

## Early Appropriate Guilty Pleas

### Case Conferences for indictable matters in the Local Court

#### Note to practitioners about explanation to legally represented accused

The early appropriate guilty pleas legislative scheme imposes certain statutory obligations on an accused's legal representative in respect of their client. These are set out in Chapter 3, Part 2 of the *Criminal Procedure Act 1986 (NSW)* ("the Act"). One of these obligations, s.72(2), is to explain certain matters to the client "before the case conference is completed", although one might think the ideal time is before the case conference commences.

Section 72(2) of the Act provides:

#### **72 Obligations of legal representative of accused**

(1) ...

(2) *The accused person's legal representative must explain the following matters to the accused person before the case conference certificate is completed:*

(a) *the effect of the scheme for the sentencing discount applied under Part 3 of the Crimes (Sentencing Procedure) Act 1999 for a plea of guilty to an offence,*

(b) *the penalties applicable to the offences certified in the charge certificate and to any other offences the subject of offers made by the accused or the prosecutor in the committal proceedings,*

(c) *the effect on the applicable penalty if the accused person were to plead guilty to any offence at different stages of proceedings for the offence.*

The 'scheme for the sentencing discount' referred to in s.72(2)(a) does not apply to accused charged with Commonwealth offences or to accused who were under 18 years at the time of the alleged offence and under 21 when charged. Nevertheless, the section still appears to require that an explanation be provided to such accused as to sub-sections 72(2)(b) and (c).

The legislation requires that a case conference certificate be completed by the parties (s.74), which entails certain declarations to be made by the accused's legal representative and the accused if he or she does not intend to plead guilty to an offence:

#### **s.75(2) A case conference certificate must also contain:**

(a) *a declaration by the legal representative of the accused person that the legal representative has explained to the accused person the matters specified in section 72 (2), and*

(b) *if the accused person does not intend to plead guilty to an offence, a declaration by the accused person that the legal representative has explained to the accused person the matters specified in section 72 (2).*

(3) *A failure by an accused person to make a declaration under this section does not affect the validity of anything done or omitted to be done by any other person in or for the purposes of the committal proceedings.*

Neither the accused's legal representative nor the accused is explicitly required by s.75(2) to declare that the accused appeared to comprehend, or in fact comprehended, the explanation. However, in the context of a legal representative explaining a matter of significant importance to their client, it is important to ensure that the accused person has understood the relevant explanation.

**By questioning the client, the legal representative should ensure a sufficient level of comprehension of the matters in the explanation.** If you are concerned that the client lacks the capacity to comprehend the explanation, there may well be a question of the accused's fitness. For advice on how to proceed in this circumstance, see the article on the Public Defenders website: "Early Guilty Pleas; A New Ball Game."

The following is a suggested explanation to be given orally and, if the client is sufficiently literate in English, in written form as well. The language of both the oral and written explanation should be translated or modified, if required, in accordance with the client's language skill and capacity for comprehension.

There are two versions of the explanation: one relevant where Part 3 of the *Crimes (Sentencing Procedure) Act 1999* applies ("explanation to a legally represented accused if statutory utilitarian discount caps apply"); and the other to accused who are either charged with Commonwealth offences or who were under 18 years at the time of the alleged offence and under 21 when charged ("explanation to a legally represented accused if statutory utilitarian discount caps do not apply").

The suggested versions reflect only the obligations of a legal representative of an accused that are required by s. 72 of the Act. They do not purport to include advice that may be relevant, for example, in relation to the extent of confidentiality of the case conference and other possible bases for discounts or mitigation of sentence pursuant to the *Crimes (Sentencing Procedure) Act 1990* (NSW); the *Crimes Act 1914* (Cth); the *Children (Criminal Proceedings) Act 1987* (Cth), or at common law.

These versions are current as at 30 April 2018 and may be modified from time to time.