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.

Updated as at 27 June 2022.

THE LEGISLATION

1. On 23 June 2022, the Bail Amendment Bill was passed by Parliament. It was assented to on 27 June 2022. Section 22B reads as follows:

> **22B Limitation regarding bail during period following conviction and before sentencing for certain offences**
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> (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
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> (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.
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> (3) Subject to subsection (1), Division 2 applies to a bail decision made by a court under this section.
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> (4) This section applies despite anything to the contrary in this Act.
>
> (5) In this section—
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> ***conviction*** also includes a plea of guilty.
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> **Note—** ***Conviction*** is defined in section 4(1) to include a finding of guilt.

[1] With thanks to Richard Wilson SC, Public Defenders Chambers.

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

    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.[2] 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.[3] If the judgment was based upon a misconstrued criterion, the judgment is one not authorised by the Parliament and this would be jurisdictional error.[4]

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[2] *Attorney General of NSW v Chiew Seng Liew* [2012] NSWSC 1223 at [25].
[3] *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].
[4] *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 <u>will be</u> 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).[5]
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).[6]
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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[5] 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.*

[6] 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 that the accused person **will** be sentenced to imprisonment by way of full-time imprisonment, following a sentencing proceeding where a future sentencing Court has 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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27 June 2022

ADDENDUM[1] - SECTIONS 22B/32 OF THE *BAIL ACT 2013*

1. One matter which has been raised since concerns the approach to s 22B in light of the terms of s 32 *Bail Act 2013* (**the Act**). Section 32(1) states:

> Any matter that must be decided by a bail authority in exercising a function in relation to bail is to be decided on the balance of probabilities.

2. This raises a question of statutory construction as to whether the balance of probabilities consideration under s 32 alters the state of satisfaction that the individual "will be sentenced to imprisonment to be served by way of full-time detention". We consider that this may raise the following considerations:
   a. Reading s 22B as part of the broader scheme of the Act, a finding on the balance of probabilities that a person "*will* be sentenced to full time imprisonment" is qualitatively different to a finding that a person "*will more likely than not* be sentenced to full time imprisonment" ('**the reductive approach**'). The reductive approach may not accord with a harmonious reading of the Act, as a whole.
   b. To take the reductive approach, that is, to dilute the s 22B by operation of s 32, may not be consistent with the plain wording of s 22B.
   c. The reductive approach to s 22B as modified by s 32 may also be incongruous with the assessment of bail concerns under s 18, particularly, s 18(1)(i1).[2]
   d. Further support for this approach is found in extrinsic sources including the Second Reading Speeches[3] and the Statement of Public Interest.[4]
   e. We do not consider that the threshold changes the state of satisfaction that the individual "will be sentenced to imprisonment" to some lower threshold of "likelihood". One way to consider the issue may be to assume that that the balance of probabilities analysis under s 32 weighs upon the approach to be taken to satisfaction of evidentiary questions, rather than moderating the state of satisfaction expressed in the word "will" under s 22B. Without further judicial comment on the matter, we express no concluded view as to the best argument to support that position.
   f. While it is accepted that s 22B overrides the consideration under s 18 where a person "will" be sentenced to imprisonment, the provision might override s 18 in a large number of cases if all that is required under s 22B is a mere "likelihood" of the person being sentenced to imprisonment. That does not appear to accord with the intention of the legislation.
   g. We still consider that where a detention application is made, that places an onus on the prosecution to show, by its own evidence that establish facts on the balance of probabilities, that the convicted person will be sentenced to full-time imprisonment. The convicted person may adduce evidence that establishes facts on the balance of probabilities that may displace any state of certainty that the person will be sentenced to full-time imprisonment.

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[1] Addendum to Bail Following Conviction And Before Sentencing: The New Section 22B Of The *Bail Act 2013*, Nicholas Broadbent, Public Defenders Chambers[1], Rose Khalilizadeh, Forbes Chambers, 27 June 2022

[2] A bail authority is to consider the following matters, and only the following matters, in an assessment of bail concerns under this Division--… (i1) if the accused person has been convicted of the offence, but not yet sentenced, the likelihood of a custodial sentence being imposed,

[3] Second Reading Speech – Legislative Assembly

[4] Bail Amendment Bill 2022 Statement of Public Interest

h. Whether a person "will be sentenced to imprisonment to be served by way of full-time detention" may be considered a jurisdictional fact, that is, a fact of a preliminary nature that must be determined before the jurisdiction of s 22B is enlivened. The extrinsic or ancillary or preliminary nature of the relevant fact makes it more likely that the fact is jurisdictional.[5] An intention to establish a jurisdictional fact, to be determined objectively, may be found where the precondition to the exercise of the power is distinct from the matters to be addressed in exercising the power and can thus be characterised as "an essential preliminary to the decision-making process".[6]

i. So, another possible approach would be to distinguish the state of satisfaction about the jurisdictional fact under s 22B, that the person "will" be sentenced to full-time imprisonment, from the evidentiary onus in s 32. As Leeming JA, writing extra-curially, observes in *Authority to Decide – The Law of Jurisdiction in Australia (2nd ed)* (with citations omitted):

> *"…Commonly, a jurisdictional fact that is an opinion or a state of satisfaction will require not merely a bona fide attempt to be satisfied, but actual satisfaction, which will mean that if, say, matters which the statute requires to be taken into account are excluded, the requisite state of satisfaction will not be reached.*
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> *Accordingly, there are regularly two threshold questions of statutory construction: is something a precondition to the exercise of power and, if so, is the precondition the existence of a fact in the real world, or is the precondition merely a state of mind? As to the former question, it is desirable to distinguish a precondition to the exercise of power (whether that be a fact in the real world or a state of mind) from a prohibition or qualification upon the exercise of power. As to the latter question, where the statute refers in terms to "opinion" or "satisfied", that tends to be decisive. The converse argument is sometimes invoked, but where the statute is silent, there is apt to be a contestable question of construction as to the nature of the precondition, for:*
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> > *It is well established that the mere fact that a requirement is objectively expressed, rather than by reference to the satisfaction of the officer or tribunal concerned, is not decisive of the construction issue. Indeed, in relation to inferior courts, it has been said that there is a strong presumption against any jurisdictional qualification being interpreted as contingent upon the actual existence of a state of facts, as opposed to the decision-maker's opinion in that regard.*
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> *Ultimately, all turns on the terms of the legislation which confers the power…."*

j. The state of satisfaction in s 22B may relevantly be distinguished from the unacceptable risk test under s 19 of the Act which imports the notion of being "satisfied", as well as the show cause test under s 16A which imports the notion of cause being shown. Neither are in the unequivocal terms found in s 22B.

k. The threshold test should remain a high one. Where the liberty of an individual is at stake, a strict construction of the provision is to be preferred.[7]

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[5] *Timbarra Protection Coalition Inc v Ross Mining NL* [1999] NSWCA 8; 46 NSWLR 55 at [36]-[44] (Spigelman CJ).

[6] *Timbarra* at [52], referring to *Colonial Bank of Australasia v Willan* (1874) 5 PC 417 at 443; *Woolworths Ltd v Pallas Newco Ltd [2004] NSWCA 422; 61 NSWLR 707* at [46]-[49]; *Barrick Australia Ltd v Williams* [2009] NSWCA 275; 74 NSWLR 733 at [26].

[7] *Smith v Corrective Services Commission (NSW)* (1980) 147 CLR 134 at 139; [1980] HCA 49.