NEW BAIL ACT AMENDMENTS:

KEEPING AHEAD OF THE CHANGES

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2022 Bail Amendments [s.22B]

Section 22B was enacted by the *Bail Amendment Act 2022* and applies to any bail decision made after the commencement of that Act, namely, on 27 June 2022: clause 45, *Bail Regulation 2021* at [9-220].

Are the Amendments Retrospective?

Whilst the legislation applies to past events, it has been held that it is not retrospective "in a legal sense".

It was argued that s.22B had retrospective effect and should be read down as to only having application to offenders convicted after the date of commencement [27 June 2022], however, it was held that there is no retrospectivity in the legal sense of that word: *Director of Public Prosecutions (DPP) v Duncan* [2022] NSWSC 927 at [26]-[30].

Bellew J in *Duncan*, on this point, held:

a. At [29]: "In determining issues of retrospectivity by reference to common law principles, it is important to draw a distinction between legislation which has a prior effect on past events (which is retrospective) and legislation which bases future action on past events (which is not): D C Pearce, Statutory Interpretation in Australia (LexisNexis Publishing, 9th Ed. 2019) at 10.4. In *Robertson v City of Nunawading,* [1973] VicRp 81; [1973] VR 819 at 824, the Full Court of the Victorian Supreme Court put the matter in this way:

   > The principle [of retrospectivity] is not concerned with the case where the enactment under consideration merely takes account of antecedent facts and circumstances as a basis for what it prescribes for the future, and does no more than that."

b. At [30]: "In *Re A Solicitor's Clerk*, [1957] 1 WLR 1219, a legal clerk was convicted of charges of larceny. At the time of his conviction, no order could be made under legislation which would have prohibited him from being employed as a legal clerk, because the victim of his offending was not his employer or his employer's client. The legislation was subsequently amended to allow such an order to be made. The Court rejected an argument that to apply the amendment to prohibit the clerk from being employed would be to give it a retrospective operation. The Court concluded that the amendment had future operation only, even if the facts on which it depended had taken place in the past. The same approach was taken in *La Macchia v Minister for Primary Industry*, [1986] FCA 452, as well as in *Geschke v Del-Monte Home Furnishers Pty Limited*, [1981] VicRp 80."

c. At [31]: "Viewed in this way, s 22B of the Act does not offend any common law presumption against retrospectivity. Adopting the phraseology in *Robertson,* s 22B takes into account antecedent facts, namely the fact that a person has been convicted but not sentenced, and uses that as a basis for what it prescribes is to occur in the future, namely that the person is not to be released if he or she will be sentenced to full-time imprisonment, and if there are no special or exceptional circumstances. This approach to the construction of s22B does not involve, in any way, utilising the cl 45 of the Regulation as an aid. The unequivocal terms of cl 45

> simply confirm that s 22B applies whether or not an application is made before or after the date of its commencement."

Rushed Legislation – Unintended Consequences

Criminal defence lawyers are entitled to be concerned about the rushed nature and the unintended consequences of the reforms to the *Bail Act 2013* [s.22B], which was based on a handful of controversial decisions aired in the media. The amendment inserts a requirement that bail must be refused following conviction [or upon a plea of guilty being entered] and prior to sentencing where the court determines that the offender will be sentenced to full-time detention, unless special or exceptional circumstances can be established.

The amendments were introduced on 21 June 2022, passed on 23 June 2022, and received assent and commenced on 27 June 2022. It is inarguable that there was not a proper consultation process with relevant stakeholders, given the extraordinarily short timeframe allowed for comments.

As with most rushed reform, it will likely result in unintended consequences, including further costs to government and longer delays in the courts. For instance, the new s22B risks a significant increase to the remand population, capturing many who may not ultimately be sentenced to imprisonment. Sentencing Magistrates and Judges, generally sentence offenders only after comprehensive submissions on sentence from both parties on all aspects of the offence and the offender. The time between conviction and sentence can be weeks or months. This is time in custody that an offender who should have been under supervision in the community, will never get back.

The Second Reading Speech states that:

> "the New South Wales Government will carefully monitor the impact of this reform in practice to ensure that it does not adversely impact on the Government's early guilty plea reforms, although it is difficult to envisage how this could occur".

Respectfully, that passage demonstrates a lack of understanding in the practical working of the Early Appropriate Guilty Plea (EAGP) scheme.

In the publicly expressed view of the NSW Law Society, the reforms have the real potential to undermine the EAGP scheme. Defendants are more likely to be deterred from pleading guilty in the Local Court if the immediate consequence is that they are, or are likely to be placed on remand until the matter is finalised in the higher court. The amendment will likely lead to an increase in defended hearings and consequentially increase the workload of the Local Court.

Also, in the publicly expressed view of the NSW Law Society, the amendment undermines critical aspects of the criminal justice system, including not only the EAGP scheme but defendants who are convicted in their absence under s196 of the *Criminal Procedure Act*, 1986, as defendants who appear in weekend bail court will not likely, be in a position to make out "special or exceptional circumstances" under s22B.

Overview of the Bail Act 2013: *Director of Public Prosecutions (DPP) v Day* [2022] NSWSC 938

1. Part 2 of the Act (ss 7-14 (inclusive)) sets out various general provisions with respect to bail and bail decisions which can be made.

2. Part 3 of the Act deals with making and varying of bail decisions. Section 15 provides that a bail decision, a term defined in s 8 of the Act to include a decision to grant bail, or refuse bail, or dispense with bail, is to be made in accordance with Pt 3.

3. Section 15(2) notes that Pt 3 applies:

> "... to the making of a decision to affirm a bail decision, or to vary a bail decision, after hearing a bail application in the same way as it applies to the making of a bail decision."

4. Division 1A of Pt 3 introduced various requirements for an accused person to show cause why his or her detention was not justified prior to a decision about bail being made in accordance with Division 2 of Pt 3.

5. Division 2, which consists of ss 17-20A, provides for the methodology of the making of a bail decision. In broad terms, it requires the assessment of any bail concerns of the kinds set out in s 17(2) of the Act prior to making a bail decision.

6. Section 18 of the Act provides that a bail authority "... is to consider the following matters, and only the following matters, in an assessment of bail concerns ..."

7. Section 18 (i) (i1) of the Act, significantly for present purposes, sets out the following matter which a court must so consider:

> "if the accused person has been convicted of the offence, but not yet sentenced, the **likelihood of a custodial sentence being imposed**, ..." (emphasis added)

8. After the evaluation of the matters set out in s 18, if the bail authority concludes that there is an unacceptable risk, then bail must be refused. If the bail authority is satisfied that there are no unacceptable risks, then bail can be granted with or without the imposition of conditions, or else the person can be released without bail, or bail can be dispensed with; and in those circumstances, it is not necessary to demonstrate the existence of special or exceptional circumstances.

9. Division 2A follows and contains ss 21-22B.

10. Division 2A is entitled "Special rules for certain offences".

11. Section 21 deals with particular provisions for offences for which there is a right to release under the relevant legislation.

12. Section 22 provides with respect to particular offences (which are set out) that bail is not to be granted or dispensed with unless it is established that special or

exceptional circumstances exist that justify that bail decision. That section is not relevant to this paper.

13. However, it should be noted that the terms of s 22(2) and s 22(3) are identical to the provisions of s 22B(2) and s 22B(3) of the Act.

14. Section 22A of the Act deals with a limitation on power to release a person with respect to what can be conveniently described as terrorism-related offences. His Honour Garling J at [24] noted that, again, the provisions of sub-sections (2) and (3) of s 22A are in identical terms to those two sub-sections of s 22B.

15. His Honour further observed that "it is of relevance to note the use of a phrase in s 22A(1)(b). That subsection deals with identifying offences to which the section applies. It describes an offence in these terms: "*any other offence for which a custodial sentence may be imposed, ...*". In other words, the introductory description of the offence raises a question of whether the offence is one in respect of which a custodial sentence **may be** imposed."

16. We now come to the section the subject of this paper, namely, Section 22B which is in the following form:

> "**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."

17. Section 31 of the Act provides that the principles or rules of law regarding the admission of evidence do not apply to a bail authority when exercising any of its functions in relation to bail.

18. Section 32 of the Act provides that any matter that must be decided by a bail authority is to be decided on the balance of probabilities.

Section 22B Authorities

Director of Public Prosecutions (NSW) v Day [2022] NSWSC 938 (18 July 2022)

19. In *Day*, the offender was convicted for very serious fraud [50 counts] following a trial in the District Court. The Crown made a detention application and the trial judge [Gartleman DCJ] expressed the view that whilst it was "highly likely" that the offender would be sentenced to a period of imprisonment, he could not be satisfied that that was certain and rejected the Crown's detention application [66].

20. The Crown appealed to the Supreme Court and the matter was determined by Justice Garling who rejected the appeal. Subsequently, the Crown appealed to the Court of Criminal Appeal and that appeal too, was dismissed: *Director of Public Prosecutions (DPP) v Day* [2022] NSWCCA 173 (15 August 2022). I will return to the CCA decision in Day as it departed from what Garling J said in an important respect.

21. Justice Garling made a number of observations, findings and determinations that generally assist criminal defence lawyers in those matters where there is a probability or likelihood that, following a sentence hearing, the offender will ultimately be sentenced to imprisonment to be served by full-time detention – they include:

    a. At [21] his Honour referred to s.18 (i1) of the Bail Act and observed its importance in determining the Crown's detention application – that section is in the following terms:

        "if the accused person has been convicted of the offence, but not yet sentenced, the **likelihood of a custodial sentence being imposed**, …" (emphasis added)

        The distinction between s.18 and s.22B as identified by his Honour is considered below.

    b. At [27], his Honour referred to a recent decision of Simpson AJA, with whom Bell CJ and Beech-Jones JA agreed, in *State of NSW v Kaiser* [2022] NSWCA 86, relating to the [relevant] principles of statutory construction. For present purposes, particular reliance is placed on the following enunciated principles [with bold emphasis added]:

        (4) courts must strive to give meaning to every word of the provision to be construed … and should **'strain against a construction which gives no work whatsoever to legal language'**: … if possible,

some meaning and effect should be given to all the words used in a statute: … **The rule is subject to the qualification that it may be displaced if there is good reason to do so**: …;

(5) **a statute will not be construed so as to abrogate or curtail certain human rights or freedoms unless such an intention is clearly manifested by unambiguous language** that indicates that the legislature has turned its mind to the rights or freedoms in question and has consciously decided upon abrogation or curtailment …;

(6) **legislation that affects personal liberty will be given a strict construction**: ...

c. Also at [27] Garling J, referred to *Lee v NSW Crime Commission* (2013) 251 CLR 196; [2013] HCA 39 at [29], and observed that French CJ said that a statute said to affect important common law rights and other safeguards of individual rights and freedoms, will be construed as 'effecting no more than is strictly required by clear words or as a matter of necessary implication'."

d. At [28]-[34], his Honour referred to the Second Reading Speech and observed that after the Bill was read a second time that an amendment was made to what had earlier been said, namely:

> "New section 22B **would not be enlivened where there is doubt whether the offender will be sentenced** to imprisonment by full-time detention." (emphasis added)

e. At [36]-[47], his Honour made significant references to statutory and other sentencing principles including [relevantly]:

i. The "s.5 threshold" (at [37]).

ii. "The process of arriving at an appropriate sentence is one of instinctive synthesis whereby a judge identifies all the factors which are relevant and makes an evaluative decision or a value judgment as to what the sentence ought be. There is no single correct sentence: *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 at [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ); [51] (McHugh J)." (at [38]).

iii. "Relevant factors to be considered include matters identified by statute and the common law, and those referrable to the particular offence and the particular offender." (at [39]).

iv. Section 3A of "the Sentencing Act" and that "These purposes are often in tension" (at [40]).

v. "The sentencing discretion of a Judge is also guided by the common law principles to be found in the case law. In summary these include proportionality, parity, totality and the avoidance of double punishment. Other factors which have also been identified by the common law include whether incarceration may be, for the individual offender,

particularly burdensome by reason of their mental illness or for any other reason." (at [42]).

vi. "As well, subjective factors applying to the particular offender can be relevant. Such factors include, but are not limited to:

- early childhood deprivation;
- the existence of any mental illness or intellectual incapacity;
- the moral culpability of the offender for the particular offence or course of criminal conduct;
- whether general or specific deterrence have any role to play because of factors particular to the individual offender." (at [43]).

vii. At [47]: "This unduly lengthy, but necessary, exposition of the complex task of identifying and imposing an appropriate sentence for an offender shows that, for the purpose of interpreting the provisions of s 22B of the Act:

- a judge hearing a release or detention application after conviction and before pronouncement of sentence, including before a sentence hearing, cannot be understood to be engaged in the process of sentencing, but an entirely different decision-making process, namely the making of a bail decision;

- it follows that in making a bail decision, a judge who will preside over a sentencing hearing and then pronounce sentence, cannot be taken to be pre-judging the sentence which is to be imposed. If any part of the bail decision constitutes a pre-judgment of the sentence to be imposed, then there is a significant risk that the judge who presided over a trial and who is best placed to receive and deal with submissions about sentence, is at risk of being disqualified from undertaking that part of the criminal trial process by reason of pre-judgment. This would not benefit the administration of justice; and

- the bail decision-making process should avoid embracing an approach which is in any way contrary to, or inconsistent with, the instinctive synthesis approach to sentencing. Put differently, in undertaking a bail decision, it is not open to the judge to apply a "one-tier" approach – namely, to consider and determine whether a sentence of imprisonment will be imposed based only on an assessment of the objective facts and circumstances and the objective seriousness of the offence."

viii. At [57] his Honour said:

> "As noted earlier, the operative words "*will be sentenced to [fulltime] imprisonment*" differ from other phrases used in the Act: "*likelihood of a custodial sentence being imposed*": s 18(1)(i1); or else "*any other offence for which a custodial sentence may be imposed*: s 22A(1)(b)."

ix. At [59] his Honour said: "The Court is called upon to decide if the Offender "*will be sentenced to… full-time [imprisonment]*". It is not called upon to determine if the Offender may be so sentenced, nor whether they might be so sentenced. Nor is it called upon to determine that a sentence of full-time imprisonment will on the balance of probabilities be imposed." [underline emphasis added]. I will return to these underlined words.

x. At [60] his Honour said: "The word "*will*" connotes a degree of certainty or confidence that the requisite term of imprisonment will be the outcome of the sentencing hearing. Such an interpretation is consistent with the purpose of the section which is not, by a sidewind, to engage in refusing bail and causing an offender to go into custody and commence serving a sentence (which is yet to be imposed) unless the Court determines consistently with s 5 of the Sentencing Act, that given all available sentencing alternatives, no alternative other than full-time imprisonment will be imposed."

xi. Controversially, at [61] his Honour said in part:

> "…The prosecution must satisfy the Court on the balance of probabilities that no sentencing alternative could, lawfully, be imposed other than full-time imprisonment."

xii. At [69] his Honour sought to reason that, even being persuaded on the balance of probabilities, did not amount to be satisfied that an offender "will be sentenced to….full-time imprisonment" and said [bold emphasis added]:

> "Persuasion on the balance of probabilities that there is a high likelihood of a sentence of the requisite kind being imposed on the Offender, which was my conclusion in this case, **is not sufficient to satisfy the qualification required for an offence to fall within s 22B(1) of the Act because it is not the equivalent of a conclusion that the Offender "*will be sentenced to… full-time [imprisonment]*"**

With respect, his Honour's reasoning is not easy to follow and thankfully the NSWCCA has cleared it up.

xiii. The NSWCCA has held that section 22B requires the Court to make a realistic evaluative assessment of the sentencing outcome, as distinct from what theoretically is available; that the court is required to express an opinion, not make a finding of fact, and therefore, to say that a standard of proof is required and it is "on the balance of probabilities" is incorrect: *Director of Public Prosecutions (DPP) v Van Gestal* [2022] NSWSC 73 (12 August 2022) at [42]-[47]; *Director of Public Prosecutions (DPP) v Day* [2022] NSWCCA 173 (15 August 2022) at [21]-[23].

Van Gestal, also came to the CCA following a Crown appeal, after a decision of Garling J, refusing the Crown's detention application in the

Supreme Court. The CCA in *Van Gestal*, granted the Crown's detention application.

In *Day* [CCA], which was determined three days after *Van Gestal* [the same bench], the Court referred to and approved of what was said in *Van Gestal* in that regard*,* and the relevant paragraphs are extracted below.

The remaining of the quoted words/reasoning of Garling J at E xi above, namely "….that no sentencing alternative could, lawfully, be imposed other than full-time imprisonment" were also rejected by the Court in *Van Gestal* [see below].

xiv. Nonetheless, other comments by Garling J are helpful and at [62] his Honour said [bold emphasis added]:

> "Where, as is the case here, the DPP essays that task by relying solely on the inferences and conclusions to be drawn from convictions for the offences charged, and nothing else by way of Agreed Facts, evidence or matters addressing the presence or absence of any subjective circumstances, **it will be very difficult to persuade a court** that the possibility of any other lawfully available sentencing alternatives has been excluded."

xv. At [64] his Honour said:

> "As well, this interpretation would mean that a court was not imposing a sentence of full-time imprisonment in circumstances where, after a further hearing of all of the matters relevant to sentence, it may find itself having to determine whether such a sentence is the only one which it can lawfully impose."

xvi. At [68] his Honour said:

> "I agree that in this case if all that was placed before a sentencing Judge ultimately at a sentence hearing was the evidence from the trial (which I did not have) and the fact of the convictions and nothing else, it is highly likely that the Offender would be sentenced to full-time imprisonment. But I am also persuaded that there will be more material – particularly going to subjective considerations, which will be before the sentencing Judge."

Director of Public Prosecutions (NSW) v Duncan [2022] NSWSC 927 (11 July 2022]

22. In *Duncan*, Bellew J dismissed a detention application and concurred with the conclusions reached by Garling J in *Day* (at [39]). Some of Bellew J's reasoning is as follows:

a. Bellew J observed that the trial and ultimate sentencing judge, Judge Tupman (in *Duncan*) had expressed a view that full-time custody was highly likely, if not inevitable. Indeed, the offender himself conceded it was highly likely. His Honour

observed these comments by the ultimate sentencing judge were made in the context of offending of a different nature to *Day* (50 counts of significant fraud/embezzlement in *Day;* in *Duncan,* it was eight counts of intentional sexual touching of a child, following jury trial).

b. At [39], Bellew J agreed with what Garling J said in *Day*, namely that, in a detention application, the Director has to satisfy the Court, on the balance of probabilities, that there is no sentencing alternative other than full time imprisonment. We now know such an approach is incorrect.

c. At [41] Bellew J concluded that on the balance of probabilities, the offender would be sentenced to imprisonment by full-time detention. And yet, dismissed the Crown's application. His Honour appears to have done so on the basis that there would likely be other material before the sentencing Judge, including as to the health of the offender that may mitigate against his offending.

d. His Honour went on to express disquiet with the "practical difficulty, and indeed a degree of artificiality, in the operation of s 22B. This is simply due to the fact that in many cases (this case being an example) a Judge or Magistrate called upon to make a determination of the outcome of sentence proceedings for the purposes of s 22B will not be the sentencing Judge or Magistrate, and will therefore not have the benefit of the entirety, or perhaps any, of the evidence upon which an offender may wish to rely in mitigation." (at [42]).

e. As with Garling J, on the same point, it is difficult to follow his Honour's reasoning, as once he expressed satisfaction that, on the balance of probabilities the offender would be sentenced to full-time imprisonment and that that was the standard of proof he said was required, it is not easy to understand the logic in dismissing the Crown's application.

Applicable s.22B Principles following Conviction – Submissions as to the Sentencing Outcome?

[Director of Public Prosecutions (DPP) v Van Gestal [2022] NSWSC 73 (12 August 2022)]

23. Whilst *Day* [at first instance] and *Duncan*, are useful to defence lawyers, one should be careful not to rely on those parts of the judgements that have been criticised by the CCA in *Day* [CCA] and *Van Gestal*. In short, those unreliable parts relate to Garling and Bellew JJ's references to the Court having to be satisfied "on the balance of probabilities" that there is no other sentencing alternative available; and that in effect, if on the balance of probabilities, there is a lawful sentencing alternative available, then bail should be granted.

24. In *Van Gestal*, the Court granted the Crown's detention application and relevantly, held:

    a. Section 22B requires the Court to make a realistic evaluative assessment of the sentencing outcome, as distinct from what theoretically is available.

    b. "…that an alternative sentence to full time imprisonment is lawfully, and therefore theoretically, available does not mean that the Court could not

reach the opinion or state of satisfaction that the convicted person will be sentenced to full time imprisonment." [46] [emphasis added]

c. It is implicit in s.22B that the Court is required to express an opinion, not find as a fact, that the offender will be sentenced to a full time term of imprisonment [before refusing to grant bail]; and therefore, "As this is an evaluative judgement of a future matter and not a fact to be proved, proof on the balance of probabilities is not the relevant standard." [17]

d. Section 22B "sets a high bar for the degree of satisfaction to be reached by the Court to engage the power to make a bail decision under s.22B." And the Court referred to the decision of *Kaiser* [*supra*], in which it was held "that legislation which affects personal liberty will be given strict construction". [42]

e. The nature of the application of s.22B is not a pseudo or abridged sentence hearing: [42]

f. The Court explore the legislature intention of the use of the word "will" and observed that the Court as a bail authority, is not the sentencing court and will not be apprised of all of the evidence at trial, nor will it have all the materials relied upon by the parties at sentence: [43]

g. The Court concluded that as the word 'will' indicates future likelihood, the meaning to be attributed to the word is "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…" [44]

h. In assessing what is realistically inevitable the Court will have regard to:

- The seriousness of the offence, having regard to the principles of sentencing and particular, the Sentencing Procedure Act and the availability of sentencing alternatives;

- The materials and submissions before the Court as the bail authority; and

- The abbreviated nature of the release or detention application before the Court and especially, that the application is not a pseudo or abridged sentence hearing

i. , when the Court returned to the topic at [42]-[46], "the issue", in my view, was now unequivocally resolved and still remains a shade of grey. Ok, so we know [according to Van Gestal] that the standard of "satisfaction" is not "on balance of probabilities". So what is it?

S.22B (1) (a) and (b) - Special or Exceptional Circumstances

25. If the Court as the bail authority is satisfied that full-time imprisonment is realistically inevitable, then what?

26. The terms “special” and “exceptional” are not defined in the *Bail Act*.

27. In *Duncan*, Bellew J, considered the meaning of the terms “special” and “exceptional”:

    a. His Honour considered there was a considerable degree of overlap between them. [44]-[46].

    b. His Honour referred to s.9C of the Bail Act 1978 [when in certain circumstances, such as on a charge of murder], bail was not to be granted unless the Court was satisfied that exceptional circumstances were established; and agreed with the views of Johnson J in *R v Tillman* [2008] NSWSC 1227 at [13], who concluded that, as the facts of a matter differ, each matter must be determined on a case by case basis. [48]

    c. In *Van Gestal*, the NSWCCA expressly approved of the approach taken by Bellew J in *Duncan*.

28. In *Van Gestal*, the Court also considered the meaning of special or exceptional circumstances:

    a. At [50]:The phrase “special or exceptional” circumstances appears in s 22(1) of the *Bail Act* as a limitation on the Court’s power to grant bail or dispense with bail for specified offences for which (a) an appeal is pending in the Court of Criminal Appeal against a conviction on indictment, or a sentence imposed on conviction on indictment, or (b) an appeal from the Court of Criminal Appeal is pending in the High Court in relation to such an offence.

       The same meaning should be given to the same words appearing in different parts of a statute unless there is reason to do otherwise and neither party suggested that there was a reason to do otherwise with respect to s 22B.

    b. At [51]: “The approach of this Court to s 22 of the *Bail Act* has been not to set out an exhaustive list of factors that may constitute “special or exceptional circumstances”. In *El-Hilli and Melville v R* [2015] NSWCCA 146 at [29], Hamill J (Simpson and Davies JJ agreeing) said that special or exceptional circumstances “may exist in the combination of factors or in ‘the coincidence of a number of features’ ... It is not possible to determine or predict in advance what those features may be.”

    c. At [52]: “In *Director of Public Prosecutions (NSW) v Duncan* [2022] NSWSC 927 at [48], after referring to dictionary definitions of the words “special” and “exceptional” in the *Macquarie Dictionary* 2022, and earlier authorities in relation to s 9C of the *Bail Act 1978* (NSW) which also considered dictionary definitions, Bellew J adopted the approach in *El-Hilli and Melville v R* and said that given the facts of cases obviously differ, whether circumstances are special or exceptional for the purposes of s 22B involved a case-by-case determination. That approach should be followed.”

d. At [52]: “Reference to dictionary definitions in statutory construction is not of great assistance given the warnings in the authorities such as *TAL Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim* (2016) 91 NSWLR 439; [2016] NSWCA 68 at [80] (Leeming JA, Beazley P and Emmett AJA agreeing):

> Dictionary definitions may assist in identifying the range of possible meanings a word may bear in various context, but will not assist in ascertaining the precise meaning the word bears in a particular context.”

Appendices

(1) NSW Law Society Media Release – 22 June 2022

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MEDIA RELEASE

THE LAW SOCIETY OF NEW SOUTH WALES

Wednesday, 22 June 2022

Bail amendment - rushed reform can be flawed reform

Statement
President Law Society of NSW Joanne van der Plaat

The Law Society of NSW recognises that effective and fair bail laws need to strike a balance between reducing risk of further offending and recognising that an accused is innocent until a court finds them guilty or they so plead.

With certain exceptions, it has been usual practice for courts to remand in custody offenders likely to face a period of full-time incarceration at sentencing.

While the Government has described the introduction of these reforms as 'swift and decisive', the Law Society considers that insufficient time has been allowed to permit thorough and considered consultation and to ensure the reform is based on evidence.

Rushed reform can lead to flawed laws. The Law Society's committees are made up of some of the most experienced practitioners in NSW and able to provide government with expert advice, particularly about unintended consequences.

The Law Society is very concerned about the potential for this reform to significantly increase the remand population, affecting many offenders who may well face jail, but are not the serious offenders the reform is intended to capture.

The change risks confusion regarding whether an offender "will be" sentenced to full-time detention, before any sentencing submissions or risk assessments being made. As a result, the remand rate could increase well beyond the intended effect of the amendment.

This proposed reform does not exclude children from its application, and may discourage early guilty pleas, given the length of time that it can take to prepare sentencing submissions and risk assessments. This would only add pressure to a criminal justice system still struggling with COVID-19 related backlogs.

The ability to divert into treatment or rehabilitation programs offenders who have not committed the serious offences that should result in a refusal of bail post-conviction could be severely affected. We are particularly concerned about the impact this may have on the imprisonment of Indigenous people, who are already over-represented in the justice system, and query the extent to which this reform is consistent with national reforms to Close the Gap.

The Law Society considers that judicial officers are best placed to make decisions on bail of offenders awaiting sentencing, having both heard all the evidence of the offence, and given both sides the opportunity to make detailed submissions. Should the legislation be referred to committee as part of its debate in Parliament, the Law Society's experienced committee members will be glad to provide their expert input.

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