

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

25 July 2024

Justice and Equity Centre
ABN 77 002 773 524
www.jec.org.au

Gadigal Country
Level 5, 175 Liverpool St
Sydney NSW 2000
Phone + 61 2 8898 6500
Email contact@jec.org.au



About the Justice and Equity Centre

The Justice and Equity Centre is a leading, independent law and policy centre. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we work with people and communities who are experiencing marginalisation or disadvantage.

The Centre tackles injustice and inequality through:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

We actively collaborate and partner in our work and focus on finding practical solutions. We work across five focus areas:

Disability rights: challenging discrimination and making the NDIS fairer to ensure people with disability can participate equally in economic, social, cultural and political life.

Justice for First Nations people: challenging the systems that are causing ongoing harm to First Nations people, including through reforming the child protection system, tackling discriminatory policing and supporting truth-telling.

Homelessness: reducing homelessness and defending the rights of people experiencing homelessness through the Homeless Persons' Legal Service and StreetCare's lived experience advocacy.

Civil rights: defending the rights of people in prisons and detention, including asylum seekers, modernising legal protection against discrimination, raising the age of criminal responsibility to 14, advancing LGBTIQ+ equality and advocating for open and accountable government.

Energy and water justice: working for affordable and sustainable energy and water and promoting a just transition to a zero-carbon energy system.

Contact

Grace Gooley
Senior Solicitor
The Justice and Equity Centre
Level 5, 175 Liverpool St
Sydney NSW 2000

T: +61 2 8898 6554
E: ggooley@jec.org.au

Website: www.jec.org.au

The Justice and Equity Centre office is located on the land of the Gadigal of the Eora Nation

Contents

Summary of Responses and Additional Recommendations	1
Introduction.....	4
Issue 1	5
The doctrine of implied licence	6
Legitimate purpose and interference with possession and injury	7
Legitimate purpose.....	7
Interference with possession and injury	10
Issue 2	12
Issue 3	15
Issue 4	15
Issue 5	17
Issue 6	19
Issue 7	21
Issue 8	22
Additional concerns and comments.....	22
Disproportionate impact on Aboriginal and Torres Strait Islander people	22
Use of risk assessment tools	24
Multiple, conflicting bail conditions	25
Potential agency maladministration and serious misconduct	26

Summary of Responses and Additional Recommendations

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

The doctrine of implied licence cannot be relied upon by police officers when undertaking bail compliance checks. It is not necessary for a licence to be implied, when a statutory procedure exists to enable the entry. Additionally, a bail compliance check, without more, is not an entry for a legitimate purpose and inevitably in practice will involve an interference with possession or injury to an occupier or their guests.

Issue 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?

Yes, the Bail Act is intended to 'cover the field' of circumstances in which bail compliance checks can be conducted by police, impliedly proscribing bail compliance checks outside of s 77 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?

Yes, it follows from our responses to Issues 1 and 2 that police must apply to a court for a bail enforcement condition before conducting bail compliance checks 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?

A number of safeguards already exist in s 30 of the Bail Act for ensuring that enforcement conditions are reasonable having regard to the individual circumstances of the bailed person.

It is otherwise essential for both police and the bailed person that enforcement conditions are detailed, certain and clear so that both police and the bailed person understand the limits of the enforcement powers.

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?

We acknowledge the limitations identified by NSW Police in the current bail enforcement regime. While there are steps that could be taken to attempt to resolve those limitations, these would unsettle the balance the enforcement regime currently strikes between the public interest in ensuring that people are complying with their bail conditions and the interest that people on bail, and the friends, family or others that they reside with, have in the quiet enjoyment of private

property, and their rights to privacy and family life. Investment in bail support programs would be the most effective and appropriate way to ensure increased bail compliance.

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?

As with Issue 5, our view is that expanding the powers of police to take further actions with respect to people the bailed person resides with intrudes too far into the rights of those people to quiet enjoyment of their property, privacy and family life, in a manner that is disproportionate to the public interest in ensuring that people are complying with their bail conditions.

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

No. It is not clear to us what this proposal would seek to achieve, other than avoiding the legislative safeguards in the enforcement conditions regime, which is not desirable.

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?

We do not consider that the Bail Act lacks clarity in this respect. It is clear that police are unable to conduct bail compliance checks where they do not suspect a breach of bail conditions unless there is an enforcement condition in place.

The better solution is for the Bail Compliance Standard Operating Procedures to be amended, so that this position is clearly understood and implemented in police practice.

Additional recommendations

AR1: The NSW Police Bail Compliance Standard Operating Procedures be amended to expressly provide that:

- (a) Police officers must seek an enforcement condition from the court, through the prosecutor, if they are of the view that it is necessary to monitor compliance with a person's underlying bail conditions.*
- (b) Where no bail enforcement condition is ordered by the court, police officers must not enter property to monitor a person's compliance with underlying bail conditions.*
- (c) Where an enforcement condition is ordered by the court, police officers must not enter property for the purposes of monitoring a person's compliance with underlying bail conditions outside of the terms of that order as to time and frequency of monitoring.*

AR2: The NSW Government commission and fund a research project on the impacts of bail conditions and enforcement activity on the behaviour of bailed persons, with a view to better understanding:

- (a) whether bail conditions and bail enforcement activity are effectively preventing the bail concerns in s 17 of the Bail Act; and*
- (b) what negative impacts bail conditions and bail enforcement activity are having on bailed persons and their close associates, with a particular focus on the impacts on rehabilitation of the bailed person.*

AR3: The NSW Government commission, fund and implement a centralised system for recording bail conditions which will enable courts, police, lawyers and bailed persons to know the bail conditions and enforcement conditions that are in place in respect of a bailed person at any point in time. This should be accompanied by:

- (a) guidance for courts about the importance for both police and the bailed person of coherency of bail conditions across multiple bail grants and the practical issues of having multiple conflicting bail conditions; and*
- (b) rolling-out to all courts a standard form template for enforcement conditions, based on the template currently used by the Children's Court of NSW.*

AR4: NSW Police should disclose, and consult with relevant stakeholders about, the 'risk-based priority assessment' methodology so that there can be confidence in the approach being used by police to calculate how frequently to conduct bail enforcement checks.

AR5: The NSW Government fund evidence-based bail support programs that resource people to comply with their bail conditions and address root causes of offending.

AR6: The Commission consider whether to exercise its power pursuant to s 51 of the LECC Act, to investigate whether the NSW Police practice of conducting bail compliance checks outside of the regime provided by the Bail Act constitutes 'agency maladministration' and/or 'serious misconduct' (as those terms are defined in the LECC Act).

Introduction

The Justice and Equity Centre ('the Centre') welcomes the opportunity to provide this submission in response to the Bail compliance checks in NSW – Issues Paper ('Issues Paper') published by the Law Enforcement Conduct Commission ('the Commission').

For nearly a decade, the Centre has represented clients who have been subject to bail compliance checks by NSW Police,¹ conducted in the absence of a court-imposed enforcement condition or beyond the limitations specified in a court-imposed enforcement condition. In our experience, police officers regularly enter private property to monitor compliance with residence or curfew conditions, without first obtaining an enforcement condition from a court. These checks often occur multiple times a day, and very late at night or in the early hours of the morning.

- In 2018, we represented two people who were subject to repeated visits to their house by police officers for the purpose of conducting bail compliance checks. In a three-month period, police came to the house on at least 50 occasions, between 9pm and 2:15am. This matter was the subject of the Commission's Operation Cusco Report.
- In 2024, we filed two trespass claims against NSW Police in the Supreme Court of NSW. These claims were filed on behalf of two mothers of Aboriginal children and arise from police attendances at their homes to conduct bail compliance checks, where there was no bail enforcement condition in place or in excess of the limits specified in the bail enforcement condition. For one mother, police came to the house more than 90 times over 18 months and for the other mother, 153 times in 20 months. For the second, 55 of those attendances were between the hours of midnight and 4am.

For many years, we have argued that unless police have a court-ordered bail enforcement condition that empowers them to conduct these checks, the home attendance will be unlawful and constitute trespass. The cases filed in 2024 directly raise that position for decision by the Supreme Court.

Our awareness of NSW Police practice around bail compliance checks first emerged in the context of our investigations into the NSW Police Suspect Targeting Management Plan ('STMP'), which would later become the subject of the Commission's Operation Tepito investigation. As the Issues Paper notes, and as Chapter 8 of the Operation Tepito Final Report documents extensively, bail compliance checks were used as a 'targeting strategy' against young people subject to the STMP, as a strategy from the 'disruption' tool kit.

The Centre holds similar concerns about the ongoing practice of bail compliance checks, as were held about the STMP more broadly. Namely that:

- current policy is leading NSW Police officers to engage in unlawful conduct, entering or remaining on private property in excess of lawful authority to do so;

¹ In this submission, unless otherwise indicated, we adopt the definition of a 'bail compliance check' as described by the Commission at page 12 of the Issues Paper.

- current practice is improperly discriminatory in its effect, with bail compliance checks being disproportionately conducted on First Nations people, particularly for First Nations young people;
- the frequency and timing of bail compliance checking is often unreasonable, unjust or oppressive in its effect on the person on bail, without due regard to the purposes for which the bail conditions exist;
- by engaging in excessive bail compliance checking on young people particularly, NSW Police are prioritising policing strategies that tend towards increased interactions with the criminal justice system; and
- excessive and oppressive bail compliance checks on young people have an intrusive and disruptive impact on them and their families, impeding rehabilitation efforts.

For these reasons, the Centre is of the view that meaningful safeguards on the NSW Police practice of conducting bail compliance checks are essential.

Our position is that the practice of conducting checks for compliance with bail conditions in the absence of a court-imposed enforcement condition, and outside of s 77, is both an inappropriate police practice that avoids legislative safeguards and unlawful. It is an approach which undermines the clear, stated intention of the regime established by the *Bail Act 2013* (NSW) ('Bail Act') and subverts the role Parliament intended for the courts. It is a fundamental rule of law issue.

We are aware of situations in which police have continued to conduct bail compliance checks in the absence of an enforcement condition, after the implied licence has been explicitly revoked by the occupier of a premises. We are concerned that police are not conducting bail compliance checks in reliance on the implied licence in good faith, but instead are relying on this practice to avoid the procedures and legislative safeguards inherent in the enforcement condition regime.

We respond to each of the questions posed by the Issue Paper below.

Issue 1

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

The Centre's position is that the common law doctrine of implied licence cannot be relied on by police officers to provide lawful authority to enter private property for the purpose of conducting bail compliance checks.

A license cannot be implied when a statutory procedure exists to enable and regulate the entry: the basis for implying a license is that it is *necessary*. Additionally, entry to conduct a bail compliance check, unsupported by another basis for the exercise of power, is not an entry for a legitimate purpose and will, in practice, inevitably involve an interference with possession or an injury to the occupier.

The doctrine of implied licence

The law of trespass requires permission from the occupier to lawfully enter private premises.² The common law qualifies the law of trespass with the doctrine of implied licence, where permission is not express. This doctrine implies permission from the occupier for people to enter upon premises and approach a dwelling for a lawful purpose.³

As Kiefel CJ recognised in *Roy v O'Neill*, the doctrine of implied licence is a necessary implication to qualify a rule that would otherwise be unworkable:

It is well understood that the law of trespass requires that for a person lawfully to enter private premises there must be an invitation or permission from the occupier respecting that entry. The common law also recognises that such a rule would be unworkable in our society if it were strictly applied so as to render all visitors who did not have an express permission from the occupier, trespassers.⁴

The licence is implied to enable some activity that would otherwise be impractical or unworkable, if explicit consent were required to be obtained.

So much is apparent from the application of the doctrine by Kiefel CJ to the facts in *Roy v O'Neill*:

Applied to the facts of the present case, the approach of the majority in *Halliday v Nevill* readily admits of a conclusion that a licence would be implied. It is implied by the law **so that police might undertake such enquiries and observations of the appellant as were necessary** if she was present at the dwelling unit, to ascertain whether the DVO had been breached and an offence committed, as Constable Elliott expected might be the case.⁵ (emphasis added)

Similarly, concepts of workability and practicality were central to Keane and Edelman JJ in *Roy v O'Neill* rejecting submissions of the applicant about mixed or contingent purposes:

These circumstances illustrate the **unworkability of an approach** which denies an implied licence to any officer who might have a contingent intention to exercise coercive power...One possibility would be for the courts to develop, and police officers to act upon, extremely fine philosophical distinctions between background conditional intentions and conditional, speculative intentions. That would be **hopeless in practice**...The police could no longer knock on the door of the very occupiers who might be in the most desperate need, to ask "Are you ok?".⁶ (emphasis added)

NSW Police, however, are not faced with a situation which is unworkable or impractical.

If a police officer considers it necessary to undertake bail compliance checking on an individual, a process to obtain the required authority to enter the property exists, namely to apply for an enforcement condition under the enforcement condition regime in the Bail Act and enter the property to exercise a direction power further to s 81.

² *Roy v O'Neill* [2020] HCA 45, [11].

³ *Ibid.*

⁴ *Ibid.*, [11].

⁵ *Ibid.*, [18].

⁶ *Ibid.*, [90].

As the materials excerpted in the Issues Paper make clear, and as is described further in our response to Issue 2 below, Parliament intended for this to be the process, where NSW Police consider it necessary to enter property for the purpose of confirming compliance with bail conditions. There is no necessity to imply a licence to enter.

The situation may be different if there were some urgency to conduct the bail compliance check, such that it would be unworkable or impractical to first apply to a court for the enforcement condition. However, it is difficult to conceive of such a situation, where there is not otherwise suspicion of breach that would enliven the power in s 77 of the Bail Act or another circumstance which would enliven one of the powers in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) to enter the property.

Legitimate purpose and interference with possession and injury

Additionally, as the Issues Paper identifies, in order for a person entering property to be able to rely on the implied licence and not commit a trespass against the occupier, the entry must be:

1. for a legitimate purpose; and
2. involve no interference with the possession nor injury to the occupier or their guests.

The Centre's position is that a bail compliance check, unsupported by another basis for the exercise of power, is not an entry for a legitimate purpose and will, in practice, inevitably involve an interference with possession or an injury to the occupier.

Legitimate purpose

It was explained by the Court in *Halliday v Nevill* that the path or driveway of premises is held out by the occupier:

As the bridge between the public thoroughfare and his or her private dwelling upon which a passer-by may go for a legitimate purpose that in itself involves no interference with the occupier's possession nor injury to the occupier, his or her guests or his, her or their property.⁷

Chief Justice Kiefel in *Roy v O'Neill* referred to the implied licence as:

...implying a permission, on the part of an occupier, for persons to enter upon premises and approach a dwelling to engage in lawful purposes.⁸

Some common examples of lawful or legitimate purposes include lawful communications with or deliveries to the occupants of the premises⁹ and entry upon a driveway to recover an item of property or an errant child.¹⁰ In *Halliday v Nevill*, it was held that a police officer entering an open

⁷ *Halliday v Nevill* (1984) 155 CLR 1; [1984] HCA 80, [6].

⁸ *Roy v O'Neill* [2020] HCA 45, [11].

⁹ *Ibid*, [13], [70]

¹⁰ *Halliday v Nevill* (1984) 155 CLR 1; [1984] HCA 80, [6].

driveway to question or arrest a person who was not the occupier, in the particular circumstances, was a legitimate purpose.

As we set out in our response to Issue 2 below, the Bail Act proscribes police entering property for the purpose of checking compliance with bail when police are operating outside of s 77 and where there is no enforcement condition. When police enter a property to conduct a bail compliance check in the absence of an enforcement condition or suspicion of a breach that would enliven s 77, their purpose cannot be said to be lawful or legitimate. Their purpose is proscribed by the statute and accordingly unlawful.

This was the position reached by Curtis DCJ in *Travis Dargin and Kristy Green v State of NSW*, who concluded:

The conduct of a bail compliance check without first obtaining an order pursuant to section 30 of the Bail Act 2013 **is not a legitimate purpose**...In the context of the *Bail Act 2013* (NSW) a bail compliance check may not be lawfully conducted in the absence of a court ordered Bail Enforcement Order. (emphasis added)

While his Honour's judgment was overruled by the NSW Court of Appeal, this was on the basis that it was inappropriate to answer that separate question.¹¹ Little was expressed by the Court of Appeal on the substantive question, beyond the excerpt noted by the Issue Paper at 4.2.1 and some other minor comments that do not help resolve the proper position.

Alternatively, as the Issues Paper notes, the High Court in *Roy v O'Neill* concluded that a police officer entering premises for the sole purpose of exercising a coercive power will not be able to rely on the implied licence. All justices of the Court relied on the notion of coercion to delineate the limits of the implied licence. Chief Justice Kiefel opined that, if a police officer was to enter premises for the sole purpose of exercising coercive powers, a statutory power would be necessary.¹² Justices Keane and Edelman said the same was true where the purpose of entry was to subject the occupier to a 'coercive process'.¹³ Justices Bell and Gageler said that entry to land with a 'coercive purpose' would take the entry outside the scope of the implied licence.¹⁴ As their Honours put it:

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.¹⁵ (emphasis added)

The reason this is so was described by Keane and Edelman JJ as follows:

The recognition of a common law implied licence to enter private land to assert any coercive power against the occupier or the occupier's guests would **disturb the proper balance between public authority and the security of private dwellings**. It would cut across the common law regime of special cases...which license the entry onto land for the purpose of exercising only particular coercive

¹¹ *State of NSW v Dargin* [2019] NSWCA 47.

¹² *Roy v O'Neill* [2020] HCA 45, [17].

¹³ *Ibid*, [85].

¹⁴ *Ibid*, [37], [45].

¹⁵ *Ibid*, [36].

powers and only in particular circumstances. It would also be **inconsistent with the foundation of the implied licence in the habits and reasonable expectations of social life** if the common law were to extend the licence in *Halliday* to permit a police officer to enter the curtilage of a property for the sole purpose of asserting any coercive power over the occupier or the occupier's guests.¹⁶ (emphasis added)

What is clear from the reasons of all members of the High Court is that, when determining whether an entry onto land falls within the implied licence, purpose is paramount and 'if the purpose is just to coerce ... the conduct is outside the scope of the licence; it is trespass'.¹⁷

Exactly what is, and is not, a coercive purpose or a coercive power was not clearly defined by the Court in *Roy v O'Neill*. Some justices provided indications of what it may entail. Justices Bell and Gageler referred to giving orders¹⁸ or an intention on the part of a police officer to order or compel a person to do something.¹⁹ Some examples from the judgment were requiring a person to submit to a breath test,²⁰ searching a premises²¹ and entry to effect an arrest.²²

It is not clear whether an order given by a police officer is only coercive if a person is required by law to comply with the order. Justices Bell and Gageler expressed the view that where 'criminal consequences flow from a failure to comply, the giving of a direction is clearly coercive'.²³ No justice expressed a view however, as to whether a purported search, breath test, direction or other order that a person did not in fact have to lawfully comply with, would be coercive. In our view, such conduct should still be considered coercive. Many, if not most, people in contact with police would not be aware that they have the right to refuse to comply with such a direction, without facing legal consequences.

This is particularly important in the context of bail compliance checks. It may well be the case that a police officer entering land at a reasonable hour, with the intention of asking whether a bailed person is present, without expecting or requiring an answer and doing no more, may not be entering with a coercive purpose. However, it is our experience that police entering onto premises in the absence of an enforcement condition will invariably in practice also:

- give a purported direction to the occupier or one of their guests, to bring the bailed person to the door of the property to be 'sighted';
- depart from the driveway or alcove of the property if the front door is not answered, to knock on back or side doors or windows; and/or
- take additional steps to try to ascertain whether the bailed person is present at the property, including by shining lights through windows and calling the telephones of people suspected to be residing at the property.

¹⁶ Ibid, [81]

¹⁷ Ibid, [37].

¹⁸ Ibid, [36].

¹⁹ Ibid, [40].

²⁰ Ibid, [17] (Kiefel CJ).

²¹ Ibid.

²² Ibid, [80] (Keane and Edelman JJ).

²³ Ibid, [45] (Bell and Gageler JJ).

As to the first of these, each time police are entering a property for the sole purpose of carrying out a bail compliance check and intend to give a direction that the bailed person present to police and/or to require that they 'sight' the bailed person, they are doing so to coerce the occupier or their guest who answers the door (if not the bailed person). The police are not simply attending the property to 'knock and talk' or make inquiries. As to the second and third, if the police entered with the intention to walk around a property, or to 'search' for the bailed person if no one answered the door, they have also entered with a coercive purpose.

The second and third of these categories may also be independently unlawful, as police have acted beyond the scope of any implied licence that existed to initially enter on to the land to make inquiries. Justices Keane and Edelman in *Roy v O'Neill* cite with approval *Tasmania v Crane*,²⁴ in which police were held to have an implied licence to enter a property to make inquiries, but when the police began to walk around the building to investigate, they exceeded their licence and became trespassers. Justices Keane and Edelman referred to this case as an example of trespass when police act outside the scope of the implied licence.

Interference with possession and injury

As to the second limit on the implied licence, it is well established that entry to property pursuant to an implied licence cannot involve 'interference with the occupier's possession or injury to the occupier, his or her guests or his, her or their property'.²⁵ When considering 'injury' in the context of permissible entry, 'one looks to the effects of the purpose carried out upon the occupier's rights and its impact on those present'.²⁶ Injury may include an 'affront to a person's dignity'.²⁷

The justification for this is described in the opening lines of the opinion of Bell and Gageler JJ in *Roy v O'Neill*:

In the Australian way of thinking, a home is a sanctuary. This sentiment is reflected in common expectations and common practices: "the habits of the country". Those habits are founded on an ingrained conception of the relationship between the citizen and the state that is rooted in the tradition of the common law. The conception can be traced to the Jacobean resolution of the Court of King's Bench that "the house of every one is to him as his castle ... as for his repose".²⁸ (footnotes omitted)

As above, it may be that a police officer who enters land at a reasonable hour, asks whether a bailed person is present, leaves when the question is answered or refused, and does no more, may do no injury to an occupier or their guests and may not interfere with possession. However, many of the ways in which bail compliance checks are carried out in practice, do cause injury to an occupier or guest, or interfere with possession.

The first and most obvious example is a bail compliance check that is conducted late at night. Unless a police officer knows that all occupiers or guests are awake, they cannot attend the property, and knock on the door or ring the doorbell, without anticipating that they will need to wake the occupier and/or their guests to make those inquiries. An occupier or guest will be awoken, have to dress and come to the door, and may or may not experience further disturbed

²⁴ [2004] TASSC 80.

²⁵ *Halliday v Nevill* (1984) 155 CLR 1; [1984] HCA 80, [6].

²⁶ *Roy v O'Neill* [2020] HCA 45, [13] (Kiefel CJ).

²⁷ *Ibid*, [16] (Kiefel CJ).

²⁸ *Ibid*, [31].

sleep as a result of being awoken. If the person has work or school the next day, that activity may be disrupted by the person being adversely affected by the poor night's sleep. An injury has occurred to an occupier or guest, that is clearly to be anticipated from police attending to make bail compliance inquiries late at night. This injury is compounded if police are attending multiple times a night or late at night on consecutive nights.

Even a bail compliance check conducted at a reasonable time of day may interfere with possession or cause injury, if there is repetition of the conduct. The enjoyment of a property is likely to be hampered, if the occupier is coming to the door multiple times a day or week, to respond to police knocking or ringing the doorbell to make inquiries.

If these checks are occurring in full view of neighbours, or those on the street, the presence of police may cause embarrassment and injure the dignity of the occupier, fearing their neighbours' assumptions that they must be involved in illicit activity for police to be attending so regularly. Our view is the frequency and timing of bail checks are relevant to determining whether these checks involve interference with possession and injury. A single bail compliance check cannot be considered in isolation when it forms part of a course of conduct, which is generally the case in our experience.

It may also be that the giving of a direction alone, in the absence of power to do so, does injury to the occupier or the guest. If a home is a sanctuary, an occupier is entitled to be free of coercion (or purported coercion) whilst on those premises.

The potential interference and injury associated with bail compliance checks are illustrated in the below case studies from Centre clients Joanne and Jake.

Case Study 1: Joanne*

Joanne is a single mother of three, living in Western Sydney, who was referred to the Centre through the Aboriginal Legal Service (NSW/ACT). She and her family were subject to more than 90 police visits over 18 months. 59 of these visits appear to have been unlawful as they were in excess of the limitations specified in bail enforcement conditions. Through that time, Joanne's anxiety increased, and she had difficulty sleeping.

'Police coming around didn't only affect my son who was on bail. It also affected me and his sisters, especially when police were shining torches through the windows after midnight. It felt as though they were harassing the whole family. My youngest daughter is now scared of police.'

'The checks felt relentless. Once there were three checks in just a few hours. Police seemed to just do whatever they wanted, and completely ignored what the court said about how much they were allowed to come.'

'Sometimes my son would start behaving really well. But police continued to harass him anyway, and he'd feel like his good behaviour was pointless and end up being charged again.'

'It was very embarrassing to have the police constantly at my house. It made it hard for me with my neighbours. And I stopped inviting guests over in case the police turned up.'

'The checks often happened on school nights, which meant my youngest daughter was too tired to go to school in the morning.'

**Client's name has been changed to protect privacy.*

Case Study 2: Jake*

Jake is a young Aboriginal man living in Western Sydney. He was granted bail in 2022 with an enforcement condition: 'you are to go to the front door of your home ... for a curfew check if told to do so by a police officer between the hours of 9 PM and 11 PM, no more than 1 times per day and no more than 3 times per week'.

Jake was living with his mum in an apartment block. For police to conduct a bail check, they needed to dial the intercom so that Jake or his mum could buzz them into the building. If Jake or his mum didn't answer the intercom, police would find a way in. Jake believes that they either dialled the intercom of other residents, or walked in behind other people entering the building. On one occasion, they came up the fire escape. Sometimes four officers would show up to do a check. Jake felt like they did this to intimidate him.

Police often did bail checks two to three times a night and more than three times a week. If police came a second time and rang the intercom, Jake would tell them that he had already done a bail check that night and ask them to leave. When this happened, police would usually require that they sight Jake anyway.

Jake had just started a new job. He says, 'after a long day at work, I would keep myself awake because I knew police would probably come around midnight. This meant I missed a lot of sleep and was sometimes late to work'.

'I really wanted them to stop coming because me and mum had just moved to a new neighbourhood and it looked really bad to the new neighbours. Also, the landlord lived downstairs. Sometimes neighbours asked me why police were coming round. It was really embarrassing. I felt like doing the right thing was the wrong thing. I had stopped doing crime and stopped playing up. I had a job. But I felt like I was being punished anyway.'

**Client's name has been changed to protect privacy.*

Issue 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?

While the Bail Act does not expressly prohibit police from conducting bail compliance checks when operating outside of s 77 and in circumstances where there is no enforcement condition, the Bail Act is clearly intended to 'cover the field' of circumstances in which bail compliance checks can be conducted.

It is apparent from both the language of the statutory scheme and the history of legislative amendments, that ss 30 and 81, alongside s 77, of the Bail Act are intended to provide a complete regime by which police officers may enter on to private property with the intention of checking a person's compliance with bail conditions. By implication, the Bail Act proscribes police from conducting any bail compliance checks outside the provided circumstances.

If bail compliance checks could be conducted outside these provisions, the legislative framework for bail compliance monitoring crafted by Parliament and set out in the Bail Act would have no work to do in its application to accommodation and curfew conditions. Such a position would be inconsistent with the evident parliamentary intent, as documented in the materials referred to in the Issues Paper and set out below.

As the Issues Paper notes, bail enforcement conditions were introduced by the *Bail Amendment (Enforcement Conditions) Act 2012* ('Enforcement Conditions Act'), which introduced s 37AA to the then *Bail Act 1978*. Section 37AA was the first iteration of the bail enforcement condition provisions and was in substantially the same terms to the current ss 30 and 81 of the *Bail Act*.

The Second Reading Speech is instructive as to the reason for, and purpose of, the introduction of s 37AA:

The purpose of the *Bail Amendment (Enforcement Conditions) Bill* is to amend the *Bail Act 1978* to authorise the imposition of enforcement conditions of a grant of bail. An enforcement condition is 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. These reforms are being made in response to the recent decision of the Supreme Court in *Lawson v Dunlevy*. In that matter the accused had been granted bail which included a condition that he abstain from alcohol. A further condition had been imposed requiring that the accused submit to a breath test, as directed by police, to check his compliance with the abstinence condition. 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 had 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 an accused person 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.**²⁹ (emphasis added)

The Second Reading Speech also speaks to how the provisions were intended to operate in practice:

... 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

²⁹ New South Wales, *Parliamentary Debates*, Legislative Council, 24 October 2012, 1 (The Hon Michael Gallacher, MP).

condition but if a reasonable suspicion is formed then action can be taken by police.³⁰ (emphasis added)

The Second Reading Speech refers to the findings of the New South Wales Law Reform Commission's report of its review of bail law in NSW ('NSWLRC Bail Report') which was tabled on 13 June 2012:

The Law Reform Commission in its framework recommended consultation and a framework for enforcement conditions, which it referred to as "enforcement conduct directions". **Given that the impact that absence of enforcement conditions is having on police operations, the Government decided to bring forward its response to this recommendation and consulted legal stakeholders accordingly.** The reform incorporates elements of the framework recommended by the Law Reform Commission while still providing flexibility to courts when imposing enforcement conditions and flexibility for police when issuing directions pursuant to an enforcement condition.³¹ (emphasis added)

In its discussion as to the existing powers available to police to monitor compliance with bail conditions, the Commission in the NSWLRC Bail Report observed:

The exercise by police of a power to subject a bailed people [sic] 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 power that would not be otherwise available, and it is not subject to the safeguards that otherwise attach to the exercise of regular law enforcement powers.**

The question that arises, particularly in the light of the decision of Justice Garling,^[32] which, at the time of writing this Report, is taken to reflect the current law, is whether the new Bail Act should expressly permit the imposition of enforcement conduct directions of the kind outlined. **If the answer is in the affirmative, it is important to provide a clear legislative solution that would preclude the unreasonable imposition, or exercise of any such direction.**³³ (emphasis added)

The Enforcement Conditions Act was the 'legislative solution' recommended by the NSWLRC Bail Report. As the legislative history demonstrates, the provisions are a response to a Supreme Court decision and an acknowledgment by Parliament, the NSW Law Reform Commission *and the NSW Police* that police *did not have the power* (by reference to statute or common law) to attend an accused's premises to confirm their compliance with a curfew or residence condition.

If the power existed, there would have been no need for the speedy enactment of enforcement condition provisions by Parliament to empower police to monitor and ensure compliance with bail conditions. The enactment of the Enforcement Conditions Act is unlikely to have changed that

³⁰ Ibid.

³¹ Ibid.

³² Note added: this is a reference to Garling J's decision in *Lawson v Dunlevy* [2012] NSWSC 48.

³³ New South Wales Law Reform Commission, *Bail* (Report No 133, April 2012), [16.22 – 16.23].

position. To the contrary, the second reading speech suggests an intention to 'cover the field' with regards to the conduct of bail compliance checks.

NSW Police appeared to accept this position in 2018 when, in response to concerns about excessive bail compliance checks conducted on young people, Assistant Commissioner Cassar said 'NSWPF does not have a bail check or compliance policy' but went on to say, in relation to the safeguards in place:

Additionally, safeguards for Bail Compliance checks are built into the legislation as Enforcement Orders. ... Section 30(4) requires that an enforcement condition is to specify the underlying condition (e.g. curfew), the kind of directions police can make (ss (4)(a)) and 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).

If there is an enforcement order in place and Police are not entitled to do any more checks under s 30, where Police still have a reasonable suspicion then then can do a check under s 81. The Reasonable Suspicion is another safeguard.³⁴ (emphasis added)

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?

Yes. It follows from our responses to Issues 1 and 2 that police must apply to a court for a bail enforcement condition before conducting bail compliance checks 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?

A number of safeguards already exist in s 30 of the Bail Act for ensuring that enforcement conditions are reasonable having regard to the individual circumstances of the bailed person.

Section 30(5) provides that the Court can only impose an enforcement condition pursuant to s 30 of the Bail Act if it is 'reasonable and necessary', having regard to:

- (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),

³⁴ Committee on Law and Safety, NSW Legislative Assembly, Answers to Supplementary Questions, 21 June 2018, 3 (NSW Police Assistant Commissioner).

- (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.

An enforcement condition must also specify the kinds of directions that may be given, and the circumstances in which they can be given 'in a manner that ensures that compliance with the condition is not unduly onerous' (ss 30(4)(a) and 30(4)(b)). These provisions enable a court to craft enforcement conditions with regard to the particular circumstances of the person on bail and other residents of the property at which the bailed person resides. These provisions are designed to be broad and flexible and may enable a court to have regard to any special circumstances of the person to be bailed, such as age, employment or educational enrolment, Aboriginal or Torres Strait Islander status, mental illness, disability and pregnancy, as appropriate.

The Second Reading Speech explains the specific safeguards embedded in the bail enforcement condition regime:

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 NSW Police Force will develop standard operating procedures for monitoring bail conditions and enforcement that recognise the requirements set out in the bill.** These are wise reforms.³⁵
(emphasis added)

These are the legislative safeguards that are avoided when police purport to conduct bail compliance checks under an implied license.

In general, we are of the view that to be reasonable and not unduly onerous, any enforcement condition must place clear limits on the frequency with which police can attend to conduct bail compliance checks. At a minimum, checks should be limited by reference to:

- times of day;
- maximum number of attendances per day; and
- maximum number of attendances per week.

Such conditions are clear and understandable for both police and the bailed person. When crafting them, a court should have regard to the detail and purposes for which the underlying curfew or accommodation condition was imposed and strike a balance between avoiding the bail

³⁵ New South Wales, *Parliamentary Debates*, Legislative Council, 24 October 2012, 1 (The Hon Michael Gallacher, MP).

concerns in s 17 of the Bail Act and placing conditions on the bailed person that are not unduly burdensome and are conducive to rehabilitation efforts.

We were concerned by the bail enforcement conditions detailed at 6.1.1 of the Issues Paper, which either give too much power to police without adequate safeguard or leave the pre-conditions which might enable a check to take place too unclear or ambiguous for either police or the bailed person to understand. Lack of clarity or ambiguity may lead a police officer to inadvertently fail to comply with an enforcement condition and commit a trespass, or a bailed person or an occupier they are staying with to misunderstand their right to ask police to leave premises, or to inadvertently refuse to comply with a lawful direction. These are all situations that are undesirable and should be avoided. Detail, certainty and clarity should be the central concerns in a court's effort to craft enforcement conditions.

We share the Commission's view that 'open-ended' enforcement conditions, such as those set out at 6.1.2 of the Issues Paper, are unlikely to be valid. To the extent those orders relied on police to ensure that compliance was not unduly onerous, that was not in accordance with the legislative framework. To the extent the Commission may recommend rolling out a court template enforcement condition more broadly, we suggest that the Children's Court template is the most appropriate for standardisation, as it best meets the requirements of detail, certainty and clarity.

Limits on the frequency and time of day police can conduct bail compliance checks would also prevent police from using bail checks as a proactive surveillance tool for targeting people at liberty on bail. Particularly where the person on bail is a child or young person, such proactive surveillance is likely to result in increased interaction with the criminal justice system and impede efforts at rehabilitation, neither of which are desirable.

Police have identified a concern with placing timeframes and upper limits on enforcement conditions, which is that bailed persons are likely to modify their behaviour to commit offences after the quota of compliance checks for the night or week is met.³⁶ It is not clear the extent to which police have observed this in practice, or whether it is a hypothetical concern. We note that police are not required to 'use' all of the available checks on a person for a 24-hour or 7-day period. Police could mitigate this concern in part by *not* using up the entire quota every day or every week, so that the hypothetical person is kept uncertain whether police will return again to check compliance.

In any event, police will retain their powers under s 77 should they have a reasonable suspicion that a person is breaching or has breached their bail conditions.

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?

³⁶ Issues Paper, 5.3.6.

We acknowledge the limitations identified by NSW Police in the current bail enforcement regime, namely that it is not possible to confirm bail compliance where:

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

We agree that the enforcement condition regime as it exists now, does not enable NSW Police to take any further steps in those circumstances to verify bail compliance. We note similar limitations exist if police are relying upon the implied licence to enter property to conduct a bail compliance check.

Addressing these limitations by expanding police powers to monitor bail compliance would, however, overstep the balance currently struck by the enforcement regime. The current enforcement regime balances the public interest in ensuring that people are complying with their bail conditions, against the interest that people on bail, and the friends, family or others they reside with, have in the quiet enjoyment of their private property, and their rights to privacy and family life.

The enforcement regime could be amended, to provide that directions can be made to any person at the bailed person's specified accommodation, or that a police officer could enter and search a bailed person's specified accommodation if the bailed person does not come to the door when police knock or ring. However, both proposals are significant extensions of the intrusion on the rights of private citizens, and disproportionate to the public interest in ensuring persons on bail are complying with their conditions. In the same way that we place reasonable limits on the steps that police may take to investigate crimes, reasonable limits must be placed on the steps that can be taken to ensure bail compliance.

A more effective way of promoting bail compliance would be to increase investment in bail support programs, which support people to comply with their bail conditions and target criminogenic risk factors. The two principle aims of bail support programs are to prevent reoffending while on bail and increase the likelihood of a person appearing in court for the hearing of their charges.³⁷ Recent research shows that bail support programs:

- reduce reoffending by 33%;³⁸
- increase compliance with bail conditions by 95%;³⁹

³⁷ Justice Reform Initiative, *Alternatives to Incarceration in New South Wales* (2023) 43.

³⁸ Elena Marchetti, *Evaluation of the Caxton Legal Centre Bail Support Program* (Griffith University, 2021); Rohan Lulham, *The magistrates' early referral into treatment* (Contemporary Issues in Crime and Justice, 131, July 2009); Ilya Klauzner, *An evaluation of the youth bail assistance line* (Crime and Justice Bulletin, 237, July 2021), as cited in Justice Reform Initiative, *Alternatives to Incarceration in New South Wales* (2023) 8.

³⁹ Ibid.

- improve a range of other social and health wellbeing measures relevant to the drivers of criminal justice system contact;⁴⁰ and
- achieve cost savings when compared to an absence of bail support.⁴¹

One example is the Bail Support Court Integrated Services Program in Victoria. Evaluations have found this program reduces contact with the criminal justice system and facilitates access to support and treatment.⁴² Another example is the Caxton Legal Centre Men's Bail Support Program in Queensland, where 95% of participants were bail compliant in 2021-2022 and were less likely to re-offend in the short to medium term.⁴³

Supporting people to comply with their bail obligations and address the root causes of offending is more likely to prevent the bail concerns in s 17 of the Bail Act than monitoring bail compliance.

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?

As identified in our response to Issue 5 above, we are concerned that any extension to police powers in relation to other residents of a property at which a bailed person resides, are likely to unsettle the balance currently struck between the public interest in ensuring that people are complying with their bail conditions, against the interest that people on bail, and the friends, family or others that they reside with, have in the quiet enjoyment of their private property, and their rights to privacy and family life.

For this reason, there should be no extension of police powers to ask, require or compel assistance in checking bail compliance. This is a further intrusion into the privacy and quiet enjoyment of private property by those other people, who may have had no involvement or knowledge of the activities that led to the person being on bail.

A concern that needs to be recognised is the strain police attendances can place on families, friends and other housemates who may be living with bailed people. Even without involving those people in compliance checks, regular police attendances at a residence can be disruptive and burdensome on a household. As noted in Joanne's case study, police attending a property can be stigmatising, as occupiers feel like their neighbours and others may associate them with

⁴⁰ Susan Spratley, Neil Donnelly and Lily Trimboli, *Health and wellbeing outcomes for defendants entering the Alcohol-MERIT program*, (Bureau Brief No. 92, December 2013); Meredith Rossner et al, *ACT drug and alcohol sentencing list: Process and outcome evaluation final report* (June 2022), as cited in Justice Reform Initiative, *Alternatives to Incarceration in New South Wales* (2023) 8.

⁴¹ Alaina Cannon, *Evaluation of the Court Integrated Services Program: Final Report* (May 2017); Department of Justice, *Economic Evaluation of the Court Integrated Services Program (CISP): Final report on economic impacts of CISP* (November 2009), as cited in Justice Reform Initiative, *Alternatives to Incarceration in New South Wales* (2023) 8.

⁴² Justice Reform Initiative, *Alternatives to Incarceration in New South Wales* (2023) 44.

⁴³ Ibid.

wrongdoing. Our clients describe feeling judged and ostracised from the community because of the regularity of police visits to their properties.

These attendances can also place a strain on the relationships between a bailed person and those they reside with. Family or friends may implicitly blame the bailed person for the disruptive police attendances. Where the bailed person is a child, this can damage important parent-child relationships. It may also, if the strain is too great, lead to more serious consequences, like the bailed person being asked to no longer reside at the premises. Depending on the person's circumstances, this can lead to homelessness or returning to an unsafe situation like a residence with a former partner.

These burdens and strains are likely to be exacerbated if police are given additional powers with respect to others who may be at the same property as a bailed person. As with our response to Issue 6, we are concerned that these powers and the interferences they will cause are disproportionate to the interest in ensuring bail compliance. Eroding trust between citizens and police, and damaging the bailed person's relationships with the people they live with and who may support them, are counterproductive to community policing and facilitating a bailed person's rehabilitation.

The burdens and strains on others at the property are illustrated in the below case study of Centre clients James, Anna and Megan.

Case Study 3: James and Anna*

James was granted bail with a curfew condition and a residence condition requiring that he live at his partner Anna's house. There was no enforcement condition attached to James's bail.

Police records show that, in a three-month period, police came to their home on at least 52 occasions between 9pm and 3:00am, without ever suspecting that James was breaching his bail. Many checks occurred after 11:30pm and more than once a night.

Police often shone their torches into the bedroom window before knocking on the door. Sometimes, when James opened the door to police, police would shine their torch directly into his eyes. Other times, the police would flash the sirens and lights on their police car once or twice outside the house before checking bail.

At the time the checks were happening, Anna was heavily pregnant and her three-year-old son also lived at the property. Anna's son usually went to bed at around 7:30 PM. James and Anna would go to bed shortly after, at around 8:00 PM. Because of these early bed times, the bail compliance checks would always wake up James and Anna and also often woke Anna's son up.

James's neighbours asked him why the police came so much and said words to the effect of 'you must have done something bad for the coppers to come every night'. James said, 'I felt really funny and nervous about the police coming round all the time ... at one point during the bail checks, I felt like hanging myself. It was just all getting too much. Anyone would think I murdered someone, the way police were checking on me.'

Anna said 'I am a light sleeper; I wake up easily if there is a noise. The bail checks woke me up and made me tired during the day ... I was pregnant at the time and already emotional and tired. The bail checks added stress to my relationship with James and led to arguments and fighting'.

**Clients' names have been changed to protect privacy.*

Case Study 4: Megan*

Megan is a single mother of three young boys, living in regional NSW. She and her family were subject to 153 visits by NSW Police to her home over 20 months. Many visits occurred between midnight and 4am.

‘They would come anytime. Sometimes very late at night or early in the morning. Often more than once a night. I thought I had to let them in, or the boys would be locked up,’ said Megan.

Two of Megan’s young sons (aged 11 and 13 when the visits started) were on bail after being found as passengers in a stolen car. Police said they attended Megan’s home to conduct bail checks but the boys had no bail enforcement conditions authorising visits by police.

‘They would come in the middle of the night. I’d hear them bang on the door then knock on the window. Sometimes they would shine torches in windows or let themselves in through the back gate. I would have to get the boys up or walk the police in to show them they were sleeping.’

Megan suffers from a health condition that can be debilitating. The impact of the prolonged, invasive visits is being felt throughout her family.

‘It’s made me scared and stressed. It’s affected my sleep. Being woken up at all hours made us all exhausted. The boys missed school because they were too tired to go.’

‘My boys have changed from the visits. They’ve shut down. They’re more timid. They’re scared to open the door, even for family.’

‘This isn’t just a problem that affects me, it affects my community and other family members. I’m a proud Aboriginal woman and I am raising my boys to be proud Aboriginal men. It isn’t right that the police target Aboriginal people.’

‘Police have got a job to do, I understand that. But I have a job to do as a mother; to grow my boys up well. And they are stopping me from doing that, and this sort of policing has impacted generations and generations.’

**Client’s name has been changed to protect privacy.*

Issue 7

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

It is not clear to us what this proposal would seek to achieve, other than avoiding the legislative safeguards described in our response to Issue 4. As we describe in that response, those safeguards play an important role in balancing the intrusions into the life of the bailed person against the objectives sought to be achieved by bail compliance through enforcement action.

We would not support this proposal without further details of how the rights of bailed persons and those they reside with would be safeguarded.

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?

We do not consider that the Bail Act lacks clarity in this respect. The procedure for seeking an enforcement condition and the powers it enlivens are clear. Reliance on the implied licence appears to us a deliberate attempt to avoid the procedures and safeguards of the enforcement condition regime, and not the result of a genuine misunderstanding about the legislation.

In our view, it is NSW Police procedures that should be amended to make clearer the circumstances in which police can do bail compliance checks, and to ensure that police practices comply with the existing statutory regime. The better solution is for the Bail Compliance Standard Operating Procedures to be amended, so that this position is clearly understood and implemented in police practice. The Bail Compliance Standard Operating Procedures should be amended, to expressly provide that:

1. Police officers must seek an enforcement condition from the court, through the prosecutor, if they are of the view that it is necessary to monitor compliance with a person's underlying bail conditions.
2. Where no bail enforcement condition is ordered by the court, police officers must not enter property to monitor a person's compliance with underlying bail conditions.
3. Where an enforcement condition is ordered by the court, police officers must not enter property for the purposes of monitoring a person's compliance with underlying bail conditions outside of the terms of that order as to time and frequency of monitoring.

These changes are essential if the goal is to ensure police practice is lawful and non-discriminatory.

Additional concerns and comments

In this final section of our submission, we note some additional concerns and comments regarding bail compliance checks.

Disproportionate impact on Aboriginal and Torres Strait Islander people

We are concerned by the disproportionate impact of bail compliance check practices on Aboriginal and Torres Strait Islander people. Below, we have expressed the data from Table 1 of the Issues Paper, sourced from responses to budget estimates questions, in different forms to illustrate the racial disproportion in current policing practice.

To highlight just some of these numbers, in 2021-2022, 50.64% of adult bail compliance checks occurred on Aboriginal and Torres Strait Islander people, who made up 41.98% of the cohort

being checked. This is despite, according to Table E1 of the Issues Paper, Aboriginal and Torres Strait Islander adults only making up 20.12% of all adults granted bail at first court appearance.

Similarly, in 2021-2022, 75.86% of youth bail compliance checks occurred on Aboriginal and Torres Strait Islander young people, who made up 64.48% of the cohort being checked. This is despite, according to Table E1.1 of the Issues Paper, Aboriginal and Torres Strait Islander young people making up only 49.21% of all young people granted bail at first court appearance.

Aboriginal and Torres Strait Islander adults and young people are checked in the absence of an enforcement condition at much higher rates than non-Indigenous people on bail. For the four years for which there was budget estimates data, non-Indigenous adults were checked at an average rate of between 6.58 (2019/20) and 7.47 (2018/19) checks per person, whereas Aboriginal and Torres Strait Islander adults were checked at rates between 9.96 (2021/22) and 11.92 (2018/19) checks per person. The rates of over-representation in checks per person were between 1.42x (2021/22) and 1.60x (2018/19).

The disproportion is similar for young people. Non-Indigenous young people were checked at an average rate of between 9.41 (2018/19) and 10.40 (2021/21) checks per person, whereas Aboriginal and Torres Strait Islander young people were checked at rates between 15.00 (2019/20) and 17.96 (2021/22) checks per person. The rates of over-representation in checks per person were between 1.49x (2020/21) and 1.73x (2021/22).

These figures also demonstrate that young people are, in general, being checked on average much more frequently than adults. This should cause independent concern where the goal for young people should be to decrease interactions with the criminal legal system.

People over the age of 18 years

Year	Proportion of checks on Aboriginal or Torres Strait Islander people	Proportion of checked people who were Aboriginal or Torres Strait Islander	Average checks per CNI (Aboriginal and Torres Strait Islander people)	Average checks per CNI (non-Indigenous people)	Average checks per CNI over-representation for Aboriginal and Torres Strait Islander people
21/22	50.64%	41.98%	9.96	7.02	1.42x
20/21	53.56%	43.35%	10.80	7.17	1.51x
19/20	55.53%	43.98%	10.42	6.58	1.58x
18/19	57.60%	45.99%	11.92	7.47	1.60x

People under the age of 18 years

Year	Proportion of checks on Aboriginal or Torres Strait Islander people	Proportion of checked people who were Aboriginal or Torres Strait Islander	Average checks per CNI (Aboriginal and Torres Strait Islander people)	Average checks per CNI (non-Indigenous people)	Average checks per CNI over-representation for Aboriginal and Torres Strait Islander people
21/22	75.86%	64.48%	17.96	10.39	1.73x
20/21	67.18%	57.90%	15.48	10.40	1.49x
19/20	70.66%	61.34%	15.00	9.88	1.52x
18/19	76.54%	65.96%	15.85	9.41	1.68x

One of the reasons for this disproportion is likely to be the broad discretion police officers are currently exercising to conduct bail compliance checks in the absence of an enforcement condition. When police officers enjoy a broad discretion to select who they target and when they target them, they regularly apply this discretion in discriminatory ways in what has been described as a reliance by police on ‘racialised proxies for risk to construct suspect communities’.⁴⁴ The evidence with respect to bail compliance checks is consistent with the weight of evidence that, more generally, police discretionary decisions work against the interests of Indigenous people.⁴⁵ This is a further reason the legislative safeguards provided for in the enforcement conditions regime are so important.

Use of risk assessment tools

We were concerned to read in the Commission’s Issues Paper that the Bail Compliance Standard Operating Procedures published in November 2023 have introduced a risk-based priority assessment to inform officers about how frequently to conduct bail compliance checks. We were not aware of the existence of this assessment process and have not had the opportunity to scrutinise its methodology. We are concerned that a risk assessment tool, unless properly constructed, will codify pre-existing biases, exacerbating the already disproportionate use of bail compliance checks on communities experiencing disadvantage.

As was the experience with the STMP, it is often the case that risk assessment tools simply capture disadvantage, complex needs and vulnerability as proxies for risk, and legitimise reliance on these indicators of risk through a quasi-scientific, ‘objective’ framework. Risk assessment

⁴⁴ Vicki Sentas, *Traces of Terror: Counter-Terrorism, Law, Policing and Race* (Oxford University Press, 2002); Louise Boon-Kuo et al, ‘Policing Biosecurity: Police Enforcement of Special Measures in New South Wales and Victoria during the COVID-19 Pandemic’ (2021) 33(1) *Current Issues in Criminal Justice* 76, 77.

⁴⁵ Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 2015) 153.

technology relied on for predictive policing is not neutral, and it is likely that assumptions of suspicion, risk and racialised criminalisation will influence the design of any such tool.⁴⁶

In relation to the STMP, the Commission found that ‘the tools police might use to predict the likelihood of reoffending are unlikely to be neutral and will be influenced by historical and cultural assumptions’.⁴⁷ We believe the same will be true of any tool used by police to predict the likelihood of breach of bail.

A wealth of research has occurred on the propensity of predictive policing tools to disproportionately impact ethnic and racial minorities.⁴⁸ Data collection focuses on communities that are already subject to disproportionate surveillance and over-policing as a result of racial and ethnic profiling. Using historical crime data to create predictive models builds upon a racialised bias that further perpetuates and justifies disproportionate and racialised policing responses.⁴⁹ As Adelle Ulbrick explains:

Technology is neither neutral nor objective – it is based on human interactions that perpetuate socio-cultural inequalities and biases and act to disproportionately target racially marginalised communities (Williams & Kind, 2019). Assumptions of risk, suspicion and criminalisation affect the ways in which technology is developed, moderated, implemented and evaluated, particularly in the policing context (Haining & Law, 2007).

In the case of bail compliance checks, we urge significant caution in the use of a risk assessment tool which has not been subjected to external scrutiny to check for the undue influence of pre-existing or improper biases.

Multiple, conflicting bail conditions

A practical concern regarding bail compliance that we have experienced in our work is that bailed people may have multiple, conflicting sets of bail conditions in force at the same time. Multiple and conflicting conditions make it difficult for a person to know what bail conditions apply to them at any point in time, complicating both compliance by the bailed person and enforcement by police.

For example, one bail decision may impose a 7pm to 7am curfew condition. Another bail decision made later in relation to a different charge may impose a 7pm to 5am curfew. The bailed person has a job she needs to attend at 6am, which the court accounted for when imposing the shorter

⁴⁶ Patrick Williams P and Eric Kind, *Data-driven policing: The hardwiring of discriminatory policing practices across Europe* (European Network Against Racism, 2019), 14.

⁴⁷ The Law Enforcement Conduct Commission, *Operation Tepito – Final Report* (October 2023) 3.5.2.

⁴⁸ Brian Jordan Jefferson, ‘Predictable Policing: Predictive Crime Mapping and Geographies of Policing and Race’ (2018) 108(1) *Annals of the American Association of Geographers* 1; Patrick Williams P and Eric Kind, *Data-driven policing: The hardwiring of discriminatory policing practices across Europe* (European Network Against Racism, 2019); Will Douglas Heaven, ‘Predictive policing algorithms are racist. They need to be dismantled’ (2020) *MIT Technology Review*; Robert Haining and Jane Law, ‘Combining police perception with police records of serious crime records of serious crime areas: A modelling approach’ (2007) 170(4) *Journal of the Royal Statistical Society* 1019; Adelle Ulbrick *Predictive Policing and Young People: The discriminatory impacts of pre-emptive and racialised policing in Victoria* (Police Accountability Project, 2021); Julia Angwin et al, ‘Machine Bias: There’s software used across the country to predict future criminals. And it’s biased against blacks’ (2016) *ProPublica*.

⁴⁹ Adelle Ulbrick *Predictive Policing and Young People: The discriminatory impacts of pre-emptive and racialised policing in Victoria* (Police Accountability Project, 2021), 24.

curfew on the latter charge. However, if police are looking only at the earlier set of conditions, police may arrest the bailed person for breach of bail at 6am. This issue causes confusion for the bailed person and police alike.

There is limited caselaw or guidance to clarify how bail conditions operate in these circumstances. One view is later bail decisions ought to supersede earlier decisions or result in an implied repeal to the extent of any inconsistency. However, a recent decision in the Court of Criminal Appeal may point in the other direction. Justice Dhanji (Macfarlan JA and Bellew J agreeing) in *longi v R* [2022] NSWCCA 42 held bail and bail decisions are specific to offences.⁵⁰ His Honour said ‘it remains the case that bail decisions are made with respect to particular offences and not in relation to some broader idea of a proceeding or an arrest’.⁵¹ It is therefore arguable a person charged with six offences could have six different sets of potentially conflicting bail conditions on foot at one time, all of which they are required to comply with. If the Bail Act is to be amended to clarify any ambiguity, this is one that we would consider most pressing.

No obligation exists under the Bail Act or otherwise for the bail decision maker to consider previous bail conditions, even when those bail conditions were made by a decision maker in the same court or jurisdiction. Providing guidance to courts highlighting the practical issue of having multiple conflicting bail conditions (for example, through the introduction of templates or updates to bench books) is likely to be a step in the right direction. With that said, it is likely that the court systems more broadly need to be modernised. For instance, NSW’s local courts, which oversee the vast majority of bail applications, are using desperately out-of-date paper-based systems. To address this issue, we suggest a significant investment in upgrading court information technology systems, informed by the views of court staff, police, lawyers and others who are using or relying on these court systems on a regular basis.

Potential agency maladministration and serious misconduct

Finally, we suggest that the LECC consider whether the police practice of conducting bail compliance checks in purported reliance on the implied licence would appropriately be the subject of an investigation further to s 51 of the *Law Enforcement Conduct Commission Act 2016* (NSW) (‘LECC Act’).

We are deeply troubled that, as detailed in our response to Issue 2 above, having explicitly recognised the need for a legislative basis to conduct bail compliance checks, NSW Police have then chosen to act outside that regime after the amendments to the Bail Act were passed. This, coupled with experience from our case work that police have continued conducting bail compliance checks in purported reliance on the implied licence after it was explicitly revoked, give rise to concerns that police are not engaging in this practice in good faith, but instead to deliberately avoid the procedures and safeguards of the bail enforcement condition regime.

Section 51(d) of the LECC Act provides that the Commission may exercise its investigation powers in respect of conduct if the conduct concerned is (or could be) agency maladministration. Agency maladministration is defined in s 11(1) of the LECC Act:

⁵⁰ *longi v R* [2022] NSWCCA 42.

⁵¹ *Ibid.*

For the purposes of this Act, agency maladministration means any conduct (by way of action or inaction) of the NSW Police Force ... other than excluded conduct—

(a) that is unlawful (that is, constitutes an offence or is corrupt conduct or is otherwise unlawful), or

(b) that, although it is not unlawful—

(i) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or

(ii) arises, wholly or in part, from improper motives, or

(iii) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or

(iv) arises, wholly or in part, from a mistake of law or fact, or

(v) is conduct of a kind for which reasons should have (but have not) been given, or

(c) that is engaged in in accordance with a law or established practice, being a law or practice that is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its effect.

We have outlined above in response to the Issues Paper questions the reasons that police entries onto property in reliance on the implied licence are unlawful and a trespass against the occupiers. By explicitly providing to the contrary in the Bail Compliance Standard Operating Procedures, NSW Police more broadly have authorised and condoned this unlawful conduct.

As the responses to budget estimates detailed at Table 1 of the Issues Paper reveal, police officers conduct more than 100,000 bail compliance checks on over 10,000 people per year in the absence of an enforcement condition. Nearly 60 different police area commands or departments are responsible for these checks. This is potentially significant and widespread unlawful conduct.

In addition to the unlawfulness of the conduct:

- current practice is improperly discriminatory in its effect, with bail compliance checks in the absence of an enforcement condition:
 - being disproportionately conducted on First Nations people, particularly First Nations young people; and
 - occurring more regularly in relation to each First Nations person, particularly each First Nations young person, as compared with each non-Indigenous person.
- the frequency and timing of bail compliance checking is often unreasonable, unjust or oppressive in its effect on the person on bail, without due regard to the purposes for which the bail conditions exist;
- by engaging in excessive bail compliance checking on young people particularly, NSW Police are prioritising unreasonable and oppressive policing strategies that tend towards increased interactions with the criminal justice system; and

- excessive bail compliance checks on young people particularly are unreasonable and oppressive in the intrusive and disruptive impact on them and their families, impeding rehabilitation efforts.

If this conduct amounts to agency maladministration, it may also amount to 'serious misconduct': s 10(1)(b):

For the purposes of this Act, serious misconduct means any one of the following - ... **a pattern of officer conduct, officer maladministration or agency maladministration** carried out on more than one occasion or that involves more than one participant that is indicative of systemic issues that could adversely reflect on the integrity and good reputation of the NSW Police Force. (emphasis added)

Given the scale and the scope of the practice of checking bail compliance in reliance on the implied licence over many years, it may be appropriate to conclude that this is a pattern of agency maladministration amounting to serious misconduct.