



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: RBG640628

27 July 2012

Director
Criminal Law Review
NSW Department of Attorney General and Justice
GPO Box 6
SYDNEY NSW 2001

Dear Sir/Madam,

Enforcement conduct directions

Thank you for the opportunity to make a submission in relation to Recommendation 16.1 of the Law Reform Commission's report on the law of bail. The Law Society's Criminal Law Committee and Juvenile Justice Committee (Committees) have reviewed the recommendation and the Law Reform Commission's commentary.

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 Committees note that because *Lawson v Dunlevy* was delivered at a very late stage of the reference, the Law Reform Commission has only provided a provisional view on enforcement conduct directions. The Commission raised the possibility of a supplementary reference in which practical and technical issues could be identified and resolved by a report. The Committees support this suggestion. Further consultation on this issue is essential.

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.

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 suggested threshold requirements in Recommendation 16.1(2) provide as follows:

(2) An authority may impose an enforcement conduct direction if the authority considers that:

(a) without such a direction, police would not have adequate opportunity to detect and act on noncompliance with the underlying conduct direction, and

(b) the imposition of the enforcement conduct direction is reasonable in the circumstances, having regard to the history of the released person and the likelihood or risk of that person breaching the underlying conduct direction.

The threshold requirements should also include a requirement that before an enforcement conduct direction can be placed on a bail condition "exceptional circumstances" must be shown to exist.

The suggested requirements for precision and specificity when imposing enforcement conduct directions in Recommendation 16.1(3) provide as follows:

(3) The conduct enforcement direction must:

(a) state with precision what is required (for example, it must identify with precision, the form of the testing that may be employed); and

(b) specify such limits on the frequency with which the power can be exercised or the places or times at which it can be exercised, to ensure that it is not unduly onerous in all the circumstances.

In addition, the exercise of enforcement powers should not be arbitrary, but subject to a reasonable suspicion test. 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 agree with the Law Reform Commission's suggestion that if enforcement conduct directions are introduced, their application by police should be monitored by the Ombudsman.

The Committees look forward to on-going consultation on this important issue.

Yours sincerely,



Justin Dowd
President