition	15.1%	18.8%	37.9%	36.1%	36.4%	29.5%
	Total	1,495	1,754	4,436	4,085	66	112
Accommodation Requirement	Yes	221	331	2,429	2,235	27	42
	No	2,026	2,321	1,7194	18,394	214	302
	% w. enforcement condition	9.8%	12.5%	12.4%	10.8%	11.2%	12.2%
	Total	2,247	2,652	19,623	20,629	241	344
Security Requirement	Yes	7	1	571	466	7	11
	No	11	17	1,930	1,836	34	25
	% w. enforcement condition	38.9%	5.6%	22.8%	20.2%	17.1%	30.6%
	Total	18	18	2,501	2,302	41	36
Conduct Requirement - Report On Bail	Yes	17	32	1,652	1,635	20	30
	No	185	213	9,624	10,571	130	185
	% w. enforcement condition	8.4%	13.1%	14.7%	13.4%	13.3%	14.0%
	Total	202	245	11,276	12,206	150	215
Conduct Requirement - Surrender Passport	Yes	4	3	239	177	4	7
	No	17	20	816	1,091	48	58
	% w. enforcement condition	19.0%	13.0%	22.7%	14.0%	7.7%	10.8%
	Total	21	23	1,055	1,268	52	65
Conduct Requirement - Do not associate	Yes	153	207	1,460	1,325	21	29
	No	1,888	2,105	20,866	22,028	196	277
	% w. enforcement condition	7.5%	9.0%	6.5%	5.7%	9.7%	9.5%
	Total	2,041	2,312	22,326	23,353	217	306
Conduct Requirement - Place restriction	Yes	63	87	972	933	11	19
	No	760	904	8,457	9,188	98	112
	% w. enforcement condition	7.7%	8.8%	10.3%	9.2%	10.1%	14.5%
	Total	823	991	9,429	10,121	109	131
Conduct Requirement - Other	Yes	22	15	73	71	0	0
	No	1,355	1,427	11,029	11,448	130	178
	% w. enforcement condition	1.6%	1.0%	0.7%	0.6%	0.0%	0.0%
	Total	1,377	1,442	11,102	11,519	130	178

¹³² BOCSAR, *Bail in NSW* (5 September 2023) <https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Bail.aspx>.

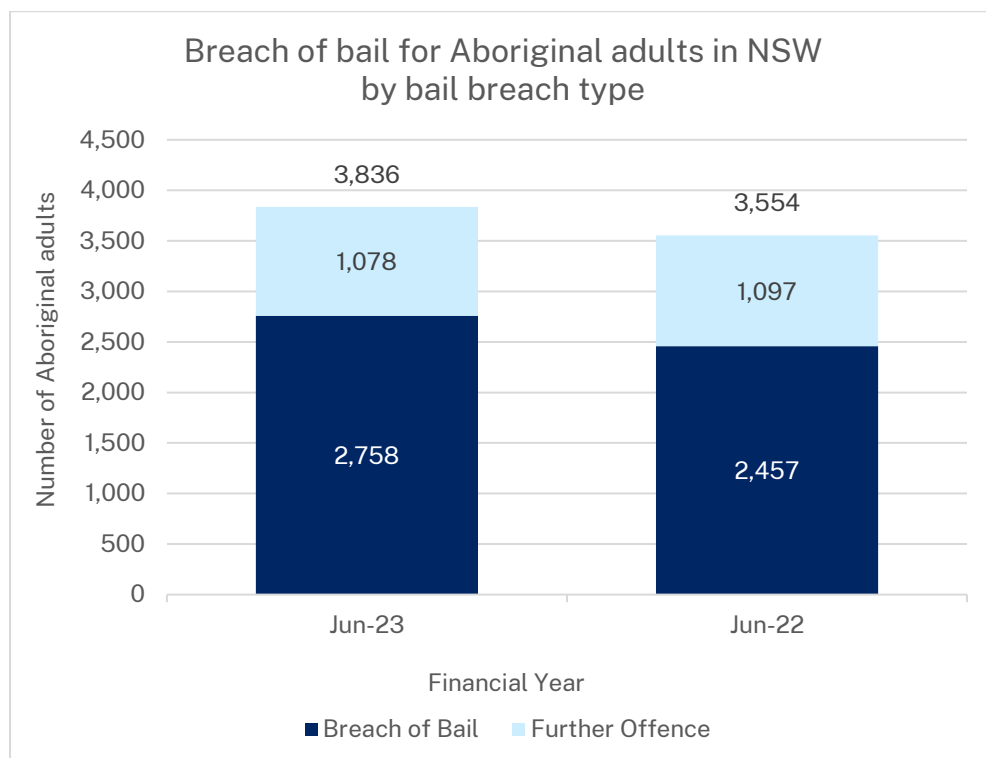
Appendix G: Bail breaches

The graphs in this Appendix have been produced from the information on the BOCSAR Bail page, with the data last updated on 5 September 2023. For more information, including from other timeframes, go to the BOCSAR Bail Page.¹³³

Graph G1: Breach of bail established in court for adults by bail breach type (All adults)

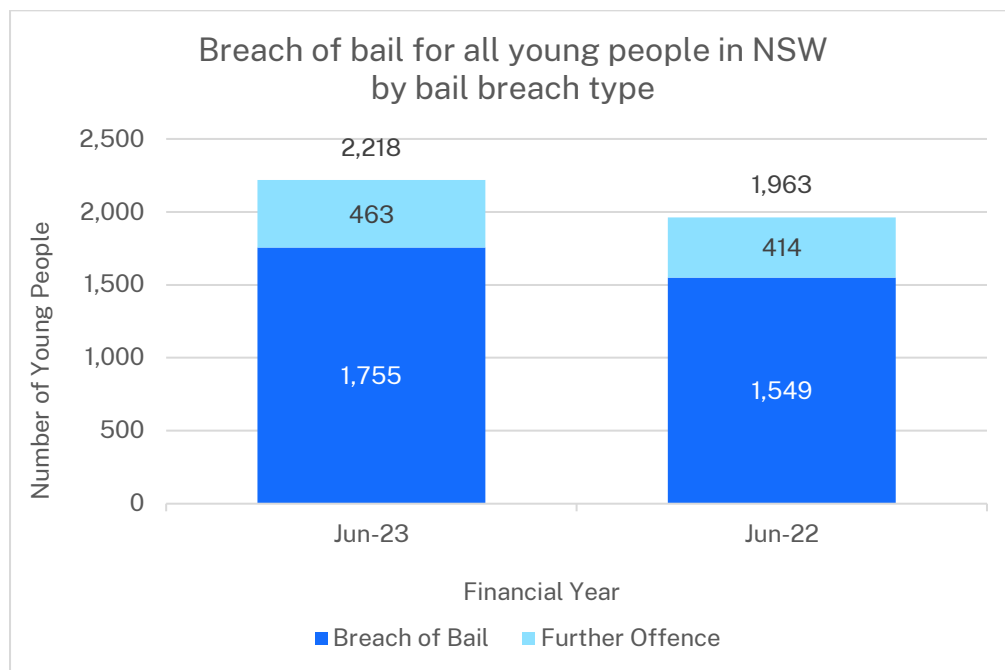


Graph G2: Breach of bail established in court for adults by bail breach type (Aboriginal adults)

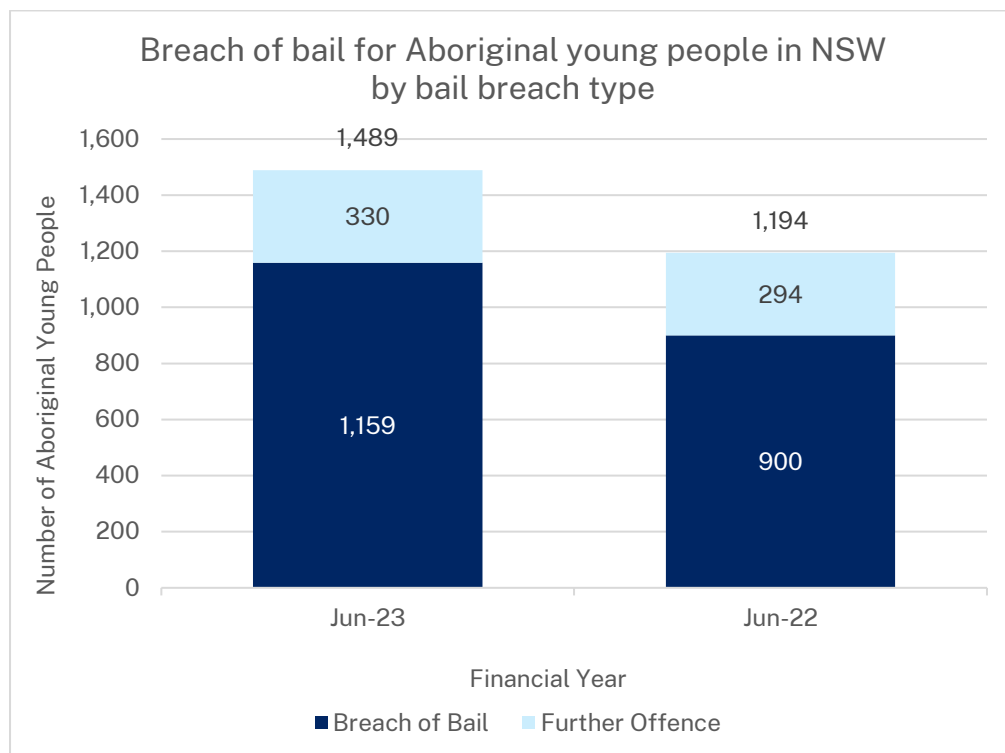


¹³³ BOCSAR, *Bail in NSW* (5 September 2023) <https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Bail.aspx>.

Graph G3: Breach of bail established in court for all young people under 18 years by bail breach type



Graph G4: Breach of bail established in court for Aboriginal young people under 18 years by bail breach type



Appendix H: Children's Court – standard bail conditions

SUMMARY OF REASONS FOR BAIL DECISION OF COURT Bail Act 2013 section 38

CHILDREN'S COURT AT:

DECISION MAKER:

DATE:

NAME OF YOUNG PERSON:

OFFENCES:

H _____ Seq _____
H _____ Seq _____

H _____ Seq _____
H _____ Seq _____

Part of this form has been redacted

☐ **Bail is refused due to unacceptable risk**

Reasons for bail refusal:.....
.....

☐ **Bail is granted without conditions**

☐ **Bail is granted with the following CONDITIONS:**

While on bail you are to:

☐ **Residence** – Live atwith/and spend each night at that address.
☐ Do what your parents or carers reasonably tell you to do.
☐ Follow all house rules of the residential rehab or place where you are living.
☐ Attend school or TAFE when told to do so by school/TAFE.

☐ **Accommodation required before release** – You are not to be released untilhas made arrangements about where you will live while on bail. That agency is to advise the Registrar of the court where you will be living while you are on bail. You are to live at the address arranged by that agency.

☐ **Accommodation required before release to a residential rehabilitation facility** – You are not to be released untilhas made arrangements for you to be admitted to a residential rehabilitation facility for treatment. That agency is to advise the Registrar of the court where you will be living prior to and during treatment. will accompany you to that place for treatment and you are to live at that place during your treatment.

☐ **Curfew** – Not leave home at between pm and am except with your parent or carer at all times, or an adult approved in writing by your parent or carer.

☐ **Curfew** – Not be in a public place between pm and am unless you are with your parent or carer at all times, or an adult approved in writing by your parent or carer.

☐ **Reporting to police** – Report to police at each Mon/ Tues/ Wed/ Thurs/ Fri / Sat / Sun / Daily between the hours of am/pm and am/pm.

☐ **Place restriction** – Not enter or go within metres/kilometres of that area.

☐ **Non contact** – Not go near, contact or try to contact except through a lawyer.

☐ **Non association** – Not be with or contact

☐ **Drug/Alcohol restriction** – Not drink alcohol or take drugs which were not prescribed by your doctor or other medical practitioner.

☐ **Treatment** – Attend and accept any treatment reasonably recommended, including attending appointments

☐ **Intervention/Diversion program** – Participate in the program and follow all assessment and program rules.

☐ **Supervision** – Follow all instructions of JJ/CS/ADAHC and go to the offices of JJ/CS/ADAHC when told to do so.

☐ **Other**.....
.....
.....

☐ **Character acknowledgement** – One (or) suitable person(s) is to agree in writing that he or she (they) know you and he / she (they) think you are a responsible person who is likely to follow your bail. This condition must be met before you are released to bail.

☐ **Security Agreement – Accused** – You are to agree to pay \$ to the court if you do not come to court when told to do so
OR

You are to agree to pay \$ to the court if you do not come to court when told to do so, and you are to deposit cash in (or security for) this amount. You must deposit this amount before you will be released.

☐ **Security Agreement – Suitable person** – One (or) suitable person(s) is to agree to pay \$..... (each) to the court if you do not come to court when told to do so. The suitable person(s) must agree to do this before you will be released.

OR
One (or) suitable person(s) is to agree to pay \$ (each) to the court if you do not come to court when told to do so, and he/she/they are to deposit cash in (or security for) this amount. This amount must be deposited before you will be released.

Enforcement conditions

☐ **Enforcement condition – Curfew** – You are to go to the front door of your home at for a curfew check if told to do so by a police officer, between the hours of am / pm and am/pm, no more than times per day and / or no more than times per week.

☐ **Enforcement condition – Drug or Alcohol testing** – You are to go to the front door of your home at and provide a sample for the purpose of a test if told to do so by a police officer. This condition is subject to the following restrictions:.....

☐ **Enforcement condition – Other**

.....
Magistrate/Judge/Authorised Justice

Appendix I: Children's Court – bail guidelines

The Children's Court of New South Wales Bail guidelines

1. Introduction

1.1 The decision to refuse bail to a young person is a decision to deprive that young person of his or her liberty, in circumstances where he or she has not been found guilty of an offence. That decision can have enormous implications for the young person. There is significant evidence, both from Australia and overseas, that:

- (a) contact with the criminal justice system is harmful for young people, and increases the likelihood that a young person will reoffend;
- (b) for many of these young people, social interventions could be more effective in reducing recidivism and increasing positive life-time outcomes;
- (c) even a short period in custody (such as overnight) can significantly increase the likelihood that a young person will reoffend;
- (d) only a relatively small proportion of young people who are found guilty of an offence are given a sentence of full-time custody; and
- (e) the rate at which police refuse bail for young people is significantly higher than the rate at which the Children's Court and other courts refuse bail.

1.2 The decision to refuse bail to a young person, or to impose bail conditions, should not be made lightly, and must be made strictly by reference to the considerations in the *Bail Act 2013* (the *Bail Act*). These guidelines aim to assist a bail decision-maker in arriving at a bail determination that achieves an appropriate balance between the interests of the community and the interests of the Young Person.

2. General principles

2.1 Young people's limited capacity and the significant difficulties they face when in contact with an adversarial, adult-oriented criminal justice process mean that they are particularly vulnerable at the time a bail determination is made about them. It is therefore important that:

- the bail authority should make all reasonable attempts to ensure that the young person has adult support, including someone who
- can advocate for their interests, before the bail determination is made; and
- the bail authority should take special care to take into account the young person's vulnerability.

2.2 Bail should **only be refused** where there is an unacceptable risk that the young person, if released from custody, will:

- (a) fail to appear at any proceedings for the offence;
- (b) commit a serious offence;

(c) endanger the safety of victims, individuals or the community; or

(d) interfere with witnesses or evidence.

In all other circumstances (unless the young person has been charged with a terrorism offence referred to in s22A of the Bail Act), bail must either be granted, conditionally or unconditionally, or dispensed with.

2.3 The **show cause** provisions in the Bail Act **do not apply** to bail determinations for young people.

2.4 Bail **cannot be refused** for the offences referred to in s21 of the Bail Act, including:

- fine-only offences;
- offences under the Summary Offences Act (except offences of obscene exposure, violent disorder or offences relating to knives,
- if the young person has previously committed a similar offence; or
- offences relating to laser pointers or loitering by convicted sex offenders); or
- offences being dealt with by conference under the Young Offenders Act,

unless the young person has breached their bail for that offence.

2.5 Police **do have the power** to grant bail under s43(5) of the Bail Act to a person who has been arrested under a warrant to bring the person before court for sentencing.

2.6 Bail conditions can often be formulated which will adequately mitigate risks. The formulation of bail conditions should be approached creatively. However, bail conditions must be no more onerous than is necessary to address the bail concerns; they must be reasonably practicable for the young person to comply with; and there must be reasonable grounds to believe the young person is likely to comply with them.

3. Procedural steps

3.1 Young people may present to a bail authority as outspoken, aggressive and defiant. Such behaviours should not be taken as a sign that the young person is capable of properly advocating for his or her interests. Outwardly difficult behaviour is often a mask for more complex underlying needs. Many of the young people who come into contact with police have experienced:

- unstable family environments;
- intergenerational disadvantage and trauma, including violence, abuse and neglect;
- housing instability, including out-of-home-care placements,
- homelessness and sleeping rough;
- disengagement from education;
- drug and alcohol addiction; and
- physical, mental health and cognitive conditions and disabilities.

Many of these young people are subject to legal interventions when a social intervention would be more effective and appropriate.

3.2 Because there is often a high degree of instability in the lives of the young people who may be the subject of bail decisions, it can be difficult to identify and find suitable adult support for them. However, the more unstable a young person's life is, the greater their need for adult support at the time of a bail decision is likely to be. As well as family and adult friends, other support may be found

amongst Youth Justice, Out of Home Care providers, other community service providers, and Family and Community services.

3.3 Where possible, all young people must also be given access to legal advice before a bail decision is made, for example from the Youth Hotline (Ph 1800 10 18 10) or the Aboriginal Legal Service Custody Notification Service.

3.4 A bail decision-maker should seek input from any support person or legal adviser before the bail decision is made. It may be that bail conditions are available of which the decision-maker was unaware, or more effective conditions could be tailored, with the input of those who have primary responsibility for the young person in the community.

4. The decision to grant or refuse bail

4.1 A bail decision-maker should only refuse bail if there is an unacceptable risk that any of the four bail concerns will be realised. In all other cases, bail must be granted or dispensed with. This is a purely risk-assessment approach.

Bail refusal is not a means to punish a young person, or ensure better compliance with bail conditions, parents or other aspects of community life.

4.2 In deciding whether any of the bail concerns presents an unacceptable risk, the bail decision-maker should consider the “acceptability” of the risk in light of the young person’s personal circumstances. For example, there may be a high likelihood that a young person will not attend court, because the young person is too young to drive, there is no public transport and his or her parent is an unreliable transporter. But particularly where the proceedings are for a less serious offence, whilst the risk of the young person failing to appear is high, it may not necessarily be unacceptable.

Similarly, in assessing whether a risk is unacceptable, it is appropriate to have regard to the likely penalty if the offence is proved. Because the sentencing law as it relates to young people promotes rehabilitation over punishment, custodial sentences for young people are relatively rare. Care must be taken to ensure that young people who will not ultimately be sentenced to custody do not spend time on remand, even for short periods, unless it is absolutely necessary.

4.3 Before deciding to refuse bail, the bail decision-maker should thoroughly explore the availability of bail conditions which could mitigate risks. The consideration of bail conditions should be approached creatively and with the objective of avoiding bail-refusal if a safe alternative can be found. For example, can any risk to the safety of the victim be mitigated by the young person going to stay with relatives who live some distance away from the victim? Can the risk of further offending be mitigated by a condition requiring engagement with a community service provider?

5. Assessing bail concerns

5.1 The central task in the bail determination is to assess risk. However, it is not just any risk that must be assessed; it is limited solely to the four bail concerns identified in s17 of the Act. Bail cannot be refused for any other reason than that there is an unacceptable risk surrounding one of those four bail concerns.

Bail cannot be refused, for example, merely because:

- the child is at risk of self-harm, or harm from others;
- the child has nowhere to live;
- the child has a drug problem;
- the child has other unaddressed welfare issues;
- the child is not complying with parents, Family and Community Services or an Out-Of-Home Care provider; or

- the child is under the care of the Minister, but Family and Community Services do not have an authorised placement available for the child.

Such matters may plainly require a response, but that response must come from an appropriate agency, not through remand. **Bail refusal must never be used to cover a gap in the provision of welfare services.**

5.2 Failing to appear

When assessing whether the risk of failing to appear is unacceptable, it is important to bear in mind that the frequency of a person intentionally absconding to avoid the criminal process is relatively low, for both adults and young people. More usually, where a young person is at risk of failing to appear, this will be due to issues such as lack of driver's licence, lack of public transport, parental dysfunction, instability and disorganisation at home, homelessness, or drug dependency. Many of those factors may be ameliorated by appropriate bail conditions, or by connecting the young person with services available in the community.

Even where the risk of failing to appear is high, it will often be the case that a young person's whereabouts are generally well-known or easy to ascertain, particularly if the young person is connected with services.

It is important to take into account all of the above circumstances in deciding whether the risk of failing to appear is "unacceptable", particularly when the young person is unlikely to receive a full time custodial sentence. Whilst failures to appear may be frustrating, if they are not caused by a deliberate attempt to avoid the criminal process, then even a high risk may, in an appropriate case, be considered acceptable.

5.3 Committing a serious offence

Bail cannot be refused merely because a young person is likely to commit further offences. It can only be refused if there is an unacceptable risk that the young person will commit a further **serious** offence.

The Bail Act does not define "serious offence", but s18(2) sets out some matters which should be considered in deciding whether there is an unacceptable risk that a young person will commit a serious offence:

- whether the offence is of a sexual or violent nature or involves an offensive weapon;
- the likely effect of the offence on any victim and on the community generally,
- the number of offences likely to be committed or for which the person has been granted bail or released on parole.

Where a young person has been charged with a serious offence, a forecast needs to be made of the risk of committing another serious offence during the period of bail. In many cases, because of the added scrutiny on the young person during court proceedings, as well as the impact of bail conditions, that risk will in fact be relatively low.

5.4 Endangering the safety of victims, individuals or the community

Endangering the safety of victims, individuals or the community involves putting their safety at risk to an unacceptable degree. Endangering safety is generally a reference to the risk of causing direct physical or psychological harm. Property crimes, for example, are generally unlikely to endanger the physical safety of the community.

5.5 Interfering with witnesses or evidence

This bail concern is directed at preventing interference with the investigative and judicial processes. Interfering with witnesses or evidence will often require a degree of sophistication that is unlikely to be exhibited by young people.

6. Bail Conditions

6.1 Bail conditions can often go a long way towards mitigating bail concerns, such that they are no longer unacceptable. However, *“Bail conditions are calculated to mitigate risk. Their imposition does not create an occasion for attempts at social engineering or paternalistic interventions in parenting decisions”*: **R v Connor Fontaine (a pseudonym)** [2021] NSWSC 177.

6.2 Bail conditions are not a behaviour-management tool. They cannot be imposed, for example, to assist parents or Out Of Home Care providers in exercising their parental responsibilities. Nor can they be used to fill gaps in the provision of welfare services to a young person.

6.3 Section 20A of the Bail Act provides that bail **conditions can only be imposed** if there are identified bail concerns, and the proposed bail conditions are:

- reasonably necessary to address the bail concern;
- reasonable and proportionate to the offence;
- appropriate to the bail concern in relation to which it is imposed;
- no more onerous than necessary to address the bail concern;
- reasonably practicable for the young person to comply with; and
- such that there are reasonable grounds to believe that the condition is likely to be complied with. When considering this issue, it is important to think not only about each individual bail condition, but about the number of different conditions and the combined effect of all of them.

6.4 Careful thought should be given before imposing some commonly seen bail conditions, for example:

- **Reporting** – this may only be imposed if there is an identified risk of failing to appear, and should involve the lowest frequency of reporting that is consistent with ensuring appearance at Court. In many cases, if reporting is required at all, once or twice per week will be sufficient.
- **Curfews** – because bail conditions are not a behaviour management tool, curfews should only be imposed where there would otherwise be an unacceptable risk of endangering safety or committing further serious offences specifically within the hours of the proposed curfew. For example, a night-time curfew should not ordinarily be imposed if there is no evidence of serious offences having been committed, or likely to be committed, at night.

If it is appropriate to impose a curfew, then consideration should be given to the form of the curfew condition. If the bail concern is that the young person will commit further serious offences in public at night, then a form of curfew condition that requires the young person not to be in a public place between certain hours will generally be sufficient to mitigate the risk. It would be unnecessary to mandate that the young person be at home within those hours.

Similarly, careful thought should be given to the hours specified in the curfew; they should be set only by reference to the mitigation of risk. A curfew cannot be used as a substitute for what may be thought to be inadequate parenting. In modern life, young people often have legitimate reasons to be out late into the evening, with no increase in risk.

- **Condition to be of good behaviour** – the Bail Act is not concerned with the risk of committing further offences; only of the risk of committing further serious offences, or endangering the safety of the community etc. Thus, a general condition that a young person must not commit

any offences is, on its face, inconsistent with the Bail Act, as it does not address any of the four bail concerns.

- **Sureties** – a condition that money be forfeited (either by the young person or by an acceptable person) can only be imposed to address a bail concern that a person will fail to appear. If failing to appear is not a bail concern, then a surety cannot be imposed (s26(5)). Further, a surety condition cannot be imposed unless it is unlikely that any other conduct conditions will ensure the person appears at Court (s26(6)).

6.5 A number of bail conditions cannot be imposed by police. They include:

- A requirement that accommodation be found for the young person before release (s28) – this may only be imposed by a Court or authorised justice; and
- An enforcement condition (s30) – these may only be imposed by a Court, and only at the request of the prosecutor. Examples of enforcement conditions include directions that a person undergo drug and alcohol testing, or that a person presents to the front door of a specified residence to confirm curfew compliance.

7 Breaches of bail

7.1 It is not unusual for young people to be defiant, and this may result in them breaching the conditions of their bail. It is important to remember, though, that a **breach of bail conditions is not an offence**. Similarly, the risk of committing further breaches of bail conditions is not itself a bail concern, and not a ground to refuse bail, unless the breach of bail conditions itself provides evidence that there is an unacceptable risk of one of the four bail concerns.

7.2 Under the Bail Act, a police officer who becomes aware of a potential breach of bail conditions must not arrest the person without warrant, unless he or she has first considered whether an alternative course of action is appropriate, such as a warning or the issue of a notice to appear at Court.

If a young person is arrested for breaching bail, the arresting police officer may also decide to discontinue the arrest and release the person.

7.3 If there is a risk of further breaches of bail conditions, then it may be appropriate to reconsider the bail conditions. As noted above, bail conditions may not be imposed under the Bail Act unless it is reasonably practicable for the young person to comply with them (s20A(2)(e)), and there are reasonable grounds to believe that the young person is likely to comply with them (s20A(2)(f)). Bail conditions must be no more onerous than is necessary to address the relevant bail concerns (s20A(2)(d)).

Please note: These guidelines have been developed to highlight the considerations that are relevant to making a bail decision for a child consistent with the risk assessment required to be made under the Bail Act 2013. The guidelines are not directive and do not purport to refer to every matter which may be relevant under the Bail Act 2013.

Appendix J: Local Court – standard bail conditions

SUMMARY OF REASONS FOR BAIL DECISION OF COURT

Bail Act 2013, Section 38

LOCAL COURT AT:

DECISION MAKER:

DATE:

ACCUSED PERSON:

OFFENCES:

H_____	Seq_____	H_____	Seq_____
H_____	Seq_____	H_____	Seq_____

☐ Bail decision deferred due to intoxication

Exceptional circumstances offence ☐

Show cause offence ☐

Serious indictable offence on bail / parole / subject to warrant ☐ or Other ☐

ASSESSMENT OF BAIL CONCERNS

Criminal history: lengthy-☐ limited-☐ nil-☐ Personal background and circumstances:

Community ties: strong-☐ weak-☐ none-☐

Nature of offence: serious-☐ minor-☐ violent-☐ sexual-☐ property-☐
prevalent-☐ Strength of case: strong-☐ weak-☐ plea of
guilty/convicted-☐ History of violence: yes-☐ no-☐

Previous serious offence on bail: yes-☐ no-☐ unable to
determine-☐ History of compliance or non-compliance with bail
or other court orders:

Compliance yes-☐ no-☐

Non-compliance yes-☐ no-☐

(Bail decision after failure to comply) Warnings issued by police officers/bail authorities re
non-compliance with bail acknowledgments/conditions: yes-☐ no-☐

Any criminal associations: yes-☐ no-☐

Any terrorist associations: yes-☐ no-☐

Any statements/activities advocating support for terrorist acts/violent
extremism:

By accused person: yes-☐ no-☐

By persons/groups associated/affiliated with accused person: yes-☐ no-☐

Likely time in custody: days-[] weeks-[] months-[] unknown

[] Custodial sentence: likely-[] unlikely-[]

Accused person convicted but not sentenced: yes-[] no-[]

Appeal proceedings: reasonably arguable prospect of success: yes-[] no-[]

Special vulnerability: youth-[] ATSI-[] cognitive or mental health impairment-[]

Accused person: obtain legal advice-[] prepare for appearance-[] work-[] family-[] medical-[]

Conduct towards victim or family member of victim: no contact-[] threatening or violent-[] Views of victim or family member of victim on safety if released (serious offence):

Prosecution Submissions

Defence Submissions

[] **Bail refused** [] **Accused has not established exceptional circumstances exist to justify bail, s 22A**

[] **Accused has not shown cause why detention not justified, s16A OR**

[] **Unacceptable risk of:**

[] failing to appear at any proceedings for the offence

[] committing a serious offence

[] endangering safety of victims, individuals or the community

[] interfering with witnesses or evidence

Reasons

[] **Bail granted** [] **Conditional bail granted (see over)**

[] **Bail is granted without conditions**

[] **Bail is dispensed with**

Bail condition(s):

[] **Residence** – live at:

[] **Reporting** – report to police at..... Police Station daily or each Mon / Tues / Wed / Thurs / Fri / Sat / Sun between the hours of a.m. and p.m.

[] **Non contact** – not to go near, or contact or try to go near or contact

.....

..... or any prosecution witness (except through a legal representative).

[] **Non association** – Not to be with or contact.....

[] **Accommodation** - arrangements to be made for accommodation of accused person before release on bail (to enable admission to residential rehabilitation facility for treatment)

[] **Treatment:** to attend..... and accept any treatment reasonably recommended, including attending appointments.

[] **Intervention/Diversion program participation:** to participate in theprogram and comply with all assessment and program requirements.

☐ **Curfew:** Not to leave home between _____PM and _____AM unless in the company of

.....

☐ **Drug/alcohol restriction:** Not to drink alcohol or take drugs unless those drugs are prescribed by a doctor.

☐ **Travel restrictions-** Not to enter any international airport or other point of departure from Australia.

☐ **Supervision** – Obey all reasonable directions of and attend at the offices of that service when told to do so.

☐ **Place restriction** Not to enter..... or not to go within kilometres of that area

(except for.....).

☐ **Passport:** To surrender passport to the Registrar of Court / police officer in charge and not to apply for another passport.

☐ **Other**

☐ **Character acknowledgment:** One (or) acceptable person/s is to acknowledge in writing that they are acquainted with the accused and consider the accused to be a responsible person who is likely to comply with a bail acknowledgment.

☐ **SECURITY AGREEMENT: Upon failure to appear in accordance with the bail acknowledgment:**

☐ **ACCUSED:** Agrees to forfeit \$..... ☐ without security ☐ deposit security ☐ deposit cash

☐ **ACCEPTABLE PERSON:** One (or.....) agree/s to forfeit \$.....(each)

☐ without security ☐ deposit security ☐ deposit cash

Enforcement conditions

☐ Curfew enforcement:

☐ Drug or alcohol testing:

☐ Other enforcement condition:

Determination as to acceptable person/security:

(if applicable)

.....
Magistrate / Authorised Justice

Glossary

Glossary	Description
Bail Act	<i>Bail Act 2013 (NSW)</i>
BOCSAR	NSW Bureau of Crime Statistics & Research
COPS	Computerised Operational Policing System
DVO	Domestic Violence Order
LEPRA	<i>Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)</i>
NSWLRC	New South Wales Law Reform Commission
NSWPF	New South Wales Police Force
PAC	Police Area Command
POI	Person of Interest
SOPS	Standard Operating Procedures
STMP	Suspect Target Management Plan
The Commission	The Law Enforcement Conduct Commission
YP	Young Person

LECC

Law Enforcement
Conduct Commission

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