THE NEW SECTION 22C OF THE BAIL ACT 2013
BAIL FOR CHILDREN CHARGED WITH "CERTAIN SERIOUS OFFENCES"

Nicholas Broadbent and Rose Khalilizadeh
Public Defenders Chambers

Note: This preliminary paper has been produced at short notice as an urgent response to the passing of this amendment on 21 March 2024. It is our best attempt to analyse the section, prior to judicial consideration. This is not legal advice nor does it purport to be a comprehensive guide. There will likely be further consideration of the amendment, as well as further updates to this paper and other resources, once it takes effect. We note that the section is due to expire 12 months after its commencement.

THE NEW SECTION 22C

1. Section 22C is set to become part of the *Bail Act 2013* (NSW) (**Bail Act**) as a result of the passage of the *Bail and Crimes Amendment Bill 2024* (NSW) (**Bail Amendment**) on 21 March 2024. At time of writing, it is awaiting assent. It reads as follows:

> **22C Temporary limitation on bail for certain young persons in relation to certain serious offences**
>
> (1) A bail authority must not grant bail to a relevant young person for a relevant offence alleged to have been committed while the young person is on bail for another relevant offence unless the bail authority has a high degree of confidence the young person will not commit a serious indictable offence while on bail subject to any proposed bail conditions.
>
> (2) A decision under subsection (1) may be made only after—
> (a) an assessment of bail concerns is made under Division 2, and
> (b) consideration of whether any bail conditions could reasonably be imposed to address any bail concerns or risk the relevant young person will commit a further serious indictable offence.
>
> (3) To avoid doubt, the requirement under this section to establish that bail should be refused for the relevant young person remains with the prosecution.
>
> (4) This section applies despite anything to the contrary in this Act.
>
> (5) This section expires 12 months after this section commences.
>
> (6) In this section—
>
> ***motor theft offence*** means an offence under the following sections of the *Crimes Act* 1900—
> (a) section 154A,
> (b) section 154C,
> (c) section 154F.
>
> ***relevant offence*** means—
> (a) a motor theft offence, or
> (b) a serious breaking and entering offence, or
> (c) an offence under the *Crimes Act 1900*, section 154K, if the underlying offence is a motor theft offence or serious breaking and entering offence.
>
> ***relevant young person***, for a relevant offence, means an individual who is, at the time the relevant offence is alleged to have been committed—

(a) 14 years of age or more, and
(b) less than 18 years of age.

serious breaking and entering offence means an offence under the *Crimes Act 1900*, Part 4, Division 4 that is punishable by imprisonment for a term of 14 years or more.

serious indictable offence has the same meaning as in the *Crimes Act 1900*, section 4(1).

2. The tension in the provision arises as a result of the requirement for a "high degree of confidence that the young person will not commit a serious indictable offence". This appears, on the face of it, a positive finding in favour of the young person. However, the requirement remains with the prosecution to establish that bail should be refused, as set out in sub-section (3).

3. The creation of a new test raises questions of statutory construction and interpretation. Although the task of statutory construction begins and ends with the text, it is undertaken with regard to context and purpose.[1] To that end, it is useful to bear in mind provisions of the *Interpretation Act 1987* (NSW), including s 33 ("Regard to be had to purposes or objects of Acts and statutory rules") and s 34 ("Use of extrinsic material in the interpretation of Acts and other statutory rules").

ELEMENTS OF SECTION 22C

4. The section, and each sub-section, has several elements to it. The following is a breakdown of each of those elements and how they may be interpreted. Because it is important to read a statutory provision as a whole and within its context, a granular approach to the text is not necessarily appropriate. Nonetheless, we have taken this approach in an attempt to provide better understanding of the various components of s 22C and to assist practitioners where issues with specific aspects of s 22C arise.

Sub-section (1)

"A bail authority must not grant bail"

5. While the Bail Act has stepped away from the historical "presumptions" in relation to bail, the first element of sub-section (1) suggests (at least) a starting point, against the grant of bail.

"…to a relevant young person…"

6. A "relevant young person" is defined in the section. It is a young person who, at the time of relevant offence is alleged to have been committed, is above the age of 14 and below the age of 18. We consider that s 22C is likely to apply if they meet the definition of a "relevant young person" at the time of the fresh relevant offence. If the child is below the age of 14 at the time of the original offence for which they received an initial grant of bail,

[1] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [47] per Hayne, Heydon, Crennan and Kiefel JJ.

it appears this offence could be a "another relevant offence" within the meaning of s 22C(1), as the definition of "relevant offence" is not age-related.[2]

"… for a relevant offence alleged to have been committed…"

7. A "relevant offence" is defined in the section. It means a motor theft offence, a serious breaking and entering offence, or an offence under s 154K (the new "performance crime" offence") where the underlying offence is a motor theft offence or a serious breaking and entering offence.

8. A "motor theft offence" is defined as the following offences, only:

    a. s 154A (taking a conveyance without consent of owner. Note that this offence also includes being carried in a conveyance);

    b. s 154C (taking motor vehicle or vessel with assault or with occupant on board); and

    c. s 154F (stealing a motor vehicle, vessel or trailer).

9. A "serious breaking and entering offence" is defined under the *Crimes Act 1900* (NSW), Part 4, Division 4 as an offence that is punishable by imprisonment for a term of 14 years or more. At present, that means the following offences (using the title of each of the sections):

    a. Breaking out of dwelling-house after committing, or entering with intent to commit, indictable offence (s 109(1)) and same in circumstances of aggravation (s 109(2)) or special aggravation (s 109(3));

    b. Breaking, entering and assaulting with intent to murder etc (s 110);

    c. Aggravated enter dwelling-house (s 111(1)) or specially aggravated enter dwelling-house (s 111(3));

    d. Breaking etc into any house etc. and committing serious indictable offence (s 112(1)) and same in circumstances of aggravation (s 112(2) or special aggravation (s 112(3)); and

    e. Aggravated breaking etc into any house etc. with intent to commit serious indictable offence (s 113(2)) or specially aggravated breaking etc. into any house etc. with intent to commit serious indictable offence (s 113(3)).

10. The definition does <u>not</u> include offences of entering a dwelling-house with intent to commit a serious indictable offence (s 111(1)), breaking and entering with intent to commit a serious indictable offence (s 113(1)) nor being armed with intent to commit a serious indictable offence (and the other conduct captured by the same section – s 114).

[2] While the definition of "relevant offence" is not age related, we do note that the definition of "relevant young person" refers to a "relevant offence": s 22C(5).

"…while the young person is on bail for another relevant offence…"

11. For the section to apply, the young person needs to have been on bail for another relevant offence at the time the fresh offence is alleged to have been committed. For this reason, it is important to check:

    a. the date of the fresh offence; and

    b. the offence(s) to which the existing bail attaches.

12. It should be noted that as a result of the transitional provision, s 22C "extends to offences committed or alleged to have been committed, or charged, before the commencement of the amendment".

13. "Relevant offence" has the same definition as set out above at [7]-[9].

"…unless…"

14. The use of the word "unless" supports what is said above at [5] regarding the section providing a presumption against bail, and here an exception to the presumption.

"…the bail authority has a high degree of confidence that the young person will not commit a serious indictable offence…"

15. The exception is where the bail authority has a high degree of confidence that the young person will not commit a serious indictable offence.

    High degree of confidence

16. "High degree of confidence" is not defined in the Bail Act. This is a test that, as far as we have been able to ascertain, is not known to the criminal law in NSW. It is a term that is otherwise found in some legislation and instruments governing the regulation of the corporations law[3] but has not been subject to any consideration of relevance to the present exercise.

17. This test is different from the test contained in legislation such as the *Crimes (High Risk Offender) Act 2006* (NSW) (**CHROA**) which requires the Supreme Court to be "satisfied to a high degree of probability that the offender poses an unacceptable risk of committing another serious offence if not kept under supervision under the order" (s 5B CHROA).

18. In relation to the CHROA test, the plaintiff (the State) must demonstrate unacceptable risk to that standard. It requires proof to a high degree of probability of a positive state of affairs: that the risk posed by the defendant is unacceptable. In *Lynn v State of New South Wales* [2016] NSWCA 57, Basten JA said at [122]:

> To address the applicant's submissions it is necessary to understand the statutory scheme. The statutory language is not easy to apply. Although the defined phrase is "high risk violent offender" the only reference to "high" in the definition is to the "high degree of probability" that the offender poses an unacceptable risk. The high degree of probability qualifies the state of the judge's satisfaction, not the degree of

[3] See, for example, *ASX Listing Rules* 526.1; *Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009*).

> the risk. Indeed, satisfaction and risk are likely to work inversely to each other. Thus, the lower the required level of risk, the easier it will be for the judge to hold a high degree of satisfaction that it exists; the higher the test of what is unacceptable, the harder it will be to satisfy the judge to a high degree of confidence that it exists.

19. The "high degree of confidence" required under s 22C may require some probabilistic assessment; it may also import some value assessment based on the evidence as well as the experience of the decision maker. However, we do not consider "probability" and "confidence" to be completely synonymous.

20. In the Second Reading Speech to the Bail Amendment on 12 March 2024, the Attorney-General Michael Daley said:

> The Government's bespoke test of "a high degree of confidence" is intended to set an appropriately higher bar for a young person's release when they are charged with repeated serious breaking and entering and motor theft offending, including offending whilst on bail.

21. While it is not explicit, the term "higher bar" (being a comparative term) presumably refers to the bar being "higher" for young persons charged with "relevant offences" than those charged with other offences.

22. A "high degree of confidence" is not a state of certainty. The court does not need to be certain that the young person will not commit a further relevant offence. It does not require a predictive exercise in determining that a young person "will not" commit a further relevant offence if released on bail subject to conditions. The state of satisfaction is lower than that, as it is qualified by the "high degree of confidence" test.

23. However, as detailed below, any state of satisfaction is subject to the onus question, which features in sub-section (3).

Will not commit

24. Arguably, the phrase "will not commit" still has some work to do despite the state of satisfaction being of a "high degree of confidence".

25. There was some judicial consideration of the term "will be sentenced to imprisonment" as it featured in s 22B, with emphasis on the state of satisfaction required for a finding that something "will" be the case. However, that section might be distinguished because it, in itself, did not set out a separate state of satisfaction in the terms of the section.

26. In *Director of Public Prosecutions (NSW) v Van Gestel* [2022] NSWCCA 171 (***Van Gestel***), the Court dealt with the part of s 22B that requires a finding that a person "will be sentenced to [full-time] imprisonment" (s 22B(1)). The Court said that in deciding whether or not a person "*will* be sentenced to imprisonment to be served by fulltime detention" requires the Court to make an "evaluative judgment as to a future matter", that is a "forward-looking assessment on the limited material placed before the Court on the release or detention application". The Court said that s 32 did not apply as the finding was one of an opinion or satisfaction of the Court, as opposed to the fact, which is "an evaluative judgment of a future matter and not a fact to be proved."

27. As to the word "will", the Court said at [44]:

> When regard is had to these contextual considerations, the use of the word "will" in the condition indicating future likelihood suggests what is realistically inevitable as distinct from what may happen or is likely to happen. That does not mean that "will" involves a state of absolute certainty. That cannot be correct since the task of the Court as a bail authority is to make a forward looking assessment of the future disposition of the sentence with respect to the convicted person based on materials which are unlikely to be complete.

28. Under s 22C, we do not think that the words "will not commit" can be divorced from the evaluative assessment that comes from a "high degree of confidence" test. Statutory construction of legislation that affects personal liberty will be given strict construction: *State of New South Wales v Kaiser* [2022] NSWCA 86 at [57(6)] (Simpson AJA, Bell CJ and Beech-Jones JA agreeing). In our view, a strict construction of the phrase "will not commit", considered in the context of the "high degree of confidence" test, may require the Court to make an "evaluative judgment as to a future matter", that is a "forward-looking assessment on the limited material placed before the Court", subject to the onus test in sub-section (3).

29. By application of the reasoning in *Van Gestel* and *Director of Public Prosecutions (NSW) v Day* [2022] NSWCCA 173 (***Day***), establishing "a high degree of confidence the young person will not commit a serious indictable offence while on bail subject to any proposed bail conditions" is unlikely to be required to be established on the balance of probabilities. As the Court said in *Day* at [21]:

> Thus, the requirement of the condition in s 22B(1) that the Court be satisfied that the convicted person "will" be sentenced to full time imprisonment, involves a *state of satisfaction*, as opposed to the *fact*. As this is an evaluative judgment of a future matter and not a fact to be proved, proof on the balance of probabilities is not the relevant standard.

30. We do recognise, however, that the "state of satisfaction" required in s 22B is one that, if met, is a finding which must be made *against* the accused to refuse bail, as opposed to the "high degree of confidence" test that requires a finding *in favour* of the young person if bail is to be granted. This leaves open the possibility of s 22C being distinguished from the standard of proof contained in s 22B.

"…while on bail subject to any proposed conditions"

31. Importantly, the part prior to this ("high degree of confidence that the young person will not commit a serious indictable offence") is subject to this part. That is, the question of whether the Court has attained the requisite state of satisfaction must be premised on a consideration, applying an evaluative judgement as to a future matter, of the ability of proposed bail conditions to address the risk of a young person committing a serious indictable offence if subject to those conditions.

Sub-section (2)

32. Sub-section (2) says that a decision under sub-section (1) may be made only after an assessment of bail concerns is made and consideration of whether any bail conditions could reasonably be imposed to address any bail concerns or risks the relevant young person will commit a further serious indictable offence.

33. There is a curious use of the word "may" in this sub-section. In accordance with s 9 of the *Interpretation Act 1987* (NSW):

> (1) In any Act or instrument, the word "may", if used to confer a power, indicates that the power may be exercised or not, at discretion.

34. It would, however, be difficult to argue that the exercise of the power (as to its exercise at all) is discretionary given the word "must" contained in sub-section (1). The phrase is "may be made only". Rather than conferring a power as contemplated in s 9(1) *Interpretation Act 1987* (NSW), we consider the words "may be made only" imposes conditions precedent to the exercise of the power. In certain circumstances, the term can confer a power coupled with a duty to exercise the power such that the term "may", read in context, functions in effect as a "must". It is often the case that a strict dichotomy between the words "may" and "must" is not achieved.[4]

35. As to s 22C(2)(a) it is unclear whether the bail authority is required to make a determination as to unacceptable risk as it requires an "assessment of bail concerns… under Division 2" but no clarity as to whether any conclusions are required. Under Division 2, s 17 requires the bail authority to "assess any bail concerns". Under that same Division, s 19 requires a refusal of bail if the bail authority is satisfied that there is an unacceptable risk "on the basis of an assessment of bail concerns". Section 20 requires that the bail authority must grant bail, release without bail or dispense with bail if there are no unacceptable risks. It might be that if the court determines that, on the basis of an assessment of bail concerns, that the young person is an unacceptable risk, that bail must be refused (and the bail authority does not proceed to deal with s 22C, giving the words "may be made only" some work to do). However, that may not be the end of the matter – given the terminology employed in s 22C(2)(b).

36. As to s 22C(2)(b), it appears to import a further consideration of "risk" (but not "unacceptable risk") as it pertains to bail conditions, in a way that is different to s 20A "Imposition of bail conditions" which links bail conditions to bail concerns. It is risk specific to the commission of a further serious indictable offence. Because the "high confidence" test must require some assessment of the likelihood (or risk) of the commission of a further serious indictable offence, it is unclear whether Parliament truly intended for this assessment to take place prior to the consideration of s22C(1). If that is what Parliament intended, we consider care must be taken to give effect to this sub-section despite its discordance with the usual assessment pursuant to Part 3, Division 2 of the Bail Act ("Unacceptable risk test – all offences").

37. It may be that s 22C(2)(b) was intended to refer to the usual process of considering unacceptable risks and bail concerns pursuant to ss 17 and 19 of the Bail Act. The argument against this is that s 22C(2)(a) already captures that process and sub-section (2)(b) should be read in accordance with its plain meaning. It may also be that the legislature intended to refer to "unacceptable risk" when it referred to "risk" in sub-section (2)(b). The argument against this is that, had the legislature intended to refer to "unacceptable" risk, it would have done so. Another argument against this is that if the sub-section was meant to read "unacceptable risk", then it would be reverting back to the (repealed) formulation of the Bail Act where bail conditions "mitigated" risk. We cannot

[4] *Coffs Harbour and District Local Aboriginal Land Council v Lynwood* [2017] NSWCA 317 at [10] per Basten JA.

express a concluded view and it is perhaps a matter for judicial consideration and/or legislative amendment.

38. Prima facie, s 22C appears to contend for the following practical steps:

    a. An assessment of bail concerns (as the Court would undertake in any bail application) in accordance with *all* of Division 2, which includes within it consideration of:
        i. The bail conditions that could reasonably be imposed to address any bail concerns in accordance with s 20A (s 18(1)(p)); then
    b. Consideration of whether any bail conditions could reasonably be imposed to address any bail concerns or risk that the relevant young person will commit a further serious indictable offence; then
    c. Consideration of s 22C(1).

Sub-section (3)

39. This sub-section provides for an uneasy reading of the provision where sub-section (1), at least on its face, places an onus on the young person to displace the presumption against bail, that is, to prove that there can be a high degree of confidence that the young person will not commit a serious indictable offence while on bail.

40. However, s 22C(3) indicates that the opposite is true, stating that "the requirement under this section to establish that bail should be refused for the relevant young person remains with the prosecution" (emphasis added).

41. The Second Reading speech makes it clear that the "requirement" is synonymous with "onus", or the legal burden. In the Second Reading Speech to the Bail Amendment[5], the Attorney General stated that the onus is not on the young person (as compared to the "show cause" test):

> If there is an unacceptable risk, there is no need for the decision-maker to go on to consider the new test, as bail will be refused. In contrast to the "show cause" requirement, where the onus is reversed and rests on the accused, the onus for the new provision will continue to rest on the prosecution to establish that bail should not be granted. This is consistent with the recommendation of the Hatzistergos review of the Bail Act that "show cause" and the reverse onus for bail should not apply to children. (Emphasis added.)

42. The Attorney General also stated:[6]

> When committed by adults, this type of repeat alleged offending whilst on bail would attract the "show cause" test, which would require a bail authority to refuse bail unless the accused person could show cause why their detention is not justified. The "show cause" provisions do not apply to children and this additional test does not impose a show cause requirement or a reverse onus. Instead, the new test will create an additional threshold for a bail decision maker, directed at the consideration of the risk of certain young persons committing further serious

[5] New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 March 2024 (Michael Daley, Attorney General) <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-139003'>.
[6] Ibid.

> indictable offences whilst on bail. Bail authorities, including courts, are responsible for applying this new test and determining whether it has been satisfied in each individual case. The unacceptable risk test will also continue to apply.
>
> ….
>
> Importantly, proposed section 22C does not impose an onus of proof on the accused person in the way that the show cause test does. It is crucial to understand that. That is an appropriate safeguard, given the difficulties young people experience in navigating the criminal justice system. This new test targets only risk of future offending and not other broader bail concerns which can be considered as part of the unacceptable risk test. The reform is intended to ensure that, if necessary, a young person can be remanded to address the risk of further offending. The amendment introduces a bespoke test that sets a higher bar for a young person's release when they are charged with that type of serious repeat offending. (Emphasis added.)

43. During the course of the Parliamentary Debates, the Attorney-General said:[7]

> As I clearly stated in my second reading speech, the Government does not intend for the new bespoke bail test to reverse the onus. However, simply for the avoidance of doubt and to respond to concerns raised by a number of stakeholders, the New South Wales Government is moving this amendment to clarify that the requirement to establish that bail should be refused rests with the prosecution under the new test in proposed section 22C.

44. Practitioners representing the young person should place significant emphasis upon the requirement that the onus to establish that bail should be refused for the relevant young person remains with the prosecution.

45. It is important to note that the language used is that the prosecution is to "establish that bail should be refused".

46. This should be a high bar where there is an onus on the prosecution and where the provision seriously curtails the liberty of a child.

47. In accordance with s 32 of the Act, that any matter decided in exercising a function in relation to bail "is to be decided on the balance of probabilities". In the specific context of this test, we see no reason why *Briginshaw* principles would not apply: reasonable satisfaction should not be produced by inexact proofs, indefinite testimony or indirect inferences: see *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-2; [1938] HCA 34.

48. It is arguable that it is *not* enough for the prosecution to simply say, "the young person has done it once and will do it again", or, for example, to tender a record and say that it speaks for itself. It should be expected that the prosecution should point to something particular – other than simply an allegation of a "tendency"– to establish that bail should be refused. Further, it must be remembered that the forward-looking assessment in s 22C(1) is one that is undertaken *with* consideration of "proposed bail conditions".

49. This, unfortunately, is probably not the end of it. We have spent a lot of time trying to understand this test, and in particular, the requirement on the prosecution to prove what

[7] New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 March 2024 (Michael Daley, Attorney General) <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-139700>

appears to be a negative. What follows is by no means settled and will be a matter for the judicial determination.

Does sub-section (3) require "proof of a negative"?

50. If the requirement to establish that bail should be refused rests with the prosecution, but sub-section (1) requires a positive state of satisfaction as to a matter in favour of the young person, does this mean that the onus is on the prosecution to prove a negative? That is, is the onus on the prosecution to establish (on the balance of probabilities) that the court should not have a high degree of confidence that the young person will not commit a further offence while on bail?

51. While this may seem circuitous, the insertion of sub-section (3) could lead to conclusion that the onus is on the prosecution to establish what is essentially the proof of a negative, that is, proof of the absence of the existence of a particular circumstance or state of satisfaction.

52. There are many authorities concerning a party's onus in establishing a negative, although these not typically found in the criminal law. Establishing a negative arises in some legal contexts that are related to criminal proceedings, such as costs applications (relating to an absence of reasonableness) or malicious prosecution cases. In *A v State of New South Wales* (2007) 230 CLR 500; [2007] HCA 10 at [60]:

> It is important to recognise that, in an action for malicious prosecution, the plaintiff must establish a negative (the *absence* of reasonable and probable cause). The forensic difficulty of proving a negative is well known. At least some of the questions presented in this appeal arise because there is an inevitable tendency to translate the negative question – whether the defendant prosecutor acted *without* reasonable and probable cause – into the different question – what *will* constitute reasonable and probable cause to institute criminal proceedings. The logical relationship between the two forms of question tends to obscure first, the importance of the burden of proof, and secondly, the variety of factual and forensic circumstances in which the questions may arise.

53. Other cases involving proof of a negative include *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corporation* (1985) 1 NSWLR 561 and *Rockcote Enterprises Pty Ltd v FS Architects Pty Ltd* [2008] NSWCA 39 (*Rockcote*).[8] The general principle which was acknowledged and applied in those cases was reflected in *Rockcote* at [78], [84] by Campbell JA (emphasis added):

> If a plaintiff has the onus of proving a negative proposition, the fact that the defendant has greater means to produce evidence which contradicts that negative proposition, does not mean that the plaintiff ceases to have the onus of proof of that negative proposition. However, once the plaintiff establishes sufficient evidence from which, if that evidence is accepted, the negative proposition may be inferred, an evidential onus shifts to the defendant to adduce evidence that tends to show that the negative proposition is incorrect. If a defendant adduces such

[8] See also *Crowe-Maxwell v Frost* [2016] NSWCA 46; (2016) 91 NSWLR 414; 111 ACSR 583 per Beazley P (with whom Macfarlan and Gleeson JJA agreed) at [91].

evidence, the plaintiff must then, as part of its overall burden of proof, deal with that evidence either by submission or argument.[9] As Hunt J put it in *Apollo* at 565:

> "… provided that the plaintiffs have established sufficient evidence from which the negative proposition may be inferred, the defendant carries what has been called an evidential burden to advance in evidence any particular matters with which (if relevant) the plaintiffs would have to deal in the discharge of their overall burden of proof …. [T]he plaintiffs' burden of proof of the negative proposition for which they contend is not as difficult in this case as it might otherwise have been because of the defendant's greater means to produce evidence which contradicts that proposition."

…Before an evidential onus shifts from a plaintiff, the plaintiff must have adduced enough evidence for the court to infer, if the evidence that the plaintiff adduced was accepted by the court and was the only evidence on that topic in the case, that the proposition concerning which the plaintiff had the onus of proof was more likely than not true. In that situation, one says that an onus of adducing evidence shifts to the defendant because the defendant is then in a situation in which, if the defendant does not adduce evidence concerning that proposition, the plaintiff might succeed in establishing that proposition. Counsel for a defendant has to decide whether to adduce evidence on a topic at a time in the course of the trial when counsel necessarily cannot be absolutely sure of two matters that are of critical importance to whether the onus of adducing evidence has actually shifted – will the judge accept the plaintiff's evidence on the topic, and if so will the judge regard that evidence, if no other evidence is adduced, as enough to make it more likely that the plaintiff's contention concerning that topic is correct. The type of *"onus"* that the defendant is then under is one of practical necessity – either adduce evidence, or risk losing on that issue. But before a defendant is in that situation, the evidence that the plaintiff has put forward on the topic must be such that, if accepted and the only evidence on the topic, it would justify the court in deciding it is more likely than not that the proposition for which the plaintiff bears the onus of proof is true. If the evidence that a plaintiff adduces is equally consistent with that proposition being true, or that proposition not being true, so that the plaintiff would fail to discharge its onus of proof if that were the only evidence on the topic, the defendant does not come under the sort of practical compulsion that I have been describing.

54. In the context of s 22C, we expect it will be necessary for practitioners to understand the difference between the onus of proof (the legal onus) and the evidentiary burden. In *Hawksford v Hawksford* [2005] NSWSC 463; 191 FLR 173 Campbell J explained the distinction, at [54]:

> "The distinction between an onus of proof and an onus of adducing evidence is of particular relevance in the present situation. Where party A has the legal onus of proving a negative proposition, and relevant facts are peculiarly in the knowledge of party B or where party B has the greater means to produce evidence relating to those facts, then provided party A establishes sufficient evidence from which the negative proposition may be inferred, party B then comes under an evidential burden, or an onus of adducing evidence." (citations omitted)

55. Campbell J's statement in *Hawkford* is an application, in the context of proof of a negative proposition, of the principle in *Blatch v Archer* (1774) 1 Cowp 63; 98 ER 969 at 970 that:

[9] See generally *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corporation* (1985) 1 NSWLR 561; *Hampton Court Ltd v Crooks* [1957] HCA 28; (1957) 97 CLR 367 at [1]-[2], 371-2; *Baiada v Waste Recycling & Processing Service of NSW* [1999] NSWCA 139; (1999) 130 LGERA 52 at [55], 64-65.

> … all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

56. Under s 22C(3), the requirement to establish that bail should be refused for the relevant young person remains with the prosecution. If this "requirement" is a reference to the legal onus only then, in accordance with *Rockcote*, once the prosecution establishes sufficient evidence from which, if that evidence is accepted, the negative proposition (that the Court will *not* be satisfied to a high degree of confidence the young person will not commit a serious indictable offence while on bail subject to any proposed bail conditions) may be inferred, an "evidential onus" shifts to the defendant to adduce evidence that tends to show that the negative proposition has not been established. It is worth considering whether submissions are advanced that accord with what was said in *DPP (NSW) v Mawad* [2015] NSWCCA 227 at 39.[10]

57. It may be that at that point, the young person then carries an evidential burden "to advance in evidence any particular matters with which (if relevant) the plaintiffs would have to deal in the discharge of their overall burden of proof": *Apollo Shower Screens Pty Ltd & Anor v Building and Construction Industry Long Service Payments Corporation* (1985) 1 NSWLR 561 at 565 per Hunt J. The rules of evidence do not apply (s 31) and the bail authority may take into account any evidence or information considered credible or trustworthy in the circumstances.

58. If the "requirement to establish" is also a reference to the evidentiary burden remaining with the prosecution, then the prosecution's job is much harder. There may be a strong argument that, because of the broad terms which s 22C(3) is expressed, and in particular, the word "requirement" (as distinct from "legal onus"), there is no shift in the evidentiary burden as contemplated in cases such as *Rockcote*. That outcome, we think, would require the prosecution to adduce positive evidence as to why bail and proposed conditions would not satisfy the Court that the person will not commit a serious indictable offence while on bail subject to those conditions.

59. To be clear, such a reading is possible and available, but we note the following:
    a. The "requirement" is to establish that bail should be refused. This sounds a lot like an onus of proof.

    b. Bail proceedings are adversarial, and there are clearly evidentiary matters which are out of practical reach of the prosecution to prove (and unlikely to be ventilated by a police officer seeking detention of a young person). If there is no evidentiary shift, then it is difficult to see how the prosecution would succeed on any application.

---

[10] "In this case the objected to opinions of the police officer can be considered at least "trustworthy" in that there is no reason to doubt the bona fides of its author. However, just because this Court is not bound by the rules of evidence does not mean it is obliged to ignore the policy and rationale underlying those rules… This includes scepticism of conclusions unsupported by any factual detail. In my view, the absence of any detail setting out the basis for what are otherwise potentially damaging assertions warrants this Court not attributing any weight to those assertions. They played no part in my deliberations."

c. The words “proposed bail conditions” suggest that conditions need to be proposed by someone. The prosecution is unlikely to do this. In a practical sense, it is for the young person to propose bail conditions, and, in accordance with the requirement to mitigate unacceptable risk and address bail concerns in accordance with s 20A (s 18(1)(p)), to demonstrate to the Court why these conditions are likely to be effective.

60. This is unlikely to provide a great deal of comfort to practitioners defending young persons in the Children’s Court. One of the matters that we think might be relevant to the consideration is whether the young person actually “has the greater means to produce evidence” that they will not commit further offences. The ability to contact family members or supports from custody is potentially relevant to this. The question of “power” is a novel question where a person has been denied freedom, but we consider it needs to be taken seriously. What it implies is that an absence of evidence at a particular point (following deprivation of liberty) does not suggest that the evidence will never be available, nor does it suggest that evidence to demonstrate that the Court would not be satisfied to a high degree of confidence that the young person will not commit a further serious indictable offence must be any more than “sufficient”. The importance is to raise it and provide some context to the evidence, however that can be done. At that point, the evidentiary burden shifts back to the prosecution.

61. As a final remark, it might be useful to remind the bail authority that by the operation of s 4 of the *Children (Criminal Proceedings) Act 1987* (NSW), s 6 of the Act applies to (a) any court that exercises criminal jurisdiction, and (b) any criminal proceedings before any such court, notwithstanding any law or practice to the contrary.

SOME PRACTICAL STEPS

- Make sure you check the dates of the relevant offences and grants of bail.
- Consider whether it is appropriate to dispense with bail where it is warranted, e.g. the offence is low in objective seriousness or of a less serious nature (e.g. being carried in conveyance).
- Consider whether you can resolve charges early or finalise matters on the day.
- Devise bail conditions early and firmly.

Nicholas Broadbent

Rose Khalilizadeh

Public Defenders Chambers

28 March 2024

A PROPOSED STEP-BY-STEP APPROACH

The approach below is our best attempt to approach the section in a step-by-step way. This will eventually be the subject of judicial consideration.

1. Is the young person above the age of 14 but below the age of 18? (s 22C(1), (6))
    - If NO – s 22C does not apply – proceed to regular bail application.
    - If YES – go to question 2.

2. Is the young person charged with a relevant offence? (s 22C(1), (6))
    - If NO – s 22C does not apply – proceed to regular bail application.
    - If YES – go to question 3.

3. At the time of the alleged relevant offence, was the young person on bail for another relevant offence[11]? (s 22C(1), (6))
    - If NO – s 22C does not apply – proceed to regular bail application.
    - If YES – go to question 4.

4. After assessment of bail concerns under <u>all</u> of Division 2 (including conditions under s18(1)(p)), are there any bail concerns? (s 22C(2)(a))?
    - If NO – go to question 6 (and consider whether s 20 applies).
    - If YES – go to question 5 (and consider whether s 19 applies).

5. Are there any bail conditions that could reasonably be imposed to address:
    a. any bail concerns; <u>or</u>
    b. <u>risk</u> the young person will commit a further serious indictable offence? (s 22C(2)(b))
    - If YES or NO – still proceed to question 6.

6. Has the prosecution established that bail should be refused? (that is, that the court should *not* have a high degree of confidence that the young person will not commit a serious indictable offence while on bail subject to any proposed bail conditions?) ((s 22C(1), (3))
    - If YES – go to question 7.
    - If NO – bail should be granted.

7. Has the young person displaced the finding made at question 6., above?
    - If YES – bail should be granted.
    - If NO – bail should be refused.

[11] Noting the transitional provision: s 22C "extends to offences committed or alleged to have been committed, or charged, *before* the commencement of the amendment".