

## **Criminal Case Conferencing Trial Bill 2008**

### **Explanatory note**

This explanatory note relates to this Bill as introduced into Parliament.

#### Overview of Bill

Currently, sections 21A and 22 of the *Crimes (Sentencing Procedure) Act 1999* require a court that is passing sentence on an offender who has pleaded guilty to an offence to take into account as a mitigating factor the fact that the offender has pleaded guilty and when the offender pleaded guilty or indicated an intention to plead guilty. Those sections do not set any maximum amount of sentence discount that a

court may allow for the guilty plea, but the exercise of that sentencing discretion is the subject of a guideline judgment in *R v Thomson* [2000] NSWCCA 309. The object of this Bill is to establish a 12-month trial scheme commencing on 1 May 2008, and limited to certain indictable proceedings being heard in certain courts, that will:

(a) codify the discounts on sentence to be allowed by the courts in respect of guilty pleas in those proceedings to recognise the saving in resources and time that would otherwise be expended if trials were held, the avoidance of the additional trauma to the victims that might be caused by the holding of trials, the contrition that may be demonstrated by pleading guilty and any other benefit associated with or demonstrated by a guilty plea, and

(b) reduce the maximum amount of sentence discount that may be allowed for guilty pleas in those proceedings, and

(c) require the legal representative of an accused person and the prosecution to participate in a compulsory conference for the principal purpose of determining whether there is any offence to which the accused person is willing to plead guilty before the accused person is committed for trial or sentence.

### **Outline of provisions**

#### **Part 1 Preliminary**

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on the date of assent.

**Clause 3** defines certain words and expressions used in the proposed Act.

#### **Part 2 Application of provisions of this Act**

**Clause 4** provides that the proposed Act applies only to proceedings in relation to an indictable offence (other than an indictable offence being dealt with summarily) if committal proceedings for the offence will be heard in the Local Court sitting at the Downing Centre, Sydney or at Central, Sydney. The regulations can extend the application of the proposed Act to other courts or substitute the courts to which it applies. Provision is made for the proposed Act to apply also to such proceedings that have been transferred from one of those courts after certain steps have been completed in the compulsory conference process.

**Clause 5** provides that the proposed Act applies only to an offence for which a court attendance notice was filed on or after 1 May 2008 but before 1 May 2009. The regulations can extend that period.

#### **Part 3 Compulsory conferences**

**Clause 6** requires (with some specified exceptions) the legal representative of an accused person and the prosecution to participate in a compulsory conference before the accused is committed for trial. The exceptions include circumstances where the accused person has pleaded guilty, or agrees to plead guilty, before a conference is held, the offence is an offence for which a compulsory conference need not be held

under the section, the accused does not have a legal representative, the prosecution is not conducted by the Director of Public Prosecutions and where a Magistrate has made an order that a conference need not be held because it is impossible or impracticable to hold a conference. The purpose of such a conference is to determine whether there is any offence to which the accused person is willing to plead guilty

and other matters on which the participants are able to reach agreement. These are to be set out in a compulsory conference certificate to be completed after the conference and filed with a Local Court. (See clause 12)

**Clause 7** sets out the steps that are to be taken in relation to the holding of compulsory conferences. Before the compulsory conference is held a brief of evidence complying with clause 8 is to be served on the accused person (or his or her legal representative) and a pre-conference disclosure certificate complying with clause 9 is to be similarly served and is to be filed. The compulsory conference is to

be held and then a compulsory conference certificate is to be completed. The steps are to be taken in accordance with a timetable fixed by a Magistrate in accordance with any relevant directions of the Chief Magistrate.

**Clause 8** sets out the requirements for the brief of evidence that is to be served on the accused person or his or her legal representative. Clause 9 (1) (b) requires the prosecution to certify that such a brief of evidence has been served on it and that the prosecution has disclosed all material in its possession that is of relevance to the matters on which agreement is to be sought at the compulsory conference in the

pre-conference disclosure certificate.

**Clause 9** requires certain matters to be set out or certified by the prosecution in a pre-conference disclosure certificate that is to be served on the accused person or his or her legal representative and filed with the court. A pre-conference disclosure certificate is conclusive evidence of the matters certified in it in any proceedings in a Local Court with respect to the offences to which it relates and the completeness

and accuracy of the matters may not be challenged in any manner in such proceedings.

**Clause 10** requires a Magistrate to give the accused person a statement in writing in the form of words prescribed by the regulations explaining the effect of participating in a compulsory conference and the effect of the discounting of sentence provisions contained in proposed Part 4.

**Clause 11** requires the legal representative of the accused person and the prosecution to be present at a compulsory conference, whether in person or by audio visual link or telephone. The legal representative of the accused is to obtain written instructions from the accused before the conference unless reasonably able to obtain instructions personally, by audio visual link or by telephone at the time of the conference.

**Clause 12** provides for the completion, signing, filing and amendment of compulsory conference certificates. As noted above, it sets out the matters to be certified in such a certificate, including, for example, the offences to which the accused person has agreed to plead guilty.

**Clause 13** describes the effect of a compulsory conference certificate and the use that may be made of it. The compulsory conference certificate is to be treated as confidential and cannot be required to be produced by a subpoena in any proceedings before a court, tribunal or body. It is admissible as evidence before a sentencing court only for certain limited purposes relating to the imposition of a lower penalty for a guilty plea (see clause 17 (7)). A court may refuse to admit a certificate as evidence if the conference has not been held, or certificate completed, as required by the proposed Part unless it is satisfied there is a good and proper reason for the failure to comply and it is in the interests of justice to admit the evidence.

**Clause 14** provides that the disclosure of any information during or in relation to a compulsory conference is not, for the purposes of section 22A of the *Crimes (Sentencing Procedure) Act 1999*, a pre-trial disclosure. Section 22A enables the court to impose a lesser penalty according to the degree to which the defence has made pre-trial disclosures.

**Clause 15** provides for the making of practice directions in connection with compulsory conference steps. They must not be inconsistent with the Act or regulations.

#### **Part 4 Sentences—guilty pleas**

**Clause 16** requires courts to determine sentence discounts for guilty pleas in relation to certain indictable offences in accordance with clause 17 and makes it clear that no greater discounts are to be allowed for guilty pleas. Current sentencing guidelines set out in *R v Thomson* [2000] NSWCCA 309 indicate that a maximum sentence discount of 35 per cent is available. The clause also provides that no discounts for

guilty pleas are to be allowed in cases where the court intends to impose a sentence of life imprisonment. The clause does not apply to indictable offences being dealt with summarily or offences excluded from the application of the clause by clause 18. Clause 16 does not affect or limit any mitigating factor that a court is required to take account of when determining the appropriate sentence for an offence.

**Clause 17** sets out the applicable discounts that must or may be allowed for guilty pleas. A discount of 25% must be allowed if the offender pleads guilty at any time before committal (clause 17 (1)). A discount of up to 12.5% may be allowed if the offender pleads guilty at any time after committal (clause 17 (2)), but any such discount is to be proportionate to the remaining benefit of the guilty plea as

determined by reference to matters set out in clause 16 (2) (such as savings in time and resources, avoidance of additional trauma to victims and the demonstration of contrition). However, a discount that is greater than 12.5% but not greater than 25% may be allowed for a guilty plea after committal if substantial grounds exist for allowing a greater discount (clause 17 (4)). These include, for example, that the offender was found unfit to be tried and pleaded guilty when subsequently found fit to be tried (clause 17 (5)). Clause 17 (7) provides for a court to take into account the compulsory conference certificate relating to the offence in certain limited circumstances when determining the applicable discount for a guilty plea (see clause 12).

**Clause 18** excludes offences under Commonwealth law from the application of clause 16 (unless the regulations otherwise provide) and enables the prosecution to exclude other offences from the operation of that clause. An offence may be excluded by the Director of Public Prosecutions if the Director is satisfied that the level of culpability in the commission of the offence is so extreme that the community

interest in retribution, punishment, community protection and deterrence can only be met by imposition of a penalty with no allowance for discount under clause 16 and that it is highly probable that a reasonable jury, properly instructed, would convict the accused person of the offence. The clause provides that in cases where the prosecutor has excluded an offence the sentencing court is to take account of the

prosecutor's reasons for excluding the offence when passing sentence on the offender.

#### **Part 5 Relationship of this Act with other Acts**

**Clause 19** provides that, generally, the proposed Act does not affect the application of the *Criminal Procedure Act 1986* or the *Crimes (Sentencing Procedure) Act 1999* to proceedings for offences to which the proposed Act applies.

**Clause 20** enables bail to be granted under the *Bail Act 1978* to an accused person in respect of the period between the person's first appearance before a court in or in connection with proceedings for an offence and the holding of a compulsory conference in relation to the offence. The clause also enables bail to be granted under that Act subject to a condition that the accused person enter into an agreement to be available for the purposes of a compulsory conference.

#### **Part 6 Miscellaneous**

**Clause 21** enables the Director of Public Prosecutions and the Commissioner of Police to enter into a memorandum of understanding in relation to requests for advice by police officers to the Director on any matter that could be the subject of a compulsory conference.

**Clause 22** enables the Governor to make regulations for the purposes of the proposed Act.

**Clause 23** is a formal provision that gives effect to the savings, transitional and other provisions set out in Schedule 1.

#### **Schedule 1 Savings, transitional and other provisions**

**Schedule 1** enables regulations to be made of a savings or transitional nature consequent on the enactment of the proposed Act.