

**BAIL FOLLOWING CONVICTION AND BEFORE SENTENCING  
THE NEW SECTION 22B OF THE *BAIL ACT 2013***

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*Note: This preliminary paper has been produced, at short notice, as an urgent response to the passing of this amendment on 23 June 2022. There will likely be further updates to this paper, other resources and further consideration of the amendment as it takes effect.*

**THE LEGISLATION**

1. On 23 June 2022, the Bail Amendment Bill was passed by Parliament. We understand that the Act may commence early next week once it receives assent. Section 22B reads as follows:

**22B Limitation regarding bail during period following conviction and before sentencing for certain offences**

(1) During the period following conviction and before sentencing for an offence for which the accused person will be sentenced to imprisonment to be served by full-time detention, a court—

(a) on a release application made by the accused person—must not grant bail or dispense with bail, unless it is established that special or exceptional circumstances exist that justify the decision, or

(b) on a detention application made in relation to the accused person—must refuse bail, unless it is established that special or exceptional circumstances exist that justify the decision.

(2) If the offence is a show cause offence, the requirement that the accused person establish that special or exceptional circumstances exist that justify a decision to grant bail or dispense with bail applies instead of the requirement that the accused person show cause why the accused person's detention is not justified.

(3) Subject to subsection (1), Division 2 applies to a bail decision made by a court under this section.

(4) This section applies despite anything to the contrary in this Act.

(5) In this section—

**conviction** also includes a plea of guilty.

**Note— Conviction** is defined in section 4(1) to include a finding of guilt.

2. In broad terms, it seems to us that the power in s 22B could only be exercised if the following facts are satisfied:

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<sup>1</sup> With thanks to Richard Wilson SC, Public Defenders Chambers.

- a. That the accused person has either:
  - i. been found guilty, or
  - ii. has entered a plea of guilty;
- b. That the accused person **will** be sentenced to imprisonment to be served by way of full-time imprisonment.

### **WHO DOES THIS AFFECT?**

3. This amendment affects an accused who pleads guilty or is found guilty (whether or not they are convicted at the time of the finding of guilt).
4. This fact is easily verified. Either there has been a finding of guilt, conviction, plea of guilty, or there has not been. It is clear that the question is applicable regardless of *where*, and potentially when, a plea is entered. If the accused is charged with a strictly indictable offence but enters a plea in the Local Court, the accused may face a situation where the Magistrate responsible for committing the matter is asked to deal with a detention application and consider the applicability of s 22B.

### **HOW DOES IS AFFECT THOSE PERSONS?**

5. During the period after conviction (which includes the period after a plea of guilty is entered):
  - a. If the prosecution make a detention application, the court must refuse bail unless there are special or exceptional circumstances; or
  - b. If the person makes a release application, the court must not grant or dispense with bail unless there are special or exceptional circumstances.
6. However, there is an essential pre-condition to whether the court even proceeds to consider the above, which is that it only applies to an accused person who **will be sentenced to imprisonment to be served by full-time detention.**

### **A PERSON WHO “WILL BE SENTENCED TO IMPRISONMENT TO BE SERVED BY FULL-TIME DETENTION”**

7. This paper, preliminary as it is, does not purport to explain jurisdictional error in any depth at all. The critical information for practising lawyers to know (and upon which to craft submissions) is whether the Court has reached the requisite state of satisfaction about a number of jurisdictional facts which are required to enliven the restriction under s 22B of the *Bail Act 2013*.
8. Satisfaction of these matters, on a plain reading of the section, involves a state of *certainty*: the Court making the determination under s22B must be satisfied that the person **will** be sentenced to a term of imprisonment, and that such term of imprisonment **will** be by way of full time detention.

9. The construction of the provision is such that the Court would need to be positively satisfied that the person will be sentenced to full-time imprisonment. This is an extremely high threshold test that must be overcome before the jurisdiction of the court is enlivened.
10. The [Statement of Public Interest to the Bail Amendment Bill](#) states:

Offenders will not be taken into remand under the provision in circumstances where it is possible that they will later be sentenced to a lesser penalty and released, or are being considered for an Intensive Corrections Order, for example, as by very definition, these are not circumstances where the offender “will be sentenced” to full time detention.
11. Section 22B should have no application if the court is not first satisfied that the person “will be” sentenced to full-time imprisonment. That a person “will be” sentenced to full-time imprisonment is a level of satisfaction that is higher than satisfaction that the person might, may, could or most likely will be sentenced to full-time imprisonment. It might be accepted that even the remotest possibility of a sentence other than full-time imprisonment being imposed is sufficient to displace the court’s jurisdiction to apply s 22B.
12. Moreover, we consider that the state of certainty about a full time custodial sentence does not involve certainty on the part of the s22B decision-maker alone, even if that decision maker is of the opinion that they would not impose anything other than full time imprisonment. This is because the section is not couched in terms of the opinion or satisfaction of the court, but in absolute terms. We consider that the decision-maker on bail must be satisfied that no sentencing court acting reasonably and having heard all submissions and received all evidence at sentencing proceedings, , could reach a conclusion that a sentence other than one of full-time imprisonment was warranted. It is clearly not enough to say that the threshold under s 5 *Crimes (Sentencing Procedure) Act 1999* (NSW) has been crossed.
13. Judicial review for both jurisdictional error and non-jurisdictional error on the face of the record will be available from a decision by a court that it is restricted by s 22B of the Act.<sup>2</sup> The supervisory jurisdiction of the Supreme Court is governed by s 69 of the *Supreme Court Act 1970*.
14. The state of satisfaction about those matters set out in s 22B are likely jurisdictional facts upon which the presence of jurisdiction to refuse bail by reason of s 22B is conditioned: *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at 652 [130]. The decision maker is required to perform, in good faith, an evaluative judgment based upon the matters set out in the section, properly construed.<sup>3</sup> If the judgment was based upon a misconstrued criterion, the judgment is one not authorised by the Parliament and this would be jurisdictional error.<sup>4</sup>

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<sup>2</sup> *Attorney General of NSW v Chiew Seng Liew* [2012] NSWSC 1223 at [25].

<sup>3</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship and Another; Plaintiff M106/2011 v Minister for Immigration and Citizenship and Another* (2011) 244 CLR 144 (**Plaintiff M70**) at [59].

<sup>4</sup> *Plaintiff M70* at [59].

## THE DIFFERENCE BETWEEN S22B AND S18(1)(i1)

15. Practitioners should note that the s22B test is significantly different to the bail consideration in s18(1)(i1), being the “likelihood of a custodial sentence being imposed”. Section 22B provides for a higher threshold test.

## SPECIAL AND EXCEPTIONAL CIRCUMSTANCES

16. Only if the court is positively satisfied that the person will be sentenced to full-time imprisonment does it go on to consider the special and exceptional circumstances test. A short selection of examples of how this test has been applied in the context of appeals bail include the following:
  - a. *Gregg v Director of Public Prosecutions (Cth)* [2019] NSWCCA 254, the applicant contended that special and exceptional circumstances were made out by virtue of a number of reasons, being the likelihood of the term of the sentence expiring by the time of determination of the appeal; the appeal having reasonable prospects of success; the applicant not posing any unacceptable risk; the applicant faced isolation on home detention which would be unremedied on appeal; there was no prejudice to a “victim”; the preparation of the appeal has been expeditious. The Court (Brereton JA, Simpson AJA, R A Hulme J) found special and exceptional circumstances on three bases: the appeal on sentence was “reasonably arguable”, the sentences would have largely been served by the time the appeal was determined and the Crown did not contend there were any unacceptable risks.
  - b. *R v Paul Campbell (a pseudonym)* [2017] NSWSC 1844, Hamill J found special and exceptional circumstances as a result of a “combination of factors”, those factors being “the prospects of success on appeal, so far as they can be considered at this distance, and the relatively short sentence imposed, along with the applicant’s age, lack of criminal convictions, good efforts at rehabilitation and the undesirability of delaying his commencement at the new school”.
  - c. *R v Vaziri* [2016] NSWSC 1283, Garling J found special and exceptional circumstances were made out on the basis that one ground of appeal had reasonable prospects of success, at all times up until imposition of the final sentence the applicant complied with his bail conditions, at all times the applicant appeared at Court when required; a substantial part of the non-parole period would be served at the time of the appeal being heard; and a grant of bail would not adversely impact the public interest, and his personal circumstances (including ill health and communication difficulties) point to there being no public interest in his being incarcerated prior to appeal.
17. Separately, it should be kept in mind that while a deferral of sentencing pursuant to s 11 *Crimes (Sentencing Procedure) Act 1999* is not in itself a type of penalty, the potential for such a deferral might lead to a sentencing outcome other than full-time

imprisonment, even for serious offences. Orders under s 11 can be made even if a custodial sentence is inevitable (see *R v Rayment* [2010] NSWCCA 85). This may be relevant to special and exceptional circumstances.

## IMPLICATIONS

### *Pleas of guilty*

18. This legislation may have an impact upon pleas of guilty. Practitioners must now incorporate into their advice that a plea of guilty, including at the Local Court, impacts the person's prospects of being granted bail (if on remand) or the person's remaining at liberty (if on bail at the time of the plea).

### *Preparation for an application where s 22B applies*

19. It remains to be seen how the provision will operate in practice. However, if you are met with a detention application or are making a release application where s 22B may apply, we suggest you might first consider the following questions.

**Q1. Has the person pleaded guilty or been found guilty?**

If not, section 22B does not apply.

If so, proceed to Q2.

**Q2. Is the Court satisfied that the person will be sentenced to imprisonment to be served by way of full-time detention?**

If not, section 22B does not apply.

If so, proceed to Q3.

**Q3. Are there special or exceptional circumstances justifying the bail decision?**

On a release application, if yes, bail can be granted or dispensed with (subject to the other provisions of the Bail Act, except show cause).<sup>5</sup>

On a release application, if no, bail must be not granted.

On a detention application, if yes, bail can be granted or dispensed with (subject to the other provisions of the Bail Act, except show cause).<sup>6</sup>

On a detention application, if no, bail must be refused.

20. With respect to submissions, consider the inquiries you intend to make regarding the subjective case on sentence that may impact upon the sentencing outcome. This might also be relevant to whether there are special or exceptional circumstances. For example, do you intend to seek:

- a. Expert evidence, including psychological and psychiatric evidence?

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<sup>5</sup> Note the new s22B(2) states: *If the offence is a show cause offence, the requirement that the accused person 15 establish that special or exceptional circumstances exist that justify a decision 16 to grant bail or dispense with bail applies instead of the requirement that the 17 accused person show cause why the accused person's detention is not justified.*

<sup>6</sup> As above.

- b. Evidence from family, community or next of kin?
  - c. Educational or work history?
  - d. Past physical or mental health history – are the inpatient records to be obtained?
  - e. References from supporters or other persons?
21. Consider whether there are any JIRS statistics or comparative cases that demonstrate that a sentence other than full-time imprisonment has been imposed for the relevant offence. The Public Defenders sentencing tables can be found [here](#).
22. Put on some evidence on the detention or release application, perhaps by affidavit, about the inquiries you have made and that you expect to make on the subjective case (but with care to be taken so as to not prejudice the offender's position on sentence). Assuming we are correct that the question of whether the person will be sentenced to a term of imprisonment requires a consideration of what material might be tendered eventually on sentence, we consider that it is sufficient to give only as much detail about the content of those inquiries as is necessary in the circumstances, without binding the offender to any particular case.
23. It would be prudent to start making inquiries about the subjective case on sentence as early as possible so that you have as much information as possible to bring to any application where s22B may apply.
24. Submissions should focus on whether:
- a. the Court determining the s22B question has reached a state of satisfaction:
    - i. that the accused person **will** be sentenced to imprisonment by way of full-time imprisonment;following a sentencing proceeding having heard all submissions and received all evidence.
  - b. Whether the Court making the bail decision is truly satisfied that no trier of fact, acting reasonably, could reach a conclusion that a sentence other than one of full-time imprisonment was warranted.

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