



THE LAW SOCIETY  
OF NEW SOUTH WALES

12 November 2012

The Hon. Paul Lynch, MP  
Shadow Attorney General and Minister for Justice  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

  
Dear Mr Lynch,

**Bail Amendment (Enforcement Conditions) Bill 2012**

The Law Society's Criminal Law Committee and Juvenile Justice Committee (Committees) have reviewed the *Bail Amendment (Enforcement Conditions) Bill 2012*.

**The Committee's position**

The Committees are strongly of the view that *Lawson v Dunlevy* [2012] NSWCA 48 is good law, and enforcement conduct directions should be prohibited.

The only situation where enforcement conduct directions may be necessary would be if e-bail is introduced, in order to allow monitoring and ensure compliance with requirements that currently attach to home detention orders. Enforcement conduct directions should be outside the ambit of ordinary bail.

**Comments on the provisions of the Bill**

If enforcement conduct directions are to be introduced, their use must be restricted and targeted to risk, and constrained by safeguards. They should not be issued as a matter of course.

The Committees make the following suggestions for amendments to the Bill:

**Sub-section 37AA(4)**

Sub-section 37AA(4) should be amended to require the court to be satisfied that "exceptional circumstances" exist before an enforcement condition can be placed on a bail condition.

The word "and" should be added at the end of sub-paragraphs (a) and (b).

**Sub-section 37AA(5)**

Sub-section (5) provides that a court may only impose an enforcement condition at the request of the prosecutor. In the Second Reading Speech the Minister for Police and Emergency Services explained that the rationale behind this provision is to ensure that enforcement conditions are not imposed where police do not require them.

The Committees agree that the court should not be able to impose enforcement conditions on its own motion. However, if an accused considers that bail is unlikely to be granted, and that agreeing to specific enforcement conditions could persuade the court to grant bail, then the accused should be permitted to make such an application.

#### Sub-section 37AA(6)

Sub-section (6)(a) provides that a police officer may give a direction of a kind specified in the enforcement condition in the circumstances specified in the enforcement direction. However, paragraph (b) allows police to take enforcement action at any time the police officer has a reasonable suspicion that a breach has occurred even if it is outside the restrictions of the enforcement conditions set by the court. The effect of paragraph (b) is to render paragraph (a) redundant whenever a police officer has a reasonable suspicion of a breach.

The Committee submits that paragraph (b) should be deleted and paragraph (a) should be amended so that it is subject to a reasonable suspicion test as follows:

... a police officer may give a direction of a kind specified in the enforcement condition:

- (a) in the circumstances specified in the enforcement condition, where 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.

The police must have a reasonable suspicion that the person is breaching the relevant conduct requirement. If a reasonable suspicion test is not included it would allow the exercise of a power that would not otherwise be available, and is not subject to the safeguards that otherwise attach to the exercise of regular law enforcement powers.

The Committees also note that while enforcement conditions can be imposed by a court only, the new provisions are included in the legislation under the heading "Part 5 Provisions Relating to Both Police and Court Bail". The Committees are concerned that this could lead to confusion, and to police officers incorrectly assuming that they are authorised to impose enforcement conditions.

#### Review by the NSW Ombudsman

The Bill should include a provision requiring the NSW Ombudsman to keep under scrutiny the use of enforcement conditions and report within two years of the commencement of the legislation.

Yours sincerely,



Justin Dowd  
**President**