Reforming Sentence Deferrals in Victoria: Consultation Paper

**Sentencing Advisory Council, October 2022**

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# Chair’s foreword

An ongoing challenge in criminal justice policy is how best to tackle the root causes of criminal behaviour. We know that sentencing alone cannot do this, particularly where the causes are deeply entrenched, complex and often interrelated, such as mental impairment, addiction, and childhood or intergenerational trauma. The best way to protect the community from criminal behaviour is to address these issues directly through preventive measures, such as adequate housing and properly funded social welfare systems. But for those people who do offend, it is essential that sentencing courts have a suite of options that can be tailored to the circumstances that contributed to the person’s offending.

Sentence deferral is a useful tool available to courts in Victoria. It allows courts to postpone sentencing for a brief period, no more than a year, for a variety of reasons. It can allow an offender to participate in a behaviour change program to show that they have the capacity to change. It can allow the offender to be assessed by health professionals so that the court is fully apprised of any underlying mental or other health concerns. It can even be used to allow restorative justice processes to occur between offenders and victims.

For whatever reason a sentence is deferred, by the end of the deferral period sentencing courts are invariably better able to assess the offender’s prospects of rehabilitation and the ongoing risk that the offender poses to the community. In turn, courts are better able to craft an appropriate sentence for that offender.

When sentence deferrals were first introduced to adult courts in Victoria in 2000, they were designed to ‘allow courts to intervene at an early stage’ and assist ‘offenders on their road to recovery’. Rehabilitation is, after all, the most effective means of long-term community protection. Originally, however, there were a number of limitations about when deferrals were available. They were initially limited to the Magistrates’ Court, to young adult offenders aged 17 to 25, and were for a maximum period of six months. Following recommendations from this Council, sentence deferrals were extended to the County Court in 2012, the age restriction was removed, and the maximum period was extended to 12 months.

It has been 10 years since those changes were made, an opportune time to reflect on how sentence deferrals are operating in Victoria. Are there opportunities to increase or improve their use? To better understand contemporary issues with sentence deferrals, we began by meeting with senior representatives of 14 key organisations, and we conducted a survey of legal practitioners and judicial officers. As ever, we are grateful to everyone who took time out of their busy schedules to meet with us and share their invaluable insights.

In this consultation paper we raise 14 questions about potential issues and possible reforms on which we welcome feedback. Given the potential rehabilitative advantages of sentence deferrals, this is an opportunity for the justice system to be more effective in reducing recidivism, and therefore reduce the human and financial costs associated with criminal offending.

Emeritus Professor Arie Freiberg AM

Chair, Sentencing Advisory Council

# Call for submissions

The Sentencing Advisory Council is seeking submissions on the questions posed in this consultation paper.

The deadline for submissions is **Friday 2 December 2022**.

The Council intends to use submissions, and the results of consultations, to make recommendations about the use of sentence deferral in Victoria. The Council welcomes submissions from stakeholders in the legal profession as well as from the broader community, including victims of crime and their representatives.

When making a submission, please identify how you would like your submission to be treated, based on the following three categories:

* **Public submission:** the Council may publish, refer to and/or quote directly from the submission and name the source of the submission in relevant publications.
* **Anonymous submission:** the Council may publish, refer to and/or quote directly from the submission but will not identify the source of the submission in relevant publications.
* **Confidential submission:** the Council will not refer to or quote from the submission. The submission will not be published or provided to any third parties. Confidential submissions will only be used to inform the Council generally in its deliberations.

The Council reserves the right not to use or publish any submission that it considers may be defamatory, sensitive or offensive.

To make a submission, please email contact@sentencingcouncil.vic.gov.au.

# Consultation questions

## Question 1: Supreme Court

Should sentence deferrals be available in the Supreme Court? If so, why? If not, why not?

## Question 2: Barriers to use

What, if any, are the current barriers to using sentence deferrals in appropriate cases? What changes would you propose to overcome those barriers, and why?

## Question 3: Eligibility criteria

Are there any issues with the current criteria and considerations courts must take into account before ordering a sentence deferral? In answering this question, you may want to consider:

* if courts deciding whether to order a deferral should be required to consider the interests or views of any victims, and/or the interests of justice; and
* whether section 83A should specify that a court may order deferral even if it considers that the seriousness of the offence justifies a prison sentence.

## Question 4: Marginalised groups

Are there reforms that could be made to sentence deferrals that could reduce the disproportionate effect of the criminal justice system on marginalised groups? If so, what reforms would you propose, and why?

## Question 5: Purposes of deferral

Should the current legislative purposes of sentence deferral in section 83A(1A) of the *Sentencing Act 1991* (Vic) be amended? If so, what changes would you recommend, and why?

## Question 6: Length of deferral

Should there be any changes to the maximum length of 12 months for sentence deferral in the Magistrates’ Court and/or in the County Court? If so, what changes would you propose, and why?

## Question 7: Deferral conditions

Should section 83A of the *Sentencing Act 1991* (Vic) be amended to allow conditions to be attached to deferral orders? If so, why? If not, why not? In answering this question, you may wish to consider whether compliance with deferral conditions should be prohibited from being made a condition of bail.

## Question 8: Judicial monitoring

Is there scope to increase or improve the use of judicial monitoring during sentence deferrals? If so, how?

## Question 9: Justice plans

Should justice plans be made available as a condition of sentence deferral? If so, why? If not, why not?

## Question 10: Programs and services

Are there any improvements that could be made to the availability of support services and programs for people whose sentence has been deferred? If so, what do you propose, and why?

## Question 11: Deferral plans

Should offenders receive a written deferral plan outlining what they have agreed to do during the deferral period, and the potential consequences of not engaging positively with those requirements?

## Question 12: Sentence after deferral

Should courts be expressly permitted or required to tell the offender the sentence that they can expect if they successfully engage with the deferral? If so, why? If not, why not?

## Question 13: Deferrals and totality

To what extent should the requirements imposed on an offender during a sentence deferral be taken into account at sentencing?

## Question 14: Prioritising rehabilitation

If an offender has engaged positively with the conditions of their deferral, should rehabilitation become the primary purpose of sentencing?

1. Introduction
	1. The Sentencing Advisory Council was established in 2004 as an independent statutory authority.[[1]](#footnote-1) The functions of the Council are set out in legislation and include providing statistical information on sentencing, conducting research on sentencing and, most relevantly for this project, consulting with key stakeholders and the general community on sentencing matters, and advising the Attorney-General on sentencing issues.[[2]](#footnote-2)
	2. The aim of this project is to consult with key stakeholders and the general community about the current use of sentence deferrals in Victoria, identify opportunities for reform and provide advice to the Attorney-General. The project will examine the legal framework, the use of sentence deferral, and the available supports, to consider how to maximise the effectiveness of the deferral process.

## What is sentence deferral?

* 1. Sentence deferral is a *pre-sentence* option available in the Magistrates’ Court and County Court under section 83A of the *Sentencing Act* *1991* (Vic) (‘the *Sentencing Act*’).[[3]](#footnote-3) It allows a court to postpone (‘defer’) an offender’s sentence after they have been found guilty of an offence. The most common reason for deferring a person’s sentence is to give them an opportunity to demonstrate their willingness and ability to rehabilitate.[[4]](#footnote-4) Deferring sentence can also be for other reasons, such as enabling a restorative justice process to occur between the victim and the offender in appropriate cases.[[5]](#footnote-5) The offender must agree to the deferral, and the deferral must be in the offender’s interests.[[6]](#footnote-6)
	2. Sentence deferral first became available in the Children’s Court in 1991[[7]](#footnote-7) and in the Magistrates’ Court in 2000.[[8]](#footnote-8) Prior to these legislative deferral schemes, courts had a common law power to adjourn a criminal matter and order the offender to agree to be of good behaviour – a ‘Griffiths bond’.[[9]](#footnote-9)
	3. While deferrals were originally only available for offenders aged 17 to 25 in the Magistrates’ Court, legislation came into effect in 2012 – implementing recommendations of this Council[[10]](#footnote-10) – that removed the age restriction and also expanded the availability of deferrals to the County Court.[[11]](#footnote-11) This will be the first dedicated review of sentence deferral in Victoria since its 2012 expansion.

Figure 1: Timeline of legislative deferral schemes in Victoria

| Year | Jurisdiction | Scheme |
| --- | --- | --- |
| 1991 | Children’s Court | Deferral up to 4 months |
| 2000 | Magistrates’ Court | Deferral up to 6 months for offenders aged 17 to 25 |
| 2012 | Magistrates’ Court and County Court | Deferral up to 12 months for all offenders, legislative purposes added |

## Other pre-sentence options

* 1. There are other ways that a court can give the offender time before they are sentenced to address factors that contributed to their offending. For example, a court may:
* refer the offender to the Court Integrated Services Program (CISP);[[12]](#footnote-12)
* refer the case to the Assessment and Referral Court (ARC);[[13]](#footnote-13) or
* transfer the case to the Koori Court for a sentencing conversation.[[14]](#footnote-14)
	1. Courts also have a general power to adjourn a criminal proceeding to any time and place, for any purpose, and on any terms that the court considers appropriate.[[15]](#footnote-15) While an adjournment can be made for a variety of reasons, such as allowing an unrepresented accused to seek legal representation, it can also be used as an ‘informal deferral’.
	2. Any consideration of section 83A sentence deferrals must occur in the context of these other pre-sentence options, each of which gives courts a useful tool to craft an appropriate sentence.

## Scope of this project

* 1. This project primarily focuses on sentence deferrals under section 83A of the *Sentencing Act*, in particular asking:
* Are there any issues with the legislative framework for deferrals?
* Are there any issues with how deferrals operate in practice?
* Are there any issues with the systems and services that support deferrals?
	1. Where relevant, the programs and other orders that often operate alongside sentence deferrals – such as CISP and ARC – are also mentioned, but their operation is beyond the scope of this project.

## Human rights considerations

* 1. As a public statutory authority, the Council is required, ‘in making a decision … to give proper consideration to a relevant human right’. In developing its recommendations, the Council will have regard to the *Charter of Human Rights and Responsibilities Act 2006* (Vic), including the right to equality (section 8); the right to legal assistance (section 25); the right not to be punished in a cruel, inhuman or degrading way (section 10); and the right to humane treatment when deprived of liberty (section 22).[[16]](#footnote-16)

## Five phases of the project

* 1. There are five phases to this project:
1. **Preliminary consultation:** meet with stakeholders to identify the key issues relating to sentence deferrals (December 2021–February 2022).
2. **Survey:** survey judicial officers and criminal law practitioners about their perceptions of sentence deferrals (February–March 2022).
3. **Consult on issues and options for reform:** publish this consultation paper and invite written submissions on the questions raised (October–November 2022).
4. **Consult on issues and draft recommendations:** host a series of roundtable consultation meetings to seek views on the issues raised in this paper and options for reform, and draft recommendations (early 2023).
5. **Final report:** deliver a final report with recommendations to the Attorney-General, and then publish the report on the Council’s website (mid-2023).

## Method and data

* 1. This consultation paper analyses section 83A sentence deferrals in Victoria in the nine years from 2012 to 2020. It includes CourtLink data on the use of deferrals in the Victorian Magistrates’ Court; however, reliability issues mean that analysis is both limited and caveated. A total of 3,507 cases were recorded in CourtLink as being sentenced in the Magistrates’ Court following a deferral (‘deferral cases’). While this is a reliable sample, recording limitations mean that some (possibly many) deferral cases would not have been captured in the data. Further, CourtLink does not capture informal deferrals. Therefore, the number of deferrals should be treated as a minimum count, with the actual number likely to be higher.
	2. This consultation paper also includes the results of a survey of judicial officers and legal practitioners about the use of sentence deferrals and, using the Council’s reoffending database, an analysis of the reoffending patterns of people who received a sentence deferral.
	3. A more detailed methodology is set out in Appendix 2.
1. Use of sentence deferrals
	1. Using the limited data that is available, this chapter examines the use of sentence deferrals in Victoria, the age and gender of people whose sentence was deferred, and the offence types in deferral cases. It then explores some practical issues that may be limiting the use of deferral and possible improvements to overcome them.

## Sentence deferrals in the Magistrates’ Court

* 1. Due to data limitations (see [2.25]), data on the use of sentence deferrals in Victoria should be treated as a minimum estimate. While there were no apparent false positives in the data (all recorded deferrals seemed to be accurately recorded), there may be some, or even many, false negatives (where deferrals occurred but were not recorded).
	2. With that caveat in mind, there was a deferral in at least 0.4% of sentenced cases in the Magistrates’ Court between 2012 and 2020,[[17]](#footnote-17) or at least one in every 250 cases. The use of sentence deferrals seems to have increased markedly since the 2012 reforms (see [1.5]), from at least 85 a year to 753 in 2019 (Figure 2). The drop in 2020 was most likely due to the effect of COVID-19 on court operations.

Figure 2: Number of cases sentenced in the Magistrates’ Court after a recorded sentence deferral, 2012 to 2020

| Year | Number of cases |
| --- | --- |
| 2012 | 85 |
| 2013 | 122 |
| 2014 | 190 |
| 2015 | 284 |
| 2016 | 367 |
| 2017 | 569 |
| 2018 | 671 |
| 2019 | 753 |
| 2020 | 466 |
| **Total** | **3,507** |

### Rural and regional use of deferral in the Magistrates’ Court

* 1. Based on the available data, 75% of cases with recorded deferrals between 2012 and 2020 were sentenced in the greater Melbourne area with the remainder sentenced in rural and regional Victoria (25%). This is almost identical to the distribution of sentenced cases overall, with 74% of sentenced cases sentenced in the greater Melbourne area and 26% of cases sentenced in rural and regional Victoria. If the deferral cases accurately reflect deferral use across Victoria, this finding suggests that the use of deferral across Victoria is largely proportional to the total number of cases finalised.

### Gender

* 1. From 2012 to 2020, 19% of deferral cases involved a female offender (682 of the 3,505 deferral cases where data on gender was recorded). Again, noting the data limitations, if this represents the proportion of men and women receiving deferrals, it could suggest that sentence deferrals are slightly less common for women than for men, as women accounted for 22% of all sentenced offenders in that same period.[[18]](#footnote-18) This could suggest that there is a need to better utilise sentence deferrals in cases involving women, especially given that women are more likely than men to experience certain vulnerabilities that make sentence deferral a useful order (see [4.19]–[4.22]). Alternatively, this could, to an extent, reflect that women (for a variety of reasons) have a lower imprisonment rate than men do,[[19]](#footnote-19) such that there are fewer ‘borderline imprisonment’ cases (see [3.11]–[3.13]), which stakeholders suggested are a common situation in which deferral is currently used.

### Age

* 1. The median age of offenders with a recorded deferral was 31. One in three deferral recipients were aged 18 to 25 at sentencing (33%). This is higher than the proportion of people aged 18 to 25 in the general sentenced adult population (25%).[[20]](#footnote-20) As Roberts has argued, this may reflect courts’ recognition that young adults in particular may benefit from sentence deferral: they are still developing, which improves their prospects of rehabilitation, and are often experiencing rapidly evolving life circumstances.[[21]](#footnote-21)
	2. Deferral was certainly not limited to young adult offenders, however, with 42% of recipients aged 26 to 39 and 25% of recipients aged 40 and over.

### Offence type

* 1. The most common principal proven offence[[22]](#footnote-22) type in cases with a recorded deferral, by far, was assault and injury offences (32%) (Figure 3). This may in part reflect the use of rehabilitation programs for violent offending, such as men’s behaviour change programs in family violence cases, and anger management courses. A deferral would allow the offender time to participate in those programs before sentencing. Similarly, the relatively high rate of drug offences (9% of deferral cases) is most likely representative of courts deferring sentence for those offenders to participate in substance abuse treatment.

Figure 3: Principal proven offence type in deferral cases, Magistrates’ Court, 2012 to 2020

| Principal proven offence type | Percentage |
| --- | --- |
| Public order offences (ANZSOC 13) | 1% |
| Robbery offences (ANZSOC 6) | 1% |
| Sex offences (ANZSOC 3) | 2% |
| Property damage offences (ANZSOC 12) | 3% |
| Harassment and threat offences (ANZSOC 5) | 3% |
| Fraud offences (ANZSOC 9) | 4% |
| Burglary offences (ANZSOC 7) | 5% |
| Weapons offences (ANZSOC 11) | 6% |
| Endangerment offences (ANZSOC 4) | 6% |
| Traffic/vehicle offences (ANZSOC 14) | 8% |
| Justice offences (ANZSOC 15) | 9% |
| Drug offences (ANZSOC 10) | 9% |
| Theft offences (ANZSOC 8) | 10% |
| Assault and injury offences (ANZSOC 2) | 32% |

* 1. There were some notable gender differences in offence types. Although the most common offence type for both men and women was assault and injury offences, the proportion was substantially higher for men (34%) than for women (25%). Conversely, women had a higher rate of theft offences (19% compared to 8% for men) and fraud offences (7% compared to 4% for men).

### Criminal history

* 1. In 2019 and 2020, 1,201 offenders were recorded as sentenced in the Magistrates’ Court after a deferral. In the three years before their deferral case was initiated in court, over two-thirds had been sentenced on at least one prior occasion (68%), and about one in five had been sentenced to imprisonment in the preceding three years (19%). These rates were almost identical for men and women. These are remarkably high prior offending and prior imprisonment rates. As a point of comparison, the Council previously found that 34% of sentenced children and young people had a prior sentence in the previous four years, and that 49.5% of people who were sentenced for breaching a family violence safety notice or intervention order had been sentenced on another occasion in the preceding three years.[[23]](#footnote-23) Both of these groups – children and family violence offenders – are known to have high recidivism rates, yet the prior offending rate for people receiving deferrals (68%) is even higher than for both of them.

Figure 4: Prior offending rates of people sentenced after a recorded deferral in the Magistrates’ Court in 2019 and 2020 (1,201 offenders)

| Period | Percentage with prior sentence (any) | Percentage with prior imprisonment sentence |
| --- | --- | --- |
| Within 3 years | 68% | 19% |
| Within 2 years | 60% | 14% |
| Within 1 year | 43% | 7% |

* 1. This suggests that sentence deferrals are primarily being used as a therapeutic order for offenders who have already had some involvement in the justice system. In many such cases, the use of sentence deferral may reflect circumstances where a failure to intervene effectively now will irreparably entrench the offender in the justice system.

## Sentence deferrals in the County Court

* 1. Deferral has been available in the County Court since 2012 but is used sparingly in that jurisdiction due to the serious nature of offences sentenced, the greater use of prison sentences, and concerns about delays and the effect of these on the victim(s).[[24]](#footnote-24) However, the County Court has advised that sentence deferrals are useful in appropriate cases.[[25]](#footnote-25)
	2. There is currently no available data on the use of sentence deferral in the County Court. We therefore reviewed available sentencing remarks to identify cases involving a deferral between 2012 and 2020. We identified 32 cases, involving 27 men and five women.[[26]](#footnote-26) Of these 32 cases, 10 involved young adult offenders (aged 18 to 25), though there were also five cases involving offenders aged over 40.
	3. In addition to the 32 deferral cases, we identified a further 14 cases where the offender was sentenced after an unsuccessful application for deferral.[[27]](#footnote-27) An interesting insight from the review of sentencing remarks was provided by these 14 additional cases where the judge decided notto defer sentencing. In 12 of those cases, the offender was sentenced to imprisonment, and in six of those imprisonment cases, the court said that the reason for refusing deferral was that a prison sentence was inevitable. Other reasons for refusing deferral included a history of the offender not taking up opportunities for rehabilitation and not making any efforts towards their rehabilitation in the time leading up to their application for sentence deferral. In one case, the reasons for contemplating the deferral (correcting a sentencing error) did not fall within the purposes of deferral under section 83A.[[28]](#footnote-28) In another case, the court had already formed a favourable view of the offender’s rehabilitation prospects, holding that, as a result, further deferral was of limited value and finality was more important.[[29]](#footnote-29)

## Sentence deferrals in the Supreme Court?

* 1. Sentence deferrals are not currently available in the Supreme Court, although the court may informally defer sentence using its general adjournment power (see [1.7]). However, there is no apparent reason to prohibit sentence deferrals from being available in the Supreme Court, especially if there may be cases where they would be appropriate. While most offenders sentenced in the Supreme Court receive a prison sentence, this is not always the case.[[30]](#footnote-30) Further, as discussed at [3.14]–[3.17] and [4.20]–[4.22], deferral can also be useful even in cases where imprisonment is inevitable.

## Question 1: Supreme Court

Should sentence deferrals be available in the Supreme Court? If so, why? If not, why not?

## ‘Informal’ deferrals

* 1. As flagged in Chapter 1, in addition to a ‘formal’ legislative deferral power, courts have a general power to adjourn the hearing of a criminal proceeding to any time and place, for any purpose, and on any terms that the court considers appropriate.[[31]](#footnote-31) Adjournment is used for a range of purposes, such as for an unrepresented accused to seek legal advice or to enable discussion between the prosecution and the defence. It can also, however, be used to achieve the same purposes as a section 83A sentence deferral, such as organising for the offender to be assessed by a psychologist or to arrange treatment.[[32]](#footnote-32)

‘The limitation period in respect of deferrals can sometimes be restrictive, making a simple adjournment more useful prior to any deferral … In cases where only a short period is required in order to obtain further materials following the plea, a simple adjournment would also be more appropriate than a deferral.’

Survey participant, March 2022

* 1. In our preliminary consultation and survey, the overlap between section 83A sentence deferral and the court’s general adjournment power did not emerge as an issue. Instead, it appeared that the availability of both options gives courts flexibility in tailoring responses. Several respondents mentioned the 12-month limitation on the length of deferral as a circumstance where adjournment may be more appropriate.[[33]](#footnote-33) One participant also commented that adjournment may be more appropriate where a short time is needed after the plea hearing to gather information for the court.[[34]](#footnote-34)

## Strengths of sentence deferrals

* 1. Sentence deferrals are an important rehabilitation mechanism allowing sentencing courts to consider an offender’s actual, rather than theoretical, prospects of rehabilitation.[[35]](#footnote-35) In some cases, this can allow courts ‘to determine whether or not a custodial sentence should be imposed, and possibly its length, or the nature and length of a non-custodial sentence’.[[36]](#footnote-36) This is because the offender’s demonstrated rehabilitation during the deferral may persuade the court to impose a more lenient option than originally envisaged, avoiding the ‘unnecessary escalation of the offender up the sentencing hierarchy’.[[37]](#footnote-37) Roberts has argued that there ‘is clearly scope to increase the number of occasions on which sentencing is deferred’, and that deferral should be considered ‘for a wide range of individuals whose evolving personal circumstances may justify imposition of a sentence other than the one envisaged prior to deferral’.[[38]](#footnote-38)

‘I think [deferrals] should be used more often than they are and be approached more creatively by judicial officers than they often are as well.’

Survey participant, March 2022

* 1. Stakeholders and survey participants described other benefits of sentence deferral; for example, it can:
* enable offenders better and earlier access to appropriate programs and services;
* enable offenders with tumultuous life circumstances to stabilise in the community, rather than being further disrupted by a custodial sentence;
* facilitate restorative justice processes;
* acknowledge that rehabilitation, particularly for offenders with complex needs, will often be a prolonged journey, best facilitated by ongoing support;
* operate as a useful period to ensure consistency in the delivery of court-based services and community-based services;
* be highly flexible, in terms of both duration and requirements;
* be highly responsive, with opportunities for multiple review hearings; and
* incentivise offenders to engage positively with programs and services.
	1. During preliminary consultation with the legal profession and judiciary, stakeholders and survey participants were overwhelmingly positive about sentence deferrals, with almost all of them saying that deferrals should be used more frequently. The one survey participant who thought that sentence deferral was used ‘about the right amount’ mainly practised in the County Court where offence seriousness means that deferral is less common (Figure 5).

Figure 5: Responses to survey question: ‘Ideally, should s 83A sentence deferrals be more common than they currently are?’

| Response | Number |
| --- | --- |
| Yes, much more common | 11 |
| Yes, a little more common | 12 |
| No, they are used about the right amount | 1 |
| No, they are too common | 0 |

* 1. These views are consistent with the experience in Scotland. The ‘structured deferred sentence’ in Scotland – which targets young offenders and is limited to six months – has been positively evaluated numerous times,[[39]](#footnote-39) with suggestions that it would be used more frequently if it were better funded.[[40]](#footnote-40)

## Barriers to the use of sentence deferrals

* 1. During our preliminary consultation and survey, legal and judicial stakeholders also identified several barriers to the use of sentence deferral. These included:
* concerns that increased use of deferrals may delay criminal proceedings (particularly while courts deal with the backlog caused by COVID-19);
* concerns that delays caused by deferral will have a detrimental effect on victims of crime, particularly in cases involving physical and sexual violence (especially family violence);
* judicial caution about ordering a deferral in cases where imprisonment is inevitable (though as discussed at [3.14]–[3.17] and [4.20]–[4.22], there may be good reasons to use deferrals in these cases);
* practitioners sometimes requesting deferrals without having developed a plan of available supports if the court were to agree to the request;
* a lack of awareness – by judicial officers and practitioners – about section 83A sentence deferrals;
* insufficient funding for lawyers representing legally aided clients to cover all necessary preparation and appearances for cases where a sentence has been deferred;[[41]](#footnote-41) and
* the limited availability of many services (such as housing) and programs (such as men’s behaviour change programs), and long waiting lists.

‘There are lawyers who come with a package: “I’ve organised this, I’ve organised that, drug counselling is underway, I’ve got them in services” … But it’s patchy. And it relies on someone being represented.’

Meeting with Magistrates’ Court (9 December 2021)

* 1. The Victorian Aboriginal Legal Service has raised a number of these issues, including the time pressures on magistrates ‘want[ing] to clear the list rather than deferring sentencing’,[[42]](#footnote-42) as well as funding restrictions, noting that ‘legal aid grants do not cover adjournments, so private lawyers may be reluctant to ask that sentencing is deferred’.[[43]](#footnote-43)
	2. In response to these issues, stakeholders offered some possible ways to encourage increased use of sentence deferrals in appropriate cases:
* funding initial sentence deferral applications for legally aided clients to ensure resources are available for lawyers to develop a proposed plan for the deferral period, including confirming that services and supports are available;
* extending the availability of CISP in deferral cases to ensure that services are available throughout the deferral period and are not limited to four months;
* developing an in-house Magistrates’ Court coordination service (less intensive than CISP) that could assist some accused people to find and register with appropriate supports and programs but, to reduce the resources required by such a service, leaving ongoing progress reporting to the program and accused person;
* increasing judicial officers’ awareness about sentence deferral through training provided by the Judicial College of Victoria; and
* increasing legal practitioner awareness about sentence deferral through professional development training.

## Question 2: Barriers to use

What, if any, are the current barriers to using sentence deferrals in appropriate cases? What changes would you propose to overcome those barriers, and why?

## Data issues

* 1. One of the difficulties that the Council faced in examining the use of deferral in Victoria is the lack of reliable deferral data. This was because of constraints in the current Courtlink system, which uses the same hearing type field to record deferral, Koori Court and CISP (among others).[[44]](#footnote-44) It was therefore difficult to accurately identify the overall number of deferral cases in Victoria. These challenges are not unique to Victoria. As Roberts recently observed in the context of sentence deferrals in England and Wales:

[i]t is challenging to determine current use as the statistical record of deferred sentencing is incomplete. No statistics are currently available with respect to the volume of deferred sentences.[[45]](#footnote-45)

* 1. The Magistrates’ Court is currently developing a new case management system, with the criminal stage due for delivery in the 2022–23 financial year.[[46]](#footnote-46) This could provide a useful opportunity to better record the use of sentence deferrals, the date of deferral, the date to which sentence was deferred, any deferral conditions, and any scheduled review dates. The Council will liaise directly with the Magistrates’ Court about potential improvements in the recording of sentence deferral data.
1. Eligibility for sentence deferral
	1. The Magistrates’ Court and County Court may defer an offender’s sentence if:
* the court has found the offender guilty of an offence;
* the offender agrees; and
* the court is of the opinion that it is in the interests of the offender.[[47]](#footnote-47)
	1. Unlike legislation in some jurisdictions, Victorian legislation does not require the court to consider the interests of the victim or the interests of justice in deciding whether to defer sentencing. The provision is also silent about the relevance of offence seriousness and/or the likelihood of imprisonment. This chapter explores the above eligibility criteria and whether the legislation should require any additional considerations to be taken into account.

## The interests of the offender

* 1. Case law on the notion of the ‘interests of the offender’ tends to revolve around circumstances where the offender is presumed to have an interest in being rehabilitated and in not reoffending, and in avoiding incarceration.[[48]](#footnote-48) The concept primarily arises in cases involving young offenders, and it tends to be raised concurrently with the interests of the community, because rehabilitation and desistance from offending tend to be mutual goals of both offenders and the broader community. For example, in *DPP v Pan*, the Court of Appeal noted that ‘rehabilitation and avoiding or reducing the adverse effects of incarceration’ will typically be ‘a fundamental aspect in sentencing’ as it serves ‘the interests of the offender and the community’.[[49]](#footnote-49) In *DPP v Ring*, the County Court noted that tailoring a sentencing outcome ‘to promote the offender’s rehabilitation … serves the interests of the individual offender and the community as a whole’.[[50]](#footnote-50) And in the guideline judgment of *Boulton v The Queen*, the Court of Appeal held that a community correction order (CCO):

offers the sentencing court the best opportunity to promote, simultaneously, the best interests of the community and the best interests of the offender and of those who are dependent on him/her.[[51]](#footnote-51)

## The interests of the victim?

* 1. At various stages in criminal cases, a court may be required to consider the views of the victim. For example:
* bail decision-makers must consider the known or likely view of alleged victims about granting bail;[[52]](#footnote-52)
* courts may refuse to give a sentence indication if there is insufficient information about the impact of the offence on the victim;[[53]](#footnote-53) and
* a sentencing court must consider the impact of the offence on the victim.[[54]](#footnote-54)
	1. In contrast, there is no formal requirement that a court consider the possible view of, or the effects of the deferral on, any victims in deciding whether to order a deferral.[[55]](#footnote-55) In that context, it is unsurprising that 14 respondents to our survey said that it was somewhat or very uncommon for courts to consider the potential effects of a deferral on any victims. Only seven participants said that it was somewhat or very common to do so.
	2. There are several reasons to consider the interests of the victim before deferring sentence. Most prominently, postponing sentencing can cause additional stress and trauma to victims who want the case to be finalised.[[56]](#footnote-56) For instance, the South Australian Supreme Court has noted that ‘deferment of sentence, other than in the truly appropriate case, delays further healing for victims of crime’ and ‘exacerbates suffering’.[[57]](#footnote-57)
	3. In our 2008 review of suspended sentences, Victoria Police raised concerns about the effect of sentence deferral on victims.[[58]](#footnote-58) In response, section 83A was amended to include a list of intended purposes, to ‘help to ensure that deferral is not used by defendants as a means of unnecessarily prolonging proceedings’.[[59]](#footnote-59) A question remains, however, whether the effect of deferral on victims should be a legislated consideration.

## The interests of justice?

* 1. While Victorian courts are required to consider the interests of the offender before deferring sentence, there is currently no requirement to consider the interests of justice more generally. In comparison, courts in Canada[[60]](#footnote-60) and in England and Wales[[61]](#footnote-61) are required to consider the interests of justice before deferring sentence. The ‘interests of justice’ is an intentionally broad notion designed to fit the circumstances of its application.[[62]](#footnote-62) It requires a court to consider the overall fairness and equity to the parties and the interests of the community when making a discretionary decision. How it is interpreted will vary depending on the facts, circumstances and affected people in a particular situation. In the context of sentence deferral, for example, a requirement to consider the interests of justice might require the court to balance:
* the interests of the offender;
* the interests of the victim(s) and any adverse effect on them (such as distress caused by further delay) if sentence is deferred;
* the need for finality of litigation where possible;
* the risk to the community if an offender facing a possible prison sentence is given the opportunity to continue on bail while they demonstrate their rehabilitation;
* the long-term benefits to the community if the offender is rehabilitated.
	1. On the one hand, including an ‘interests of justice’ consideration for courts deciding whether to defer sentence could encourage courts to more expressly consider the community’s interest in reducing criminal behaviour, above and beyond the offender’s own interest in avoiding further contact with the justice system.[[63]](#footnote-63) On the other hand, an ‘interests of justice’ criterion for eligibility may inadvertently operate as a barrier to sentence deferrals being used in appropriate cases.

## Offence seriousness and the likely sentence?

* 1. In our preliminary consultation, stakeholders told us that there is currently uncertainty about whether deferred sentencing is appropriate in cases involving serious offending for which a prison sentence is highly likely or even inevitable. Conversely, they also expressed uncertainty about whether sentence deferrals are appropriate in less serious cases where imprisonment is highly unlikely. In that context, it may be useful for the *Sentencing Act* to clarify whether, and to what extent, the likely sentence to be imposed is a relevant consideration in the use of deferral.

### Borderline imprisonment cases

* 1. In Western Australia, sentence deferral is *only* available if an offender is on the cusp of receiving a term of imprisonment. That is, the seriousness of the offence justifies the imposition of a term of imprisonment, but the court might not impose one if the offender complies with the deferral conditions.[[64]](#footnote-64) It is effectively an opportunity to avoid a term of imprisonment. Similarly, the Sentencing Council for England and Wales suggests that deferred sentences are mainly relevant in the ‘small group of cases’ near the threshold for custody ‘where, should the offender be prepared to adapt his behaviour in a way clearly specified by the sentencer, the court may be prepared to impose a lesser sentence’.[[65]](#footnote-65)
	2. In comparison, sentence deferral in Victoria (and elsewhere)[[66]](#footnote-66) is not limited to cases on the cusp of a prison sentence. Nevertheless it seems to be common in borderline cases, especially perhaps where the offender’s circumstances appear to be changing for the better.[[67]](#footnote-67) For example, an offender may have just secured stable housing or employment, enrolled in education or started a treatment program.[[68]](#footnote-68) Deferral in these cases can provide the offender with a final opportunity to show their commitment to rehabilitation and thereby assist the court in determining whether the offender should ultimately receive a prison sentence.[[69]](#footnote-69)

‘Often a Court experiences difficulty when sentencing an offender in determining the offender’s prospects of rehabilitation and whether the foreshadowed rehabilitation will occur. In many instances it will be of great assistance to the sentencing judge if there is an adjournment to enable the offender to demonstrate that rehabilitation has taken place or is well on the way … It is so much better for the court to have evidence of what has actually taken place than to have to base its decision on the opinions of experts, assertions by the offender and what has happened over a short period of time, that is, since the commission of the offence or the offender’s arrest.’

R v Trindall [2002] NSWCCA 364, [60]

* 1. The available data on the use of sentence deferrals suggests that many of them may be occurring in these borderline imprisonment cases. Of the 3,507 cases sentenced after a recorded deferral in the Magistrates’ Court, 26% received a CCO, suggesting that, in at least some of these cases, the offender may have avoided a prison sentence by demonstrating their rehabilitation during the deferral. As a point of comparison, just 9% to 10% of all Magistrates’ Court cases tend to result in a CCO,[[70]](#footnote-70) suggesting deferrals are more common in cases that ultimately receive a CCO than in all cases generally.

### Inevitable imprisonment cases

* 1. Above and beyond borderline imprisonment cases, sentence deferral may even be used in Victoria if a prison sentence is likely, or even inevitable. This is also the case in most other Australian jurisdictions. For instance, legislation in the Australian Capital Territory makes it clear that ‘[a] court may make a deferred sentence order whether or not it considers that the seriousness of the offence justifies a sentence of imprisonment’.[[71]](#footnote-71) In New South Wales, case law has established that, in appropriate cases, sentence deferral is available even if a period of imprisonment will be ordered, so long as the deferral might affect the length of the sentence or non-parole period.[[72]](#footnote-72) Sentence deferral is also possible in inevitable imprisonment cases in South Australia, though courts have emphasised that it would be rare:

No good purpose will usually be served in deferring sentence … if the demands of punishment and general deterrence are so great that a substantial sentence of immediate imprisonment must be imposed even if the proposed rehabilitation program is largely successful.[[73]](#footnote-73)

* 1. In practice, sentencing remarks suggest that Victorian courts have been reluctant to defer sentencing in cases where imprisonment is inevitable. For instance:

I consider in this case that a sentence of imprisonment is inevitable, and I refuse to defer sentencing you.[[74]](#footnote-74)

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Your counsel … submitted that the sentence should be deferred to enable you to complete participation in rehabilitation courses … I am simply unable to accede to that submission. It is inevitable that you will receive a custodial sentence for this offence and it should commence immediately.[[75]](#footnote-75)

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[Y]ours was a sentence that could not involve anything but immediate imprisonment. In those circumstances I found that it was most inappropriate to defer sentencing to allow you to commence on a pure rehabilitative process for the next 12 months. Such would then have meant that it would have been most inappropriate to impose a period of imprisonment at that later stage.[[76]](#footnote-76)

* 1. That said, there were many cases in the Magistrates’ Court where the offender was imprisoned after a deferral (20% of recorded deferral cases). While many of these are likely to have been borderline imprisonment cases where the offender’s progress on deferral was insufficient to convince the court that a non-custodial disposition was appropriate, it is possible that, in at least some of them, imprisonment was inevitable but the court nevertheless ordered a deferral.
	2. The Council is interested in stakeholder views on whether it may be useful to amend section 83A to clarify that a court may defer sentencing even if the seriousness of the offence justifies a prison sentence. Deferrals in such cases can still be useful where the offender’s participation would result in a shorter prison sentence or non-parole period,[[77]](#footnote-77) where restorative justice is sought and especially where offenders have child-related responsibilities (see further [4.20]–[4.22]). In such cases, however, it would be important not to give the offender a ‘false expectation’ that their performance on deferral might allow them to avoid a prison sentence.[[78]](#footnote-78) It may even be appropriate to warn the offender that a prison sentence is still likely.[[79]](#footnote-79)

### Less serious cases

* 1. Sentence deferral is also available for less serious cases, for example, ‘where the court needs time to consider the outcome of public or private treatment or other interventions, or the outcome of restorative justice conferences’.[[80]](#footnote-80) Reflecting this broad availability, half (51%) of the 3,507 recorded deferral cases ultimately received a sentence at the lower end of the sentencing hierarchy:
* 30% received an adjourned undertaking;
* 19% received a fine; and
* 2% received a discharge or dismissal.
	1. Caution is required, however, in using deferral in cases involving relatively minor offending. Just as the principle of proportionality does not allow a sentence to exceed what is necessary in any given case,[[81]](#footnote-81) neither should the conditions imposed *prior* to sentencing exceed what is appropriate (even if they are intended to support the offender’s rehabilitation).[[82]](#footnote-82) Because of the potentially onerous nature of deferral conditions, it has even been argued that a ‘deferred sentence is best conceived as a sentence and not a protracted adjournment’.[[83]](#footnote-83) By extension, it is arguable that the duration and conditions of any deferral should be considered ‘part of the totality of punishment imposed’,[[84]](#footnote-84) and not be disproportionate to the seriousness of the offending.

## Question 3: Eligibility criteria

Are there any issues with the current criteria and considerations courts must take into account before ordering a sentence deferral? In answering this question, you may want to consider:

* if courts deciding whether to order a deferral should be required to consider the interests or views of any victims, and/or the interests of justice; and
* whether section 83A should specify that a court may order deferral even if it considers that the seriousness of the offence justifies a prison sentence.
1. Purposes of sentence deferral
	1. Since 2012, the *Sentencing Act* has specified the purposes for which a court may defer sentencing. These purposes, which were based on the Council’s advice,[[85]](#footnote-85) are distinct but overlap. A court may defer sentencing for:
* the offender’s capacity and prospects for rehabilitation to be assessed;
* the offender to demonstrate that rehabilitation has taken place;
* the offender to participate in a program addressing underlying causes of the offending;
* the offender to participate in a program addressing the impact of the offending on the victim;
* any other purpose that the court considers appropriate in the circumstances.[[86]](#footnote-86)

Figure 6: Purposes of sentence deferral

* Assessment
* Demonstrate rehabilitation
* Program addressing causes of offending
* Program addressing victim impact
* Any other purpose
	1. The purposes of sentence deferral under section 83A will sometimes overlap with the reasons that a court will exercise its general power to adjourn a criminal proceeding. Roberts has argued, however, that sentence deferral can better engage the offender:

In contrast to an adjournment, deferral actively engages the offender in the sentencing process. Over a longer period, deferment offers an opportunity to demonstrate that the offender’s life has changed for the better. Deferral also provides the offender with an incentive to participate in restorative meetings with the victim. Deferred sentencing is thus a rare example of active offender participation in the sentencing exercise.[[87]](#footnote-87)

* 1. Victoria’s legislated deferral purposes are largely similar to those in comparable jurisdictions. Purposes often include assessing the offender’s rehabilitative prospects or needs,[[88]](#footnote-88) allowing the offender to address the causes of their behaviour, demonstrate rehabilitation or undertake rehabilitative interventions,[[89]](#footnote-89) and allowing the offender to take part in restorative justice processes or agreements.[[90]](#footnote-90) Catch-all ‘any other reason’ purposes are also common.[[91]](#footnote-91)
	2. Participants in the Council’s survey of legal practitioners and the judiciary identified rehabilitation-focused purposes as the most common reason for sentence deferrals: the offender demonstrating that rehabilitation has taken place (10 participants), participating in a rehabilitation program (eight participants) or having their rehabilitative prospects assessed (six participants). No survey participants nominated restorative justice or any other purpose as the most common reason for deferral.

## Assess rehabilitation prospects

* 1. Deferrals to assess an offender’s rehabilitation prospects or capacity may be relatively short compared with deferrals for other purposes. These deferrals can involve the offender seeing a psychologist, psychiatrist or other health professional to assess the offender’s health issues and how they relate to their offending, ongoing risk and sentencing.
	2. An assessment of an offender’s rehabilitation prospects may also include an assessment of suitability to participate in a court-based program or process, such as the Court Integrated Services Program (CISP), the Assessment and Referral Court (ARC) or the Koori Court (see further [1.6]).

## Demonstrate rehabilitation

* 1. The second possible purpose of deferral is to enable the offender to show evidence of their progress towards rehabilitation. This can include, for example, desisting from offending, returning negative drug tests, and obtaining stable accommodation or employment.
	2. This purpose overlaps with many of the others. For example, an offender may demonstrate their rehabilitation by participating in a program (such as an anger management course) that addresses factors that contributed to their offending or through participating in a restorative justice process.

‘In part I propose to do this, if you are agreeable, as you appear to be at a critical place in your life. If you continue in the direction which you have, I am of the view that there is a very good prospect of you leaving your offending past behind, overcoming your difficulties, and rehabilitating yourself. If you maintain your positive progress, I will have regard to that when I impose sentence on you, in what would be some six months’ time.’

Unpublished sentencing remarks provided to the Council

## Program addressing causes of offending

* 1. The third possible purpose of deferral is for the offender to participate in a program addressing the underlying causes of their offending. For example, an offender with drug dependency issues may have their sentence deferred to undertake a drug rehabilitation program. Genuine and active participation in these programs can give the court some cause for optimism about the offender’s rehabilitative prospects, even if there are some issues along the way (such as positive urinalysis tests).

What works well with deferrals?

‘Deferrals enable flexibility in the sentencing process and account for the fact that offenders typically achieve relative rehabilitation or progress towards it at different speeds depending on their underlying issues. In my experience, the disposition ultimately arrived at following a deferral is far more effective and tailored to the individual than one imposed immediately following plea submissions … and thus is more likely to lead to long-term benefits for the offender and community.’

Survey participant, March 2022

* 1. In one case, the offender’s sentence was deferred for him to complete a residential rehabilitation program.[[92]](#footnote-92) He had pleaded guilty to attempted armed robbery, committed when he was aged 24 and ‘in the grip of a serious drug dependency’.[[93]](#footnote-93) At the time of his deferral, he had completed three of four stages of the rehabilitation program. By the time of sentencing, he had successfully spent about 16 months in residential rehabilitation, including a period where he was not allowed to leave the premises. The court sentenced him to a 12-month community correction order (CCO), noting that ‘[t]he prosecution did not oppose the possibility of a non-custodial disposition, in view of your good progress’.[[94]](#footnote-94)

## Restorative justice – ‘addressing victim impact’

* 1. The fourth possible purpose of deferral is to allow for pre-sentence restorative justice processes between offenders and victims in appropriate cases.[[95]](#footnote-95) There is no single definition of restorative justice, but it most commonly involves bringing together in a safe and structured way the offender and anyone harmed by their behaviour to discuss how the crime has affected the victim(s). In appropriate cases, it can be a healing process for victims and give offenders an opportunity to take responsibility for their behaviour. In recommending restorative justice as a purpose of sentence deferral, the Council in 2008 explained that:

deferral of sentencing could provide a useful means by which the court could encourage participation in [restorative justice] programs. From a victim’s perspective, the use of restorative justice could result in greater satisfaction with the process, while for the offender it may lead to a better understanding of the impact of his or her offending behaviour on those directly affected by it.[[96]](#footnote-96)

* 1. There is increasing recognition of the benefits of restorative justice as an addition to the justice system,[[97]](#footnote-97) particularly as a reason for deferring a sentence. In part, this is because restorative justice allows the offender to demonstrate[[98]](#footnote-98) remorse for their offending, which can be an important consideration for sentencing courts.[[99]](#footnote-99) As the Victorian Law Reform Commission has argued, however, sentence mitigation on the basis of restorative justice outcomes will only be available if the offender’s engagement is genuine.[[100]](#footnote-100) Further, courts have cautioned against quantifying the extent of any sentence reduction.[[101]](#footnote-101)
	2. There is limited information about the extent to which deferral has been used to facilitate restorative justice in Victoria. In our survey of legal practitioners and the judiciary, no-one identified restorative justice as the most common purpose of sentence deferral (although that does not necessarily mean it has not been used for that purpose). Further, the Australian Association for Restorative Justice recently observed that despite ‘a consistent and growing base of evidence’ about the effectiveness of restorative approaches in responding to and preventing crime, ‘restorative approaches remain significantly underutilised in the Victorian criminal justice system’.[[102]](#footnote-102)
	3. There are three possible issues that emerge in relation to the use of restorative justice during sentence deferrals:
* as both the Victorian Law Reform Commission and the Centre for Innovative Justice have also observed,[[103]](#footnote-103) the current language of section 83A(1A)(c) does not clearly signal that the provision is intended to enable restorative justice processes (‘for the offender to participate in a program addressing the impact of the offending on the victim’);[[104]](#footnote-104)
* courts are not currently legislatively required to ensure that the victim is willing to participate in restorative justice processes prior to deferring sentence for this purpose (even if this already happens in practice, requiring such confirmation may be a useful safeguard and symbolically important); and
* while beyond the scope of this project, there is no legislative framework about when, how and why to use restorative justice processes in Victoria.[[105]](#footnote-105)

## Other purposes the court considers appropriate

* 1. Finally, a court can defer sentencing for any other purpose it considers appropriate. This has, for example, included:
* to allow the offender to recover from surgery or receive medical treatment;[[106]](#footnote-106)
* to avoid the risk of suicide if the offender remains in custody before sentencing;[[107]](#footnote-107)
* to allow the offender to apply for assistance from the National Disability Insurance Scheme (NDIS) or to allow the court to get an update from the NDIS on the supports currently being provided or available for the offender;[[108]](#footnote-108)
* to ‘ensure that a mother is not separated from a newborn baby’;[[109]](#footnote-109)
* to ‘allow [the offender] time to work and earn money to pay the children’s school fees and to allow [his] prospects of rehabilitation to be further assessed’ (as stated in a submission that sentence be deferred, but the court refused the application for a deferred sentence for this purpose);[[110]](#footnote-110)
* to give the offender the opportunity to pay restitution to the victim.[[111]](#footnote-111) There are concerns, however, that deferral for this purpose may ‘permit wealthy defendants the time to pay compensation and thereby evade imprisonment’. It is important, therefore, to ensure that it does not differentially benefit wealthy defendants’.[[112]](#footnote-112)

## Sentence deferrals and marginalised groups

* 1. There are a number of groups of people who are often disproportionally affected by the criminal justice system and/or are frequently overrepresented in prison. This includes, for example, Aboriginal and Torres Strait Islander peoples; people from culturally and linguistically diverse backgrounds; people with a history of trauma, including family violence; people with substance abuse issues; people with mental health issues, intellectual disability or cognitive impairment; people experiencing homelessness; people living in rural and regional Victoria; and young adults.
	2. Sentence deferral can be a useful mechanism for keeping such offenders out of prison, facilitating their rehabilitation and thereby protecting the community. The Council is interested in hearing whether there are any reforms that could be made to sentence deferrals – whether to legislation, practice or resourcing – that could improve justice system responses for those groups.
	3. For instance, the Council would be interested in hearing about:
* whether making justice plans available for offenders on deferred sentences (especially people ineligible for participation in ARC) could improve their access to programs and services that reduce their risk of reoffending;
* whether encouraging sentence deferrals for offenders with drug and alcohol dependency issues would give them a better opportunity to seek treatment prior to sentencing, particularly given the long wait lists for programs as noted by stakeholders during preliminary consultations; and
* whether and how sentence deferral might play a role in reducing the overrepresentation of Aboriginal and Torres Strait Islander peoples in the criminal justice system generally, and prisons specifically.

## Question 4: Marginalised groups

Are there reforms that could be made to sentence deferrals that could reduce the disproportionate effect of the criminal justice system on marginalised groups? If so, what reforms would you propose, and why?

## Women, pregnant offenders, and offenders with dependent children

* 1. One particular group for whom sentence deferral may be particularly useful is women, especially those with child-related responsibilities. Women have been increasingly recognised as a particularly vulnerable offender group, especially in the prison system.[[113]](#footnote-113) This can result from:
* the low rate of female prisoners in general, meaning there are very few prisons that can accommodate them, increasing the risk of them being incarcerated further away from family and friends;[[114]](#footnote-114)
* the increased likelihood that their offending is a product of their own past victimisation, such as childhood sexual abuse and/or family violence;[[115]](#footnote-115)
* pregnancy and/or breastfeeding; and/or
* their primary carer responsibilities, for either children or grandchildren.[[116]](#footnote-116)
	1. As Gerry has argued,[[117]](#footnote-117) increasing the use of sentence deferrals for female offenders could be a useful tool in offering women pathways out of the justice system, including the opportunity to avoid prison, and thereby strengthening Australia’s compliance with multiple international human rights treaties. Deferring sentence can, for example, allow women the opportunity to give[[118]](#footnote-118) birth outside prison, breastfeed their newborn children and/or make adequate arrangements for dependent children. The Prison Reform Trust in the UK has recommended that when women are the sole or primary carer, there should generally be a presumption in favour of deferral regardless of the likely sentence:

There should be a presumption in favour of sentence deferral … to give them the opportunity to work with probation services to demonstrate their capacity to comply with community requirements the court may be considering.

If the offence is so serious that only a custodial sentence can be justified, there should be a presumption where the offender is a sole carer that sentencing will be deferred to allow arrangements to be made for the children. This would reduce the trauma commonly experienced by both mother and children.[[119]](#footnote-119)

* 1. In *R v Togias*,[[120]](#footnote-120) the New South Wales Court of Criminal Appeal criticised a trial judge for not deferring sentence for a breastfeeding mother convicted of importing a commercial quantity of narcotics. At the time of sentencing, there was insufficient evidence about the arrangements in custody for contact between the offender and her newborn. The Court of Criminal Appeal held that the trial judge:

failed to have regard to the fact that, by deferring the sentencing task, he may have been able to ensure that, with the co-operation of the authorities and subject to a positive assessment, there would be no such separation.[[121]](#footnote-121)

* 1. It is arguable that specific legislative inclusion of a purpose of deferral relating to parental responsibilities would highlight the particular advantages of deferral in this context, and therefore increase and encourage consistency in its use. This could, for example, include deferring sentence in appropriate cases:
* to take into account the best interests of an offender’s unborn or newborn child (for example, to allow an offender to give birth outside the prison system or to make arrangements to ensure that an offender will be able to continue breastfeeding while serving a prison sentence);[[122]](#footnote-122)
* to enable an offender who is the primary or sole carer of one or more children to demonstrate their ability to comply with community requirements and remain in the community with their children; and/or
* to enable an offender with dependent children to make caring arrangements for when the offender is in prison, particularly if they are the sole carer.

## Question 5: Purposes of deferral

Should the current legislative purposes of sentence deferral in section 83A(1A) of the *Sentencing Act 1991* (Vic) be amended? If so, what changes would you recommend, and why?

1. Length of sentence deferral
	1. The maximum length of sentence deferrals in Victoria is currently one year.[[123]](#footnote-123) This is the same as in New South Wales, South Australia and the Australian Capital Territory,[[124]](#footnote-124) though in South Australia a deferral can exceed the 12-month maximum if that restriction would prevent the offender from participating in a relevant intervention program.[[125]](#footnote-125) The maximum length is shorter in England and Wales (six months), longer in Tasmania (two years) and discretionary in Scotland (‘for a period … as the court may determine’).[[126]](#footnote-126)
	2. The maximum period in Victoria was previously six months, but it was increased to 12 months in 2010 following a recommendation by this Council.[[127]](#footnote-127) Consultation at the time revealed mixed feelings about extending the maximum period of sentence deferrals, because there needed to be a balance between ensuring timely finalisation of criminal proceedings and providing adequate time for the purposes of deferral to be achieved.[[128]](#footnote-128)
	3. There is currently no reliable data on the length of sentence deferrals in Victoria. However, respondents to the Council’s survey were asked the typical length of sentence deferrals. The most common response was six months (eight participants), but answers ranged from one month (one participant) to 12 months (three participants).

## Availability and length of rehabilitation programs

* 1. During preliminary consultation, stakeholders told us that the 12-month limit on deferrals can sometimes be an issue in relation to offenders with complex needs, particularly those engaging in treatment programs that either are lengthy or have long waitlists. Some respondents to our survey of legal practitioners and judicial officers similarly told us that the 12-month limit can be one of the reasons a court uses a general adjournment power over a deferral, because there is no limit on the number of adjournments in a case. Some survey participants suggested that it was worth exploring increasing the maximum length of sentence deferral, particularly in the County Court.

‘[A]n informal deferral through an adjournment can sometimes be of use as it allows for more flexibility in terms of ultimate finalisation of a matter. Also in circumstances where a lengthy treatment program which has a significant waiting list is being contemplated as forming part of the assessment of prospects of rehabilitation, or assisting dealing with underlying issues, the 12 month cap on a deferral may mean that the treatment will not be completed by the time the deferral ends.’

Survey participant, March 2022

* 1. As an example, in Case Study 1 (page 37) the offender pleaded guilty part way through a 16-month residential drug rehabilitation program. The court deferred sentencing to allow him to complete the program, and he was ultimately able to show significant rehabilitative progress that justified a community correction order (CCO) rather than imprisonment. The length of that program (much longer than 12 months) shows that there would be cases where a deferral of longer than 12 months would be useful.

## Case Study 1: Jake

Jake (age 24) was sentenced for an attempted armed robbery. He had entered a local shop, dressed in dark clothes and a beanie, armed with a knife. He pointed a knife at the young male shop assistant and demanded money. The owner of the shop threw a can of Red Bull at Jake and told the shop assistant to ‘get the gun’. Jake ran away and was arrested a few days later.

At the time of the offence, Jake was using ice daily and committing offences to pay for drugs. Jake was released on bail, on condition that he was admitted to a residential drug rehabilitation program, which required him to stay at the premises under close supervision.

Jake’s sentence was later deferred to enable him to finish the program and to allow the court to better assess his progress. By the time of sentencing, Jake had spent about 16 months in the residential program and had successfully completed it. The program providers reported that Jake had made excellent progress, was still residing at the premises, was working four days a week as a bricklayer, and was doing voluntary gardening work one day a week as well as becoming a leader, supervisor and mentor for others on the program. During the program, Jake had undergone counselling and drug testing, and had engaged in courses dealing with his previous emotional difficulties.

While awaiting sentencing, Jake also participated in a mediation session with the victims of an unrelated burglary. The victims wrote to the court saying that they were pleased that Jake had received the help he needed, and said they could see that he had become a ‘dramatically different person’ from the man he was before. Jake was ultimately assessed as suitable for a CCO, and the prosecution did not oppose one being made given Jake’s progress. In sentencing Jake to a 12-month CCO with conviction, the court said:

[y]ou have spent a week in custody, and you have now spent about 16 months in residential rehabilitation, successfully so. Your time has not been your own, and in a significant way you gave up your liberty to complete the course and ensure that you did not offend again. This is quite unusual, and obviates the need for me to place great weight on the need for general deterrence, as I otherwise would.

DPP v Wharton [2014] VCC 1844

## Bail provisions and ‘setting an offender up to fail’

* 1. One issue relevant to considering whether to extend the maximum deferral period beyond 12 months is whether this could subject some deferral recipients to an unduly long period of potential exposure to reverse onus bail laws. The current provisions of the *Bail Act 1977* (Vic) can expose people charged with an indictable offence to a reverse onus bail position if they are alleged to have committed another indictable offence while on bail during the deferral period. The new alleged offence becomes a Schedule 2 offence, meaning the person would need to establish a ‘compelling reason’ why they should be released rather than remanded.[[129]](#footnote-129) If that person is then released but is then alleged to have committed another indictable offence while on summons or bail, they would then need to establish ‘exceptional circumstances’ why they should be granted bail.[[130]](#footnote-130) While exceptional circumstances are not an ‘impossible’[[131]](#footnote-131) hurdle and can also be based on a combination of factors,[[132]](#footnote-132) they are nonetheless a ‘high’ hurdle.[[133]](#footnote-133)
	2. Given the complex lives of many people who come into contact with the justice system and that desistance from offending can be a journey rather than a single moment in time,[[134]](#footnote-134) these bail provisions place people on deferred sentences – a therapeutic order primarily designed to facilitate rehabilitation and reduce criminogenic contact with the justice system – in a very precarious position. As well as amounting to a barrier against using deferral at all, this provision is a barrier to extending deferral beyond the 12-month maximum. As a result of these provisions, what may seem like an opportunity for longer-term support and supervision could instead further entrench those individuals into the justice system. Although relevant to the consideration of deferral length, the broader issue of whether bail laws should be reformed in relation to people on sentence deferral is beyond the scope of this project and the Council’s remit.

‘I would remove deferrals from the “conditional sentence” provisions of the Bail Act. This would remove the disincentive from taking a deferral if there is any risk of reoffending.’

Survey participant, March 2022

## Possible options for reform

* 1. In light of the above, some possible options for reform relating to the maximum length of sentence deferrals could include:
* extending the maximum duration for everyone, which would allow for participation in rehabilitation programs that are lengthy or have long waitlists;
* retaining the 12-month maximum but creating an exception if there are good reasons for a longer deferral period (similar to the provisions in South Australia);
* retaining the 12-month maximum but allowing the offender to apply for an extension if they have not been able to complete their rehabilitation program(s); and/or
* retaining the 12-month maximum in the Magistrates’ Court but allowing for longer sentence deferrals in the County Court.

## Question 6: Length of deferral

Should there be any changes to the maximum length of 12 months for sentence deferral in the Magistrates’ Court and/or in the County Court? If so, what changes would you propose, and why?

1. Conditions and support during deferral
	1. Deferral orders do not have formal conditions attached to them. Instead, deferral requirements are imposed either as bail conditions or as informal requirements. For this reason, there is no available data on the types of requirements imposed on offenders during deferrals, beyond a handful of available higher courts sentencing remarks. This chapter explores whether the *Sentencing Act* should be amended to specifically allow for the imposition of deferral conditions, and what types of conditions are appropriate during deferrals.

## Should conditions be attached to deferral orders?

* 1. Section 83A of the *Sentencing Act* does not currently empower courts to impose conditions on offenders whose sentence has been deferred.[[135]](#footnote-135) Instead, the offender is released either on bail or on their own undertaking to attend court when required.[[136]](#footnote-136) Their deferral commitments are either included in bail conditions or communicated verbally. This approach was intended to avoid a pre-sentence order effectively operating as a sentencing order, with potentially onerous conditions and compliance obligations.

‘I think it would be useful to have a provision written in which allows conditions to be attached to the deferral itself, rather than needing to resort to placing someone on bail in order to be able to mandate participation in particular programs as part of the deferral process.’

Survey participant, March 2022

* 1. There is, however, a contrary argument that section 83A should specifically allow courts to impose conditions on deferral orders, particularly given changes to bail laws in recent years. We heard in preliminary consultation that many courts tend to make deferral requirements conditions of bail, which may have undesirable consequences.
	2. First, there is an inconsistency between the purposes of deferral and bail conditions. The purposes of bail conditions are to manage the risk of an offender either committing offences while in the community or not attending court as required.[[137]](#footnote-137) In contrast, the purposes of deferral conditions are primarily rehabilitative and therapeutic.[[138]](#footnote-138) During preliminary consultation, stakeholders observed that this inconsistency meant that it was often inappropriate for deferral requirements – such as participation in rehabilitation programs – to be made conditions of bail. They particularly emphasised that when bail conditions relate to abstaining from substance abuse, this ‘does not account for how drug and alcohol dependency impacts on people, and is a punitive rather than a health-based approach’.[[139]](#footnote-139)
	3. Second, if the requirements of deferral are made conditions of bail, then non-compliance can lead to revocation of bail and/or charges of contravening a conduct condition of bail. This can lead to an unfortunate situation where the aim of a deferral is to encourage rehabilitation, but it instead has the contrary effect of further entrenching someone in the justice system.[[140]](#footnote-140) As some stakeholders observed during our preliminary consultations, there is a measure of inconsistency in punishing someone for not participating in treatment.
	4. Third, setting deferral requirements as bail conditions means there is no similar mechanism for offenders who are on summons rather than bail. In those cases, the court is limited to communicating its expectations of the offender verbally. Alternatively, the court may find it necessary to release the offender on bail where it may otherwise have released them on summons.
	5. In light of these concerns, it may be beneficial to amend section 83A of the *Sentencing Act* to permit conditions to be attached to deferral orders and to specify the consequences of insufficient or inadequate engagement. There is, however, a risk of courts ‘doubling up’ by making compliance with deferral conditions a condition of bail. Courts often make compliance with one court order a condition of another (for example, a community correction order (CCO) requiring compliance with a family violence intervention order). If it is preferable to separate deferral conditions from bail conditions, it may be worth considering whether compliance with deferral conditions should be expressly prohibited from being a condition of bail. Instead, poor engagement or non-compliance with deferral conditions might more appropriately lead to a review where the court may vary the deferral requirements, end the deferral and proceed straight to sentencing, or allow the offender to continue on the deferral after discussing with them the importance of engagement.

## Question 7: Deferral conditions

Should section 83A of the *Sentencing Act 1991* (Vic) be amended to allow conditions to be attached to deferral orders? If so, why? If not, why not? In answering this question, you may wish to consider whether compliance with deferral conditions should be prohibited from being made a condition of bail.

## Which conditions?

* 1. If conditions were attached to deferral orders, consideration would also need to be given to what types of conditions would be appropriate. For instance, punitive or overly onerous conditions, such as curfews, work conditions and supervision by Corrections Victoria, may be inappropriate.[[141]](#footnote-141) As Freiberg and Morgan have argued, some conditions are more properly imposed as part of a ‘formal sentence’ rather than as a ‘conditional non-sentence’ such as a deferral order.[[142]](#footnote-142) It is important not to blur the lines between pre-sentence orders and sentencing orders, otherwise people can be subject to disproportionately more onerous requirements overall than what would have been appropriate had they simply been sentenced. Moreover, punitive conditions would most likely be inconsistent with the purposes of sentence deferral.
	2. Instead, conditions that reflect the purposes of sentence deferral may be appropriate, such as conditions that support rehabilitation. Two conditions worth exploring further are judicial monitoring conditions and justice plan conditions.

### A judicial monitoring condition?

* 1. In deferring an offender’s sentence, courts can set a date (before the deferral end date) for the offender to reappear for review of the order.[[143]](#footnote-143) This is a form of judicial monitoring, which ‘involves a judicial officer monitoring an offender’s … treatment or compliance via specially listed “review” hearings’.[[144]](#footnote-144) At a hearing to review a deferral order, the court may:
* take no further action (allowing the deferred sentence to continue); or
* cancel the deferral order and sentence the offender.[[145]](#footnote-145)
	1. The judge or magistrate who originally deferred the sentence may also direct that the review is dealt with by them.[[146]](#footnote-146) This makes the offender accountable to the judicial officer and allows the judicial officer to intervene if the offender is not cooperating.
	2. In our preliminary consultation, several stakeholders described judicial monitoring (through the review power) as often critical to the success of deferral as a therapeutic intervention to reduce reoffending.[[147]](#footnote-147) They said that it provides a mechanism for altering the requirements of the order if necessary, building a relationship between the judicial officer and the offender, and occasionally holding service providers accountable if the person has not yet been able to participate in a particular program. Review hearings can also, as was observed during the 2012 deferral reforms, ‘provide the offender with an incentive to continue to comply with the terms of the deferral’.[[148]](#footnote-148) Such benefits were apparent during the Council’s own observations of sentence deferral review hearings in February 2022. The magistrate implemented motivational interviewing strategies, using the judge–offender relationship to engage offenders in their own rehabilitation plan.[[149]](#footnote-149)

What works well with deferrals?

‘Regular review by the judicial officer.’

Survey participant, March 2022

* 1. The positive stakeholder feedback about the value of review hearings is consistent with research, particularly in the context of problem-oriented drug courts, finding the judge–offender relationship can often be the ‘key’ nexus point for behavioural change.[[150]](#footnote-150)
	2. However, despite the potential value of judicial monitoring during deferral, there was inconsistency in how often survey participants believed it typically occurred. Some said that reviews typically happened three or more times during the deferral (seven participants), while others said that there is usually no judicial monitoring at all, such that the offender only sees the judicial officer again at the final sentencing hearing (four participants).
	3. There is therefore a question whether judicial monitoring should become a more common, or at least a more consistent, feature of sentence deferrals than it currently is.
	4. If so, one barrier would be the resource implications for courts. The Magistrates’ Court is a high-volume jurisdiction, hearing over 90% of criminal matters in Victoria. Recent research found that many magistrates in Victoria considered administrative and listing pressures a barrier to using judicial monitoring under standard workloads.[[151]](#footnote-151) In the wake of COVID-19-related court backlogs, there is more incentive than ever to finalise cases rather than leave them ‘part heard’ while someone is on deferral.

## Question 8: Judicial monitoring

Is there scope to increase or improve the use of judicial monitoring during sentence deferrals? If so, how?

### A justice plan condition?

* 1. For offenders with an intellectual disability,[[152]](#footnote-152) the *Sentencing Act* allows adjourned undertakings and CCOs to include a condition that the offender participate for up to two years in services specified in a justice plan. To date, there has been very little research into the use of justice plans in Victoria, though the Council has found that about 1.7% of CCOs[[153]](#footnote-153) and 0.4% of adjourned undertakings[[154]](#footnote-154) have justice plans attached.
	2. Stakeholders were unanimous about the potential value of justice plans for people with an intellectual disability who come into contact with the justice system. They also had more general concerns, however, about the limited availability of justice plans. Justice plans are limited in both eligibility (because of a narrow definition of *intellectual disability*) and resources. There are similar eligibility and resourcing issues associated with the Assessment and Referral Court (ARC), which is available for people on bail (and therefore also for people whose sentence has been deferred).[[155]](#footnote-155) These concerns, while important, are beyond the scope of this project.
	3. Despite the existing limitations of justice plans, stakeholders raised the possibility of making justice plans available as a condition of sentence deferral. For instance, one survey participant said:

[i]t would … be useful to be able to have the capacity to attach a justice plan to a deferral in circumstances where an accused has an intellectual disability. Unless NDIS is involved, it is near impossible to get appropriate support in place for those with an [intellectual disability] until sentence is being imposed.[[156]](#footnote-156)

* 1. Giving courts the power to request and ensure compliance with a justice plan as a deferral condition could improve access to appropriate services while awaiting sentence for people with an intellectual disability, especially for those who are otherwise not eligible for ARC. This may increase the viability and effectiveness of sentence deferral for such offenders. If sentence deferral is granted, a justice plan may provide the support they need to fully engage with, and achieve the purposes of, their sentence deferral.

## Question 9: Justice plans

Should justice plans be made available as a condition of sentence deferral? If so, why? If not, why not?

## Available programs and supports

* 1. During preliminary consultation, stakeholders identified the importance of adequate programs and services for people on deferral. Deferral can be a platform to connect those people to social services beyond the justice system, such as mental health treatment,[[157]](#footnote-157) housing, alcohol and other drug services, and services provided through the NDIS. Some people access private treatment or programs (such as treatment by a medical practitioner) but others access them via the court (such as participation in CISP).
	2. Stakeholders also, however, identified areas for improvement, including:
* the need for offenders often to both locate and pay for the services themselves, which can be difficult from a financial and an administrative perspective;
* long wait times to access relevant services and programs, especially men’s behaviour change programs; and
* inconsistency between the usual maximum CISP period in the Magistrates’ Court (about four months)[[158]](#footnote-158) and the maximum possible period of sentence deferral (12 months).
	1. The Melbourne Magistrates’ Court recently piloted ‘Navigator’, an initiative aimed at assisting offenders to overcome difficulties in finding, accessing and paying for certain services. During criminal proceedings, if an accused person with complex needs is part of the pilot program, they will have their needs assessed in order for the court to identify the types of services that may assist the person with their rehabilitation. This includes identifying and coordinating both court-based services and supports in the community.[[159]](#footnote-159) A similar approach could be useful for courts considering a deferral, both for ensuring the relevant services are available and for alleviating the administrative and financial burden on offenders having to find and fund the services themselves. It could not, however, involve Corrections Victoria as offenders on deferral are not serving a sentence, an important distinction that cannot be lost sight of in pursuing any reforms.

## Question 10: Programs and services

Are there any improvements that could be made to the availability of support services and programs for people whose sentence has been deferred? If so, what do you propose, and why?

## Deferral plans?

* 1. Regardless of whether section 83A is amended to introduce deferral conditions, it is worth considering the merits of introducing a specific ‘deferral plan’ document that outlines what the offender has agreed to do during the deferral. We were told during preliminary consultation that this is not currently done (unless the specific conditions are listed on a bail order), and that the requirements of deferral, and consequences of not engaging with them, are usually only explained verbally in court.
	2. In our survey of legal practitioners and the judiciary, most participants believed that it was somewhat common (eight participants) or very common (10 participants) for offenders to understand what was expected of them during their deferral. Nevertheless, as the Centre for Justice Innovation (UK) has noted, courts deferring sentence should be ‘upfront about what the individual needs to do and what the consequences are of non-compliance’.[[160]](#footnote-160) It is difficult to ensure a lasting consensus about those obligations and consequences if they are not reduced to an accessible written document that both the court and the offender have access to.
	3. There may therefore be value in introducing written deferral plans. Some elements of such deferral plans could potentially include:
* first, being developed *with* the offender not *for* the offender. A useful model for this approach is the individual support plans in the ARC, which are developed by the ARC case manager with the client. This empowers offenders ‘to engage with their rehabilitation and achieve positive behavioural change’, making them ‘an active participant in their own recovery’ and ‘responsible and accountable to complete and engage with their [plan] with the help of justice supports’;[[161]](#footnote-161) and
* second, providing offenders with a copy of their deferral plan, ideally signed by them in acknowledgment of what they have undertaken to do. This is similar to the approach taken with adjourned undertakings, which involves offenders signing a written acknowledgment of what they have promised to do.[[162]](#footnote-162)
	1. There is a requirement in Victoria that sentencing courts imposing an order with conditions attached to it must explain to the offender the purpose and effect of the order and possible consequences of non-compliance.[[163]](#footnote-163) In the absence of deferrals being orders with conditions attached to them, this requirement does not apply (though it would most likely occur in practice). Some jurisdictions have legislative requirements to ensure that offenders understand the expectations of them during the deferral and the consequences of engagement (or non-engagement). For example, in England and Wales a court deferring sentence must ‘forthwith’ give a copy of the deferment order to the offender (and some others if relevant).[[164]](#footnote-164) Legislation in the Australian Capital Territory goes even further and requires courts to ‘explain to the offender in general terms (and in language the offender can readily understand)’ the nature and conditions of the deferral order, the offender’s obligations under the deferral order and the consequences if the offender breaches their obligations.[[165]](#footnote-165) The court must also ensure that the offender is given a copy of the order ‘as soon as practicable’ after deferral.[[166]](#footnote-166) If sentencing courts are required or encouraged to state the sentence that the offender can expect if they successfully engage with the deferral (see [7.10]–[7.15]), this could also be included in the plan to remind the offender of the benefit of continuing to engage.

## Question 11: Deferral plans

Should offenders receive a written deferral plan outlining what they have agreed to do during the deferral period, and the potential consequences of not engaging positively with those requirements?

1. Sentencing after deferral
	1. This chapter examines the available data on sentencing outcomes in cases with a recorded deferral. It then considers whether further guidance is needed on the effect of an offender’s behaviour during deferral on the sentence ultimately imposed.

## Sentences imposed after deferral (Magistrates’ Court)

* 1. As discussed at [2.25], data relating to sentence deferral in Victoria is not exhaustive. It is, however, possible to examine the sentencing outcomes in the 3,507 cases with a recorded deferral between 2012 and 2020 (Figure 7).

Figure 7: Sentence types imposed in cases with a recorded sentence deferral, Magistrates’ Court, 2012 to 2020 (3,507 cases)[[167]](#footnote-167)

|  |  |
| --- | --- |
| Sentence type | Number of cases |
| Imprisonment | 708 |
| Community correction order | 915 |
| Fine | 654 |
| Adjourned undertaking | 1,069 |
| Other | 161 |

* 1. The most common sentence imposed in deferral cases was an adjourned undertaking (30% of cases). In addition, a relatively high proportion of deferral cases resulted in fines (19%), with a further 2% receiving discharges and dismissals. This would seem to run contrary to the perception of sentence deferrals as an order most often used in cases where an offender is on the cusp of receiving a term of imprisonment. Instead, the data suggests that, in the Magistrates’ Court, sentence deferrals are equally used in cases involving less serious offending.
	2. The use of sentence deferrals in less serious cases proved to be one of the more polarising topics in our preliminary consultations. On the one hand, it would be inappropriate to subject an offender to more requirements prior to sentencing than would have been imposed if the court had proceeded immediately to sentencing.[[168]](#footnote-168) On the other hand, the opportunity to receive ongoing support, continue with rehabilitative efforts and potentially receive a less severe sentencing outcome can have great benefits, both for the offender and for the community (see, for example, Case Study 2, in which positive engagement with services resulted in an adjourned undertaking).

## Case Study 2: ‘Lisa’ (not her real name)

‘Lisa is a 36-year[-old] single mother of two young children. Whilst Lisa was on a CCO, she was charged with new dishonesty offence which contravened the order.

[The Victorian Aboriginal Legal Service] conducted a consolidated plea in the Koori Court. At the time of the plea she had been referred to drug and alcohol support but had been cancelling/rescheduling a lot of appointments. The magistrate and Elders had a conversation with her about this and emphasized that she needed to engage with services.

The magistrate deferred sentence to enable the client to engage in community supports. Ordinarily, given the offending on a CCO and given that she had already been linked into supports, she would be likely to receive a further CCO.

The client came back to court a number of times over a period of 6 months. She was ultimately placed on an adjourned undertaking, given her engagement with services and with the Elders. The difference in the Koori Court was the emphasis on her rehabilitation and encouragement to work with supports, rather than just seeing further offending on a CCO and resentencing her immediately.’

Extract from Victorian Aboriginal Legal Service, Submission to Sentencing Act Reform Project (2020) 8–9

* 1. More serious sentence types – imprisonment and community correction orders (CCOs) – were imposed in 46% of recorded deferral cases (20% and 26% respectively). It is not possible to discern how many of the imprisonment cases involved circumstances where imprisonment was inevitable, nor how many were borderline imprisonment cases. It is likely that at least some (if not most) were borderline imprisonment cases in which the imposition of a prison sentence suggests inadequate engagement with the deferral. Conversely, it is also likely that some or many of the cases receiving a CCO were also borderline cases in which the offender took up the opportunity to demonstrate their efforts towards rehabilitation, justifying a non-custodial sentence.

## Sentences imposed after deferral (County Court)

* 1. There was no available data on the use of deferral in the County Court. The Council was, however, able to identify 32 cases sentenced between 2012 and 2020 where a deferral had been ordered prior to sentencing (see [2.13] and Appendix 2). In 17 of those cases, the most severe sentence imposed in the case was a term of imprisonment. In the other 15 cases, another sentence type was imposed (11 CCOs, two adjourned undertakings and two wholly suspended sentences). In some of the cases receiving a prison sentence, a term of imprisonment may have been inevitable, but the offender’s engagement on deferral may have resulted in either a shorter term of imprisonment or imprisonment combined with a CCO. In other cases, the prison sentence may instead reflect the offender’s failure to engage positively with the requirements of the deferral.
	2. In *DPP v Hassan*, the offender was sentenced to imprisonment after failing to engage adequately with his deferral:

[T]he sentencing purposes of just punishment, denunciation and deterrence cannot be sufficiently served by … a community corrections order, even with onerous conditions. I am satisfied that I have no alternative but to impose an immediate custodial sentence. I am also satisfied that it is not appropriate that you be sentenced to a combined term of imprisonment and a community corrections order. You have been assessed as being unsuitable for a community corrections order. You have failed to satisfactorily complete any rehabilitation program since the deferral of sentencing[.][[169]](#footnote-169)

* 1. In comparison, in *DPP v Cheong*, the offender’s sentence was deferred for 12 months because the court was ‘satisfied that [he was] profoundly psychiatrically disabled and at the time of the offending he had an undiagnosed psychiatric illness and that he was mentally impaired’.[[170]](#footnote-170) At the time of deferral, the court concluded that:

it is in the interests of [the offender] that his present therapeutic arrangement continues. That offers him the best hope for the future in terms of his ultimate rehabilitation, but importantly it offers the best protection for the community in terms of reducing the likelihood of re-offending.[[171]](#footnote-171)

* 1. When the case returned for sentencing, the court observed that the offender had ‘been released on bail with strict curfew conditions’, had ‘continued to be effectively managed by [his] psychiatrist’, had complied with his medication regime, and was accepting the ‘support and care provided by the early psychosis team’.[[172]](#footnote-172) The court sentenced the offender to an adjourned undertaking without conviction, concluding that:

[i]n all other respects [he] is a person of good character. He has demonstrated since the time following his arrest and placement on strict bail conditions that he is capable of compliance and the important thing also is that he is compliant with his medication regime and treatment generally.[[173]](#footnote-173)

## Statement about likely sentence after deferral?

* 1. In Victoria an accused can request a broad indication of the sentence type that they would most likely face if they plead guilty.[[174]](#footnote-174) This is known as a ‘sentence indication’. While previously the higher courts were limited to indicating whether they would impose an immediate custodial sentence or not, that restriction was removed in February 2022.[[175]](#footnote-175) Now all courts can specify which specific sentence type they would be likely to impose.[[176]](#footnote-176)
	2. While it is possible to request a sentence indication at almost any stage of proceedings, sentence indications are about the possible outcome ‘*if the accused pleads guilty*’.[[177]](#footnote-177) Neither the sentence indication provisions of the *Criminal Procedure Act* nor the deferral provision of the *Sentencing Act* appear to expressly allow (or require) courts to indicate the sentence type they would impose on offenders who have *already* pleaded guilty (for example, if they were to engage positively with a deferral). As a point of comparison, courts in the Australian Capital Territory are required when deferring sentence to state the penalty they might impose if the offender complies with the conditions of the order as well as the penalty the offender might receive in the event of non-compliance.[[178]](#footnote-178) Although courts in Victoria are not required to do this, there have been cases where the court has stated the penalty that the offender can expect if they engage with the requirements of their deferral.
	3. For instance, in *DPP v Mayoum*, the court said:

because of your progress on bail, because you had no prior convictions and other reasons, I am deferring your sentence for 12 months. You’ve still got to abide by bail conditions. If you are successful, I will then place you on a Community Corrections Order, which will go for some time.[[179]](#footnote-179)

* 1. Similarly, in *DPP v Tanti*, the court noted that:

[o]n that last occasion, I indicated that if you proceeded well during the deferral, I would impose a penalty involving time served in relation to the substantive charges, and that … is what I intend to do.[[180]](#footnote-180)

* 1. A statement to the offender at the time of deferral about the sentence they can expect can incentivise good behaviour and positive engagement with the conditions during the deferral period. It also provides transparency and certainty for offenders and victims about the possible outcomes and promotes consistency in the event that a different judicial officer ultimately sentences the offender.[[181]](#footnote-181)
	2. Conversely, a statement at the time of deferral about the likely sentence may fetter courts’ discretion at sentencing, particularly if other intervening circumstances between deferral and sentencing might prompt a different sentence. Further, there are likely to be varying degrees of engagement with deferral, and limited engagement may not be sufficient to warrant a reduced sentence. It may also leave victims out of the process if the court states the penalty that the offender can expect prior to the victim being given an opportunity to make a victim impact statement.

## Question 12: Sentence after deferral

Should courts be expressly permitted or required to tell the offender the sentence that they can expect if they successfully engage with the deferral? If so, why? If not, why not?

## Considerations when sentencing after deferral

* 1. After ordering deferral, sentencing courts must consider the offender’s behaviour during the deferral period in deciding an appropriate sentence.[[182]](#footnote-182) This is not a foreign exercise to courts. They are often called upon to take into account what has happened to an offender prior to sentencing. They must, for example, declare any time served on remand as being deducted from any prison sentence imposed.[[183]](#footnote-183) They must consider the punitive aspects of time spent at a residential rehabilitation facility, with the extent of any mitigation ‘depend[ing] on … the nature and severity of the restrictions to which an offender has been subject and the duration of the offender’s residency’.[[184]](#footnote-184) They will also have to consider whether the offender has been subject to strict bail conditions while awaiting trial and/or sentencing. For example, in *DPP v Cassidy*, the court said:

[y]ou have complied with strict conditions of your bail, including a curfew, a residential condition and reporting to police three days per week. These conditions may have assisted you in your rehabilitation, yet they also amount to a substantial imposition on your liberty and are a form of punishment already occasioned.[[185]](#footnote-185)

* 1. In the context of sentence deferrals specifically, most participants in the Council’s survey indicated that offenders who engage positively tend to receive a reduced sentence. Moreover, they said that most offenders typically engage positively with their deferral, with little or no non-compliance (Figure 8). And that even for offenders with significant non-compliance, there were genuine attempts to engage. Further, all participants said that when offenders engage positively with deferral conditions, it is either somewhat or very common for them to make life changes that would reduce their chances of reoffending.

Figure 8: Survey responses to ‘In your experience, how do offenders typically engage with their sentence deferrals?’

|  |  |
| --- | --- |
| Response | Number |
| Full compliance | 3 |
| Positive engagement, minor non-compliance | 11 |
| Attempt to engage, but significant noncompliance | 4 |
| No attempt to engage | 0 |

* 1. Whereas engagement with deferral can have a mitigating effect on sentence, a failure to engage should generally not be treated as an aggravating factor (this is also the case in England and Wales).[[186]](#footnote-186) Instead, the consequence of inadequate engagement should usually be that the offender loses any benefit they may have otherwise received if they had engaged positively.

### The relevance of proportionality?

* 1. The sentence imposed for a crime should be proportionate to the gravity of the offence considered in all its circumstances.[[187]](#footnote-187) The relationship between sentence deferrals and proportionality is one that warrants closer attention. Two key questions emerge:
* First, what should be the effect of proportionality on sentence deferral? Should courts avoid imposing deferral conditions that may be more onerous than the conditions that the person would have been required to comply with if they had simply been sentenced immediately? This is discussed in more detail at [3.19] and [6.8].
* Second, what should be the effect of deferral on a sentencing court’s considerations of proportionality? That is, to what extent should any conditions complied with during a deferral period constitute a form of ‘time served’ towards any sentence that the court imposes? Roberts has argued that a deferred sentence should be ‘considered part of the totality of punishment imposed’ and doing so is one reason to ‘reduc[e] sentence after the deferral period’.[[188]](#footnote-188)

## Question 13: Deferrals and totality

To what extent should the requirements imposed on an offender during a sentence deferral be taken into account at sentencing?

### Prioritising rehabilitation?

* 1. The weight to be given to any single sentencing purpose, such as protection of the community or general deterrence, will generally depend on the circumstances of the case. There are, however, some exceptions where circumstances will dictate that certain sentencing purposes take prominence in the sentencing exercise:
* for young adult offenders, rehabilitation will usually be the most important purpose;[[189]](#footnote-189)
* for serious offenders, courts will usually need to consider community protection as the most important purpose in determining the length of any term of imprisonment;[[190]](#footnote-190)
* for drug treatment orders, courts will usually need to consider rehabilitation and community protection as the most important purposes;[[191]](#footnote-191) and
* for adjourned undertakings, one of the purposes of such an order can be ‘to provide for the rehabilitation of an offender’.[[192]](#footnote-192)
	1. A question for consideration is whether section 83A should specify that in sentencing a person after successful engagement with deferral conditions, rehabilitation should become the dominant sentencing purpose. Prioritising rehabilitation in successful deferral cases would accommodate, for example, a borderline imprisonment case where, by the time of final sentencing, an offender had engaged in intensive rehabilitation for 12 months. Whereas at the time of deferral the appropriate sentence might have been imprisonment, after an intensive deferral with excellent engagement, the court might consider that a CCO or even an adjourned undertaking is the most appropriate means of continuing the offender’s rehabilitation, minimising their ongoing contact with the justice system and reducing their risk of reoffending.
	2. Elevating rehabilitation to the dominant sentencing purpose following a successful deferral – where the deferral was for rehabilitative reasons – would be consistent with:
* other sentencing schemes that elevate a particular purpose;
* the purposes of deferral; and
* the principle of proportionality in that a person being sentenced after deferral may have already complied with significant and onerous conditions.[[193]](#footnote-193)

## Question 14: Prioritising rehabilitation

If an offender has engaged positively with the conditions of their deferral, should rehabilitation become the primary purpose of sentencing?

## Reoffending after deferral

* 1. There were 916 offenders sentenced in 2016 or 2017 in the Magistrates’ Court after a recorded deferral. Over half of them reoffended within three years of their sentence (54%), at very similar rates for men and women. Most of the reoffending appeared to occur within the first 12 months after being sentenced in that deferral case (Figure 9).

Figure 9: Cumulative reoffending rates of people sentenced in the Magistrates’ Court in 2016 or 2017 after a recorded deferral (916 offenders)

|  |  |  |  |
| --- | --- | --- | --- |
| Period | Total (916 offenders) | Male (745 offenders) | Female (171 offenders) |
| Within 1 year | 36 | 36 | 37 |
| Within 2 years | 50 | 50 | 50 |
| Within 3 years | 54 | 54 | 53 |

* 1. The reoffending rate was especially high for those who received a prison sentence after deferral (74% or 125 of 169 people) compared with those who received other sentence types (49% or 369 of 747 people). Given that in many deferral cases a prison sentence imposed after a deferral period is likely to reflect the offender’s less-than-ideal engagement with the deferral, it is perhaps not surprising to find that the same cohort had high reoffending rates.
	2. A 54% reoffending rate within three years (and 74% for those sentenced to imprisonment) is relatively high compared to the findings in much of the Council’s other work on reoffending.[[194]](#footnote-194) However, that is perhaps to be expected given the nature of this cohort: as stakeholders told us, people receiving deferrals are often those with substance abuse issues, unresolved childhood trauma, underlying mental health issues, and rehabilitation journeys that are not easily ended by any single intervention. Instead, they are people for whom the path to desistance will most likely be long and arduous but who will invariably benefit from some assistance along the way.

# Appendix 1: Preliminary consultation

| Date | Meeting |
| --- | --- |
| 3 December 2021 | Meeting with County Court  |
| 9 December 2021 | Meeting with Magistrates’ Court |
| 10 December 2021 | Meeting with Law Institute of Victoria |
| 14 December 2021 | Meeting with County Court |
| 15 December 2021 | Meeting with Law Institute of Victoria |
| 16 December 2021 | Meeting with Victoria Police |
| 21 December 2021 | Meeting with Federation of Community Legal Centres |
| 22 December 2021 | Meeting with Victorian Aboriginal Legal Service |
| 17 January 2022 | Meeting with Department of Justice and Community Safety |
| 17 January 2021 | Meeting with Department of Families, Fairness and Housing |
| 18 January 2022 | Meeting with County Court |
| 19 January 2022 | Meeting with Victoria Police |
| 19 January 2022 | Meeting with Victoria Legal Aid |
| 21 January 2022 | Meeting with Office of Public Prosecutions |
| 21 January 2022 | Meeting with Magistrates’ Court |
| 25 January 2022 | Meeting with Criminal Bar Association |
| 15 February 2022 | Meeting with Centre for Forensic Behavioural Science |
| 23 February 2022 | Magistrates’ Court Observation and Meeting with Magistrates’ Court |
| 30 March 2022 | Meeting with Judicial College of Victoria |

# Appendix 2: Methodology

## Sentence deferral data from Courtlink

The available data comes from the Magistrates’ Court case management system (Courtlink). The 3,507 deferral cases analysed in this paper were sentenced cases where the court recorded ‘DEF’ (deferral) in the ‘hearing type’ field, indicating that the cases were sentenced after a sentence deferral.

Only one value is recorded in the ‘hearing type’ field, which is also used to record cases heard in the Koori Court and cases sentenced after the offender has participated in CISP. Therefore, deferral cases in the Koori Court involving CISP may have been recorded as ‘CISP’ or ‘Koori Court’ instead of as ‘DEF’, in which case they would not be included in the deferral data. Further, the data only includes cases sentenced after a deferral, not information about the deferral itself. Therefore, in this paper the number of cases sentenced after deferral should be treated as a minimum, with the actual number likely to be higher.

## Deferral cases in the County Court

There was no available data on the use of sentence deferrals in the County Court. The Council reviewed County Court sentencing remarks from 2012 (when deferral became available in the County Court) to 2020, isolating all cases containing the word ‘defer’ and identifying those that related to a deferred sentence, whether formally through section 83A or through the court’s general adjournment power. Through this process, we identified 32 deferral cases in the County Court. This number can be seen as a base level count of deferrals, with the actual number possibly being higher. An additional 14 cases identified by the Council involved an offender sentenced after an unsuccessful application for deferral.

## Surveying practitioners and judicial officers

To supplement available court data on the use of sentence deferrals in Victoria, the Council developed a survey to distribute to prosecutors, defence lawyers, magistrates and judges to seek their views. A detailed description of the methodology used – including survey development, participant recruitment, analysis of results and confidentiality – is included in the Council’s recent consultation paper in relation to adjourned undertakings.[[195]](#footnote-195) The survey was directed at both sentence deferrals and adjourned undertakings. The survey questions that relate to sentence deferrals are set out in Appendix 3.[[196]](#footnote-196)

## Prior offending and reoffending data

The Council’s reoffending database links different sentencing events using unique person identifiers. This allows us to track individuals’ prior and subsequent offences. This database was used to identify each offender who was sentenced in 2019 and 2020 after a recorded deferral. Each offender was only counted once, at their earliest deferral case (the index case) in those two years. Prior offences were those offences sentenced in the three years before the index case was initiated.

The index cases for the reoffending analysis were sentenced in 2016 and 2017. These years were used to ensure a three-year follow-up period to match the prior offending observation period. Reoffending was defined as offences committed between the index case’s sentence date and the end of the follow-up period. This was measured using data on offence date provided by the courts.

# Appendix 3: Survey

The survey of legal practitioners and the judiciary was conducted via Survey Monkey. The text below is not a precise reflection of the survey’s appearance, but it is a precise reflection of the survey’s content. Other points to note include:

* participants who selected the last option for Questions 2 and 3 were directed to a termination page because this indicated that they were not part of the target cohort;
* participants were only asked to respond to Question 4 if they indicated that they usually worked in a mix of the Magistrates’ Court and higher courts; and
* participants were only asked to respond to Question 6 if they indicated that they usually worked in regional or rural Victoria.

## Introduction

Thank you for participating. We would like to hear from you about your experiences with deferrals and adjourned undertakings in adult courts in Victoria. We’re seeking your views in relation to your role as a legal practitioner, police prosecutor or judicial officer.

There are more questions about sentence deferrals than about adjourned undertakings because court data about adjourned undertakings is more comprehensive.

The primary aim of this survey is to enhance our understanding of court data on deferrals and adjourned undertakings, especially on deferrals. This survey does not replace stakeholder consultation. We will be publishing consultation papers in the middle of the year, and we will welcome your submissions. You will also have the opportunity at the end of the survey to provide additional information and context to your responses.

This survey should take you about 15 minutes to complete.

## Demographic questions

### 1. What is your email address?

We ask for your email to avoid duplicate responses. We will not use your email to contact you unless you give us permission at the end of this survey.

All information you provide is confidential and is anonymised for the purposes of analysis.

### 2. Please identify your role in relation to sentencing

* I am a judge or magistrate
* I am a police prosecutor
* I am a legal practitioner who mainly prosecutes
* I am a legal practitioner who mainly defends
* I am a legal practitioner who prosecutes and defends about equally
* Other

### 3. In which adult jurisdiction do you usually work?

* The County Court or Supreme Court
* The Magistrates’ Court
* A mix of the Magistrates’ Court and higher courts
* I don’t work in the adult jurisdiction

### 4. Because you work in multiple jurisdictions, we ask that you select a jurisdiction to keep in mind when answering questions about sentence deferrals and adjourned undertakings.

* Higher courts
* Magistrates’ Court

### 5. In which part of Victoria do you usually work?

* Greater Melbourne area
* Rural or regional Victoria

### 6. In which justice region do you most often work?

We ask that you please keep this region in mind when answering questions about sentence deferrals and adjourned undertakings.

* Barwon South West (including Geelong and Warrnambool)
* Gippsland (including Morwell and Bairnsdale)
* Grampians (including Ballarat and Horsham)
* Hume (including Wangaratta and Shepparton)
* Loddon Mallee (including Bendigo and Mildura)

## Sentence deferrals under s 83A

Section 83A of the *Sentencing Act 1991* (Vic) permits courts to defer sentencing an offender for up to 12 months.

This section asks about your experience with sentence deferrals under section 83A. Please answer only in relation to section 83 deferrals, not alternative or informal means of deferring or adjourning sentences.

### 7. In your experience, how common are s 83A sentence deferrals in criminal cases?

* Very common
* Somewhat common
* Somewhat uncommon
* Very uncommon

### 8. Ideally, should s 83A sentence deferrals be more common than they currently are?

* Yes, much more common
* Yes, a little more common
* No, they are used about the right amount
* No, they are too common

### 9. In your experience, which legislated purpose is the most common purpose of s 83A deferrals?

* to allow the offender’s **capacity for and prospects of rehabilitation** to be assessed
* to allow the offender to demonstrate that **rehabilitation has taken place**
* to allow the offender to participate in a program aimed at **addressing the underlying causes** of the offending
* to allow the offender to participate in a program aimed at **addressing the impact** of the offending on the victim
* for another purpose (please specify)

### 10. Think about your experience with cases where there is an identifiable victim or victims. How common is it for courts to take into account the potential effects of a deferral on the victim(s)?

* Very common
* Somewhat common
* Somewhat uncommon
* Very uncommon or never

### 11. In your experience, which offence types are commonly the main charge in cases where a sentence is deferred? Select all that apply.

* Violent offences (e.g. assault, robbery)
* Sexual offences (e.g. sexual assault, rape)
* Property and deception offences (e.g. burglary, property damage, theft)
* Drug offences (e.g. possess or traffick a drug of dependence)
* Public order offences (e.g. weapons offences, disorderly conduct)
* Justice procedure offences (e.g. breach bail, breach family violence order)
* Driving offences (e.g. drive while disqualified)
* Other (please specify)

### 12. In your experience, for how long is a sentence typically deferred under s 83A?

### 13. In your experience, how commonly do s 83A deferrals involve the following requirements?

Treatment for alcohol or other drug use

* Very common
* Somewhat common
* Somewhat uncommon
* Very uncommon

Mental health treatment

* Very common
* Somewhat common
* Somewhat uncommon
* Very uncommon

Other medical treatment

* Very common
* Somewhat common
* Somewhat uncommon
* Very uncommon

Participation in an anger management or a behaviour change program

* Very common
* Somewhat common
* Somewhat uncommon
* Very uncommon

Participation in CISP

* Very common
* Somewhat common
* Somewhat uncommon
* Very uncommon

Any other requirements: please list any you regularly encounter

### 14. In your experience, how common is it for offenders whose sentences have been deferred to understand what the deferral means for them?

The offender **understands** what is expected of them

* Very common
* Somewhat common
* Somewhat uncommon
* Very uncommon
* Cannot answer

The offender understands how their engagement with the deferral might affect their **sentence**

* Very common
* Somewhat common
* Somewhat uncommon
* Very uncommon
* Cannot answer

The offender has the requirements of the deferral **in writing**

* Very common
* Somewhat common
* Somewhat uncommon
* Very uncommon
* Cannot answer

### 15. In your experience, how do offenders typically engage with their sentence deferrals?

* The offender **complies fully** with all the requirements
* The offender **engages** positively with the requirements, but there is **minor non-compliance** along the way
* The offender **tries to engage** with the requirements, but there is **significant non-compliance** along the way
* The offender **does not try to engage** with the requirements
* Cannot answer (e.g. because you do not typically see them again)

### 16. Does that non-compliance typically involve further offending?

* Often
* Sometimes
* Rarely or never
* Cannot answer

### 17. Think about offenders who engage well with their sentence deferral. How often does their engagement lead to the following?

The offender makes **life changes** that will reduce their chances or rate of reoffending

* Very common
* Somewhat common
* Somewhat uncommon
* Very uncommon
* Cannot answer

The offender receives a **reduced sentence**

* Very common
* Somewhat common
* Somewhat uncommon
* Very uncommon
* Cannot answer

### 18. In your experience, how often is an offender’s progress typically reviewed by the court during their deferral period?

* Three or more times
* Twice
* Once only
* Never (only at the final sentencing hearing)
* Cannot answer (e.g. because you do not usually see them again)

### 19. For offenders whose progress is reviewed, when does that usually occur?

* Mostly towards the beginning of the deferral period
* Mostly towards the end of the deferral period
* At fairly regular intervals
* Irregularly, whether due to the offender’s progress or other factors
* Cannot answer (e.g. because in your experience courts don’t review offenders’ progress)

### 20. In your experience, how often are offenders sentenced before the end of their planned deferral period?

The sentencing date is brought forward because the offender is **engaging well**

* Very common
* Somewhat common
* Somewhat uncommon
* Very uncommon
* Cannot answer

The sentencing date is brought forward because the offender is **not engaging well** or **has reoffended**

* Very common
* Somewhat common
* Somewhat uncommon
* Very uncommon
* Cannot answer

The sentencing date is brought forward because of **other reasons** (e.g. change of circumstances)

* Very common
* Somewhat common
* Somewhat uncommon
* Very uncommon
* Cannot answer

The sentencing date is **not** brought forward

* Very common
* Somewhat common
* Somewhat uncommon
* Very uncommon
* Cannot answer

### 21. In your experience, what works well with deferrals as they currently operate?

You can interpret this question as broadly as you like. You may wish to consider the legislation, court practices, and available support programs.

### 22. Based on your experience, how would you change the way deferrals currently operate? Please explain why you would make those changes.

You can interpret this question as broadly as you like. You may wish to consider the legislation, court practices, and available support programs.

## Adjourned undertakings

Questions 23–26 are excluded because they relate exclusively to adjourned undertakings.

## Concluding questions

### 27. Some of the questions in this survey have asked you to comment on what is common or typical. However, people who belong to certain groups might have different experiences with the process of having a sentence deferred, or be affected differently by the requirements of deferrals or adjourned undertakings.

Such groups might include, for example, young adults, women, Aboriginal and Torres Strait Islander peoples, people with substance abuse or mental health issues, people experiencing homelessness, culturally and linguistically diverse people, and people in rural and regional Victoria.

Is there anything else you would like us to know about the different experiences certain groups might have with sentence deferrals or adjourned undertakings?

### 28. Sometimes, a sentence can be ‘deferred’ by means other than using section 83A, for example, by adjourning the sentence with or without involving other services or interventions.

In your experience, are there sometimes circumstances in which an alternative approach to deferring a sentence might be preferable to section 83A? Please explain how and why.

### 29. Do you have any further comments about deferrals or adjourned undertakings?

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Victoria, *Parliamentary Debates,* Legislative Assembly, 22 April 1999 (Rob Hulls, Shadow Attorney-General).

Victoria, *Parliamentary Debates*, Legislative Council, 7 October 2010, 5302 (John Lenders, Treasurer).

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1. . Sentencing Act 1991 (Vic) pt 9A, inserted by Sentencing (Amendment) Act 2003 (Vic) s 6. [↑](#footnote-ref-1)
2. . Sentencing Act 1991 (Vic) s 108C. [↑](#footnote-ref-2)
3. . Sentencing Act 1991 (Vic) s 83A. A separate deferral scheme (which is not included in this project) operates in the Children’s Court: Children, Youth and Families Act 2005 (Vic) s 414. Sentence deferral is also available in several other jurisdictions, such as New South Wales, the Australian Capital Territory, Western Australia, New Zealand, England and Wales, and Scotland. [↑](#footnote-ref-3)
4. . Sentence deferral is ‘intended to provide offenders with an opportunity to address issues that have contributed to their offending and to demonstrate to the court that they are taking serious steps to get their lives back on track’: Sentencing Advisory Council, Suspended Sentences and Intermediate Sentencing Orders: Suspended Sentences – Final Report Part 2 (2008) 259, citing Victoria, Parliamentary Debates, Legislative Assembly, 22 April 1999, 561 (Rob Hulls, Shadow Attorney-General). [↑](#footnote-ref-4)
5. . Sentencing Act 1991 (Vic) s 83A(1A)(d). [↑](#footnote-ref-5)
6. . Sentencing Act 1991 (Vic) ss 7(2), 83A(1). [↑](#footnote-ref-6)
7. . Children and Young Persons Act 1989 (Vic) s 190, repealed by Children, Youth and Families Act 2005 (Vic) s 601. [↑](#footnote-ref-7)
8. . Sentencing (Amendment) Act 1999 (Vic) s 9. [↑](#footnote-ref-8)
9. . Griffiths v The Queen [1977] HCA 44. See also Sentencing Advisory Council (2008), above n 4, 259; Australian Law Reform Commission, Same Crime, Same Time: Sentencing of Federal Offenders, Report 103 (2006) 227 [7.36]. Courts also had a general adjournment power that could be used to informally defer a sentence (see [1.7]). [↑](#footnote-ref-9)
10. . Sentencing Advisory Council (2008), above n 4, 595; Arie Freiberg, Fox and Freiberg’s Sentencing: State and Federal Law in Victoria (3rd ed., 2014) 196. [↑](#footnote-ref-10)
11. . Sentencing Amendment Act 2010 (Vic) s 21. This legislation also introduced a list of statutory purposes for which courts can order a sentence deferral: see [4.1]. [↑](#footnote-ref-11)
12. . CISP aims to reduce the likelihood of reoffending by addressing offenders’ health and/or social needs and assisting them to access support services. [↑](#footnote-ref-12)
13. . The ARC aims to help people address the underlying factors that contributed to their offending, operating on a problem-solving court model. It is only available for people diagnosed with a mental illness, intellectual disability, acquired brain injury, autism spectrum disorder and/or a neurological impairment. Further, the person must be on bail and plead guilty to have their case transferred. See Magistrates’ Court of Victoria, ‘Assessment and Referral Court (ARC)’ (mcv.vic.gov.au, 2018). [↑](#footnote-ref-13)
14. . Magistrates’ Court Act 1989 (Vic) s 4F. Once the case is in the Koori Court, an offender’s sentence may also be formally deferred under section 83A of the Sentencing Act 1991 (Vic). [↑](#footnote-ref-14)
15. . Criminal Procedure Act 2009 (Vic) ss 331(1)–(2). Upon adjourning the proceeding, the court may allow the accused to go at large, remand the accused in custody, or grant or extend bail. [↑](#footnote-ref-15)
16. . This right has been interpreted as prohibiting disproportionate sentencing: see Ben Emmerson et al., Human Rights and Criminal Justice (2nd ed., 2007) 670–671. [↑](#footnote-ref-16)
17. . A total of 3,507 of 791,219 sentenced cases had the hearing type recorded as ‘DEF’ (deferral). [↑](#footnote-ref-17)
18. . The data on gender is restricted to the categories of male and female. Data on non-binary gender categories is currently unavailable. Data on gender was available for 777,375 sentenced cases from 2012 to 2020. In 174,584 of those 777,375 sentenced cases, the offender was female. [↑](#footnote-ref-18)
19. . Sentencing Advisory Council, Gender Differences in Sentencing Outcomes (2010) 38–40. [↑](#footnote-ref-19)
20. . Data on age was available for 686,783 sentenced cases from 2012 to 2020. In 172,203 of those 686,783 sentenced cases, the offender was aged 18 to 25 at the time of sentencing. [↑](#footnote-ref-20)
21. . Julian V. Roberts, ‘Deferred Sentencing: A Fresh Look at an Old Concept’ (2022) 3(1) Criminal Law Review 210, 223. [↑](#footnote-ref-21)
22. . A principal proven offence is measured by the offence receiving the most serious penalty in a case (for example, the longest term of imprisonment), or alternatively if multiple offences received the same most serious penalty, by using the National Offence Index: Australian Bureau of Statistics, National Offence Index (abs.gov.au, 2018). [↑](#footnote-ref-22)
23. . Sentencing Advisory Council, Reoffending by Children and Young People in Victoria (2016) 17; Sentencing Advisory Council, Contravention of Family Violence Intervention Orders and Safety Notices: Prior Offences and Reoffending (2016) 26. [↑](#footnote-ref-23)
24. . Meeting with County Court (3 December 2021). [↑](#footnote-ref-24)
25. . Meeting with County Court (3 December 2021); Meeting with County Court (18 January 2022). [↑](#footnote-ref-25)
26. . Of these cases, the following are available from the Australasian Legal Information Institute (AustLII): DPP v Matthews-Taylor [2015] VCC 1812; DPP v Vu [2016] VCC 1695; DPP v M [2018] VCC 566; DPP v Mayoum [2017] VCC 442; DPP v Mawien [2018] VCC 565; DPP v Cheong [2017] VCC 1262; DPP v Day [2020] VCC 1540; DPP v Kartabani [2021] VCC 122. In one of the 32 deferral cases (DPP v Rowarth [2012] VCC 1975), sentencing was deferred informally as the sentencing judge did not have the power at that time to formally defer sentencing in the County Court. [↑](#footnote-ref-26)
27. . Of these cases, the following are available on AustLII: DPP v Wagner [2014] VCC 350; DPP v Evangelistis [2015] VCC 1192; DPP v Swift [2015] VCC 1588; DPP v Dittloff [2016] VCC 614; DPP v Schembri [2019] VCC 1774; DPP v Davis [2020] VCC 830; DPP v Petty (A Pseudonym) [2020] VCC 1120; DPP v Raymer [2020] VCC 1289; DPP v Zaphir [2020] VCC 1746. [↑](#footnote-ref-27)
28. . DPP v Dittloff [2016] VCC 614, [4], [9]. [↑](#footnote-ref-28)
29. . DPP v Raymer [2020] VCC 1289, [62]. [↑](#footnote-ref-29)
30. . For example, from 2012 to 2020, 83% of cases sentenced in the Supreme Court received imprisonment (609 of 736 sentenced cases). [↑](#footnote-ref-30)
31. . Criminal Procedure Act 2009 (Vic) ss 331(1)–(2). See [1.7] and above n 15. [↑](#footnote-ref-31)
32. . In McGrath v The Queen [2018] VSCA 134, the offender had sought to adjourn the plea hearing to obtain a neuropsychological report. The Court of Appeal held that the sentencing judge erred in refusing the adjournment as this refusal had denied the offender procedural fairness. See also Guest v DPP [2020] VSC 218 where an adjournment of a few weeks was granted to an offender on the basis of hardship arising from the effects of the COVID-19 pandemic. [↑](#footnote-ref-32)
33. . For instance, some programs – such as some residential drug rehabilitation programs – extend beyond the 12-month maximum of section 83A sentence deferrals: see [5.5]. [↑](#footnote-ref-33)
34. . Sentencing Advisory Council, ‘Deferrals and Adjourned Undertakings Stakeholder Survey’, Survey Monkey (March 2022). [↑](#footnote-ref-34)
35. . Victorian Aboriginal Legal Service, Submission to Sentencing Act Reform Project (2020) 8. [↑](#footnote-ref-35)
36. . Freiberg (2014), above n 10, 197. [↑](#footnote-ref-36)
37. . Victorian Aboriginal Legal Service (2020), above n 35, 8. [↑](#footnote-ref-37)
38. . Roberts (2022), above n 21, 228. [↑](#footnote-ref-38)
39. . Jay Gormely et al., The Methodological Challenges of Comparative Sentencing Research: Literature Review (2022) 33, citing Katherine Macdivittt, An Evaluation of the Structured Deferred Sentence Pilots (2008); Jane Euson et al., Review of the Aberdeen Problem-Solving Approach (2018); Johanne Miller et al., Evaluation of South Lanarkshire Structured Deferred Sentencing for Young People: End of Project Report (2019). [↑](#footnote-ref-39)
40. . Gormely et al. (2022), above n 39, 34, citing Community Justice Scotland, Community Justice Outcome Activity Across Scotland: Annual Report 2018–2019 (2020) 35. [↑](#footnote-ref-40)
41. . For offenders who plead guilty and are eligible for legal aid, VLA provides a lump sum general preparation fee of $445 for a summary matter ($255 for an urgent matter), which ‘covers all necessary work’: Victoria Legal Aid, ‘Handbook for Lawyers’ (handbook.vla.vic.gov.au, 2022). As a point of comparison, offenders in the ARC List are funded for eligibility hearings and individual support plan ratification hearings. [↑](#footnote-ref-41)
42. . Victorian Aboriginal Legal Service (2020), above n 35, 9. [↑](#footnote-ref-42)
43. . Ibid. [↑](#footnote-ref-43)
44. . For example, the Magistrates’ Court 2018–19 annual report records 1,705 CISP participants in 2017–18 and 2,112 CISP participants in 2018–19: Magistrates’ Court of Victoria, Annual Report 2018–19 (2019) 47. Some of these CISP participants may have had their sentence deferred to begin or continue CISP. However, those with ‘CISP’ in the hearing type field would not be identified as deferral cases. This means that deferral cases involving CISP and/or the Koori Court will be recorded as ‘DEF’, ‘CISP” or ‘KC’ but not all three. [↑](#footnote-ref-44)
45. . Roberts (2022), above n 21, 219. Professor Roberts adds: ‘The absence of statistics on an important sentencing provision reveals a clear gap in the Ministry of Justice sentencing statistics’. [↑](#footnote-ref-45)
46. . Magistrates’ Court of Victoria, Annual Report 2020–21 (2021) 12. [↑](#footnote-ref-46)
47. . Sentencing Act 1991 (Vic) ss 7(2), 83A(1). The need for the offender’s consent is consistent with case law stating that deferring a sentence without good reason constitutes undue delay, which is unfair to the offender and may constitute a miscarriage of justice: R v Palu [2002] NSWCCA 381, [30]; see also R v Hopoi [2014] NSWCCA 263, [47]; R v Mico [2010] ACTSC 64, [19]–[20]; R v Farrell [2014] NSWCCA 30, [34], [53]. [↑](#footnote-ref-47)
48. . There are a variety of other contexts in which courts have considered the interests of the offender, including the granting of an extended parole period (R v Egan [2022] NSWSC 399, [48]), the non-recording of a conviction (R v MDD [2021] QCA 235, [22]), the restoration of a driver licence (Anderson v Commissioner of Police [2021] QSC 254, [24]), the delayed disqualification of a driver licence (Forrest v Police [2021] SASC 116, [42]), and in dealing with inconsistencies in evidence (R v Ryan (A Pseudonym) (No 2) [2021] NSWDC 733, [11]; R v Munday [2021] NSWDC 625, [25]). [↑](#footnote-ref-48)
49. . DPP v Pan [2022] VSCA 98, [49]. [↑](#footnote-ref-49)
50. . DPP v Ring [2022] VCC 489, [43]. See also DPP v Payne [2021] VCC 1857, [44]; DPP v Mauot [2021] VCC 1388, [43]; DPP v Amari (A Pseudonym) [2021] VCC 1406, [60]; Bergman (A Pseudonym) v The Queen [2021] VSCA 148, [66]. [↑](#footnote-ref-50)
51. . Boulton v The Queen [2014] VSCA 342, [115]. [↑](#footnote-ref-51)
52. . Bail Act 1977 (Vic) s 3AAA(1)(j). [↑](#footnote-ref-52)
53. . Criminal Procedure Act 2009 (Vic) ss 60(2), 208(5). If the victim is present, the court may seek their views before giving a sentence indication. If the victim is not in court, the court may consider their victim impact statement if it is available or may postpone the decision to get the victim’s views: Magistrates’ Court of Victoria, Magistrates’ Court—Guidelines for Contest Mention (1994) [6.2]–[6.3], cited in Department of Justice and Community Safety, Improving Victims’ Experience of Summary Proceedings: Final Report (2021) 32–33. [↑](#footnote-ref-53)
54. . Sentencing Act 1991 (Vic) s 5(2)(daa). [↑](#footnote-ref-54)
55. . This can be contrasted with requirements in other jurisdictions, such as Canada where the court must consider the interests of the victim in making a deferral decision: see Criminal Code, RSC 1985, c C-46, s 720(2). [↑](#footnote-ref-55)
56. . Sentencing Advisory Council (2008), above n 4, 271–272. As Julian Roberts has noted: ‘The tradition in common law jurisdictions is for a court to sentence expeditiously following conviction’, with deferral an exception to that practice: Roberts (2022), above n 21, 211. [↑](#footnote-ref-56)
57. . R v Thompson [2012] SASCFC 149, [21]. [↑](#footnote-ref-57)
58. . Sentencing Advisory Council (2008), above n 4, 271. [↑](#footnote-ref-58)
59. . Ibid 274. [↑](#footnote-ref-59)
60. . Criminal Code, RSC 1985, c C-46, s 720(2). [↑](#footnote-ref-60)
61. . Sentencing Act 2020 (UK) s 5(1). [↑](#footnote-ref-61)
62. . In the Sentencing Act 1991 (Vic) alone, there are multiple references to the ‘interests of justice’ in different contexts: ss 9A(6), 11A(4), 18P(5)(b), 85D(1), 87F(1), 101(2), 104A(4). It is also referenced over 50 times in the Criminal Procedure Act 2009 (Vic), four times in the Magistrates Court Act 1989 (Vic), three times in the Evidence Act 2008 (Vic), twice in the Crimes Act 1958 (Vic) and once in the Bail Act 1977 (Vic). [↑](#footnote-ref-62)
63. . See, for example, Roberts (2022), above n 21, 224. [↑](#footnote-ref-63)
64. . Sentencing Act 1995 (WA) s 33A(3). See also Roberts (2022), above n 21, 213. [↑](#footnote-ref-64)
65. . Roberts (2022), above n 21, 220. [↑](#footnote-ref-65)
66. . See, for example, Crimes (Sentencing) Act 2005 (ACT) s 116(2); Sentencing Act 1997 (Tas) s 57A(4). [↑](#footnote-ref-66)
67. . Roberts (2022), above n 21, 223. [↑](#footnote-ref-67)
68. . Ibid. [↑](#footnote-ref-68)
69. . Meeting with County Court (3 December 2021); Roberts (2022), above n 21,223; R v Trindall [2002] NSWCCA 364, [60]. This function of deferral – allowing courts to make reasoned assessments of offenders’ rehabilitative prospects – was one of the bases on which suspended sentences of imprisonment were abolished in Victoria: Freiberg (2014), above n 10, 196. [↑](#footnote-ref-69)
70. . Sentencing Advisory Council, ‘Sentencing Outcomes in the Magistrates’ Court’ (sentencingcouncil.vic.gov.au, 2022). [↑](#footnote-ref-70)
71. . Freiberg (2014), above n 10, 198, citing Crimes (Sentencing) Act 2005 (ACT) s 116(2). [↑](#footnote-ref-71)
72. . R v Brown [2009] NSWCCA 6, [22]; R v Rayment [2010] NSWCCA 85, [22], [160]; R v Trindall [2002] NSWCCA 364, [62], [64]. [↑](#footnote-ref-72)
73. . R v Wymond [2013] SASCFC 12, [33]. [↑](#footnote-ref-73)
74. . DPP v Swift [2015] VCC 1588, [29]. [↑](#footnote-ref-74)
75. . Unpublished sentencing remarks provided to the Council. [↑](#footnote-ref-75)
76. . DPP v Evangelistis [2015] VCC 1192, [33]. See also DPP v Schembri [2019] VCC 1774, [58]; DPP v Villis [2021] VCC 684, [29]. [↑](#footnote-ref-76)
77. . Freiberg (2014), above n 10, 197. [↑](#footnote-ref-77)
78. . R v Palu [2002] NSWCCA 381, [29]–[30]. See also R v Thompson [2012] SASCFC 149, [34]. The New South Wales Court of Criminal Appeal also held that deferral should not be used if it unnecessarily causes delay: R v Rayment [2010] NSWCCA 85, [89], [121]. [↑](#footnote-ref-78)
79. . Freiberg (2014), above n 10, 198. [↑](#footnote-ref-79)
80. . Ibid 197; Arie Freiberg, Pathways to Justice: Sentencing Review 2002 (Department of Justice, 2002) 181. [↑](#footnote-ref-80)
81. . See, for example, Richard Fox, ‘The Meaning of Proportionality in Sentencing’ (1994) 19(3) Melbourne University Law Review 489, 495:

[E]xcept where overridden by … legislation, the common law … prohibits judges or magistrates from awarding sentences exceeding that which is commensurate to the gravity of the crime … It is impermissible for any punishment to be extended above this limit in an effort to … provide for medical, psychiatric or other treatment … or to promote other ‘educative’ purposes, or to force cooperation, restitution or compensation irrespective of whether fulfilment of these ancillary objectives would protect the community against further crime. [↑](#footnote-ref-81)
82. . Arie Freiberg and Neil Morgan, ‘Between Bail and Sentence: The Conflation of Dispositional Options’ (2004) 15(3) Current Issues in Criminal Justice 220, 230. [↑](#footnote-ref-82)
83. . Roberts (2022), above n 21, 217. [↑](#footnote-ref-83)
84. . Ibid. See also Freiberg and Morgan (2004), above n 82. [↑](#footnote-ref-84)
85. . Sentencing Advisory Council (2008), above n 4, 596 (Recommendation 13–3). [↑](#footnote-ref-85)
86. . Sentencing Act 1991 (Vic) ss 83A(1A), (2)(a). The New South Wales provision is very similar: Crimes (Sentencing Procedure) Act 1990 (NSW) s 11(1). [↑](#footnote-ref-86)
87. . Roberts (2022), above n 21, 210–211. [↑](#footnote-ref-87)
88. . See, for example, Crimes (Sentencing Procedure) Act 1990 (NSW) s 11(1)(a). [↑](#footnote-ref-88)
89. . See, for example, Crimes (Sentencing) Act 2005 (ACT) s 27(1)(d); Sentencing Act 1997 (Tas) ss 57A(2)(a)–(b); Crimes (Sentencing Procedure) Act 1999 (NSW) ss 11(a)–(b); Sentencing Act 2017 (SA) ss 29(1)(a)–(b). In England and Wales, sentence deferral is permitted to allow a court ‘to have regard to the offender’s conduct after conviction … or any change in the offender’s circumstances’, which would include consideration of the offender’s rehabilitation efforts: Sentencing Act 2020 (UK) s 3(1). [↑](#footnote-ref-89)
90. . See, for example, Sentencing Act 2002 (NZ) s 25(1)(b); Sentencing Act 2020 (UK) s 3(b). [↑](#footnote-ref-90)
91. . Sentencing Act 2017 (SA) s 29(1)(e); Crimes (Sentencing Procedure) Act 1999 (NSW) s 11(1)(c); Sentencing Act 1997 (Tas) s 57A(2)(d). In New Zealand, sentencing can also be deferred ‘to enable inquiries to be made or to determine the most suitable method of dealing with the case’: Sentencing Act 2002 (NZ) s 25(1)(a). See also Sentencing Act 1995 (WA) s 16(1)(a). And in England and Wales, sentence deferral is permitted to allow a court ‘to have regard to the offender’s conduct after conviction … or any change in the offender’s circumstances’: Sentencing Act 2020 (UK) s 3(1). [↑](#footnote-ref-91)
92. . DPP v Wharton [2014] VCC 1844. See Case Study 1 (page 37). [↑](#footnote-ref-92)
93. . DPP v Wharton [2014] VCC 1844, [4]. See Case Study 1 (page 37). [↑](#footnote-ref-93)
94. . DPP v Wharton [2014] VCC 1844, [12]. See Case Study 1 (page 37). [↑](#footnote-ref-94)
95. . Sentencing Act 1991 (Vic) ss 83A(1A)(d), (2)(a). The New South Wales sentence deferral provision is very similar: Crimes (Sentencing Procedure) Act 1990 (NSW) s 11(1). [↑](#footnote-ref-95)
96. . Sentencing Advisory Council (2008), above n 4, 595. [↑](#footnote-ref-96)
97. . See, for example, Royal Commission into Family Violence, Volume IV: Report and Recommendations (2016) 135; Victorian Law Reform Commission, Improving the Justice System Response to Sexual Offences: Report (2021) 184–185; Australian Association for Restorative Justice, Submission to the Parliamentary Inquiry into the Victorian Criminal Justice System (2021) 1–8. [↑](#footnote-ref-97)
98. . See, for example, Victorian Law Reform Commission (2021), above n 97, 210–211; Victorian Law Reform Commission, The Role of Victims of Crime in the Criminal Trial Process (2016) 177; Sentencing Advisory Council (2008), above n 4, 47, 595–596; Centre for Innovative Justice, It’s Healing to Hear Another Person’s Story and Also To Tell Your Own Story: Report on the CIJ’s Restorative Justice Conferencing Pilot Program (2019) 37; Ministry of Justice (England and Wales), A Smarter Approach to Sentencing (2020) 52. [↑](#footnote-ref-98)
99. . Steven K. Tudor, ‘Why Should Remorse Be a Mitigating Factor in Sentencing?’ (2008) 2(3) Criminal Law and Philosophy 241. [↑](#footnote-ref-99)
100. . Victorian Law Reform Commission (2021), above n 97, 209. Conversely, refusal to participate in a restorative justice program is not an aggravating factor: see Crimes (Restorative Justice) Act 2004 (ACT) ss 25(f)(ii), 53(e)(ii); Crimes (Sentencing) Act 2005 (ACT) s 34(1)(h). This is consistent with case law that suggests that the absence of a mitigating factor should not generally be treated as an aggravating factor: Siganto v The Queen [1998] HCA 74, [34]; R v CJK [2009] VSCA 58, [41]; Freiberg (2014), above n 10, 222. [↑](#footnote-ref-100)
101. . R v Eric (A Pseudonym) [2021] QCA 81 [11]–[14]. [↑](#footnote-ref-101)
102. . Australian Association for Restorative Justice (2021), above n 97, 1. [↑](#footnote-ref-102)
103. . Victorian Law Reform Commission (2016), above n 98, 177; Centre for Innovative Justice, Submission to the Victorian Law Reform Commission Review on Improving the Justice System Response to Sexual Offences (2021) 24. [↑](#footnote-ref-103)
104. . The proposed language in the Council’s 2008 recommendation was more specifically ‘to allow the offender to participate in restorative justice or other programs’: Sentencing Advisory Council (2008), above n 4, 596. [↑](#footnote-ref-104)
105. . The Victorian Law Reform Commission has recommended a restorative justice scheme be legislated in Victoria: Victorian Law Reform Commission (2021), above n 97, 206, 211; Victorian Law Reform Commission (2016), above n 98, 194. So too has the Centre for Innovative Justice: Centre for Innovative Justice (2021), above n 103, 24. As a point of comparison, the Australian Capital Territory and New Zealand have legislative frameworks to facilitate restorative justice processes: Crimes (Restorative Justice) Act 2004 (ACT); Sentencing Act 2002 (NZ): Parole Act 2002 (NZ); Victims’ Rights Act 2002 (NZ); Ministry of Justice (NZ), Restorative Justice Best Practice Framework (2017). [↑](#footnote-ref-105)
106. . DPP v Hampson [2015] VCC 916, [23]; unpublished sentencing remarks provided to the Council. See also R v Trindall [2002] NSWCCA 364; Roberts (2022), above n 21, 224. [↑](#footnote-ref-106)
107. . Australian Law Reform Commission (2006), above n 9, 227. [↑](#footnote-ref-107)
108. . Magistrates’ Court Observation (23 February 2022). [↑](#footnote-ref-108)
109. . Australian Law Reform Commission (2006), above n 9, 227, citing R v Togias [2001] NSWCCA 522, [5]. [↑](#footnote-ref-109)
110. . DPP v Dattilo [2018] VCC 1237, [63], [74]. [↑](#footnote-ref-110)
111. . See, for example, R v Ria Williams [2019] EWCA Crim 1234. [↑](#footnote-ref-111)
112. . Roberts (2022), above n 21, 224. See also Julian V. Roberts et al., The Use of Deferred Sentencing in England and Wales: A Review of Law, Guidance and Research (2022) 27. [↑](#footnote-ref-112)
113. . Department of Justice and Community Safety – Corrections Victoria, Women in the Victorian Prison System (2019) 3; Felicity Gerry and Lyndon Harris, Women in Prison: Is the Justice System Fit for Purpose? (2016) 3, 8–12; Lisa C. Barry et al., ‘Health-Care Needs of Older Women Prisoners: Perspectives of the HealthCare Workers Who Care for Them’ (2019) 32(2) Journal of Women & Aging 183, 184; Ministry of Justice (England and Wales), 2020), above n 98, 36, 52; Violet Handtke et al., ‘Easily Forgotten: Elderly Female Prisoners’ (2015) 32(1) Journal of Aging Studies 1, 1–2. [↑](#footnote-ref-113)
114. . Handtke et al. (2015), above n 113, 2, 5–8. For a list of Victorian prisons, see: Corrections Victoria, ‘Prisons’ (corrections.vic.gov.au, 2021). [↑](#footnote-ref-114)
115. . See, for example, Department of Justice and Community Safety – Corrections Victoria (2019), above n 113, 4, 12 (finding that 65% of women remanded between 2015 and 2016 reported that they had previously experienced family violence). [↑](#footnote-ref-115)
116. . Handtke et al. (2015), above n 113, 2, 5–8. See also Freiberg (2014), above n 10, 422–423. [↑](#footnote-ref-116)
117. . Felicity Gerry, ‘Deferred Sentences – Used Again but Not Used Enough’ (2017) 181(21) Criminal Law and Justice Weekly 358. The Ministry of Justice in England and Wales has also encouraged the increased use of deferral as a means of ‘changing the justice pathway’ of ’‘vulnerable women’: Ministry of Justice (England and Wales) (2020), above n 98, 12, 36, 38, 52. See also Roberts (2022), above n 21, 224; Shona Minson et al., Sentencing of Mothers: Improving the Sentencing Process and Outcomes for Women with Dependent Children – A Discussion Paper (2015) 17; Maria Garcia de Frutos et al., Why Are Pregnant Women in Prison? (2021) 5; Lucy Baldwin and Rona Epstein, Short but Not Sweet: A Study of the Impact of Short Custodial Sentences on Mothers & Their Children (2017) 57. [↑](#footnote-ref-117)
118. . One example is the Bangkok Rules, which provide for the treatment of women prisoners and non-custodial measures for women offenders: United Nations, United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders, GA Res 65/229, 3rd Comm, 65th sess, Agenda Item 105, UN Doc A/65/457 (16 March 2011) (‘Bangkok Rules’); Andrea Huber, ‘Women in Criminal Justice Systems and the Added Value of the UN Bangkok Rules’, in Helmet Kury et al. (eds), Women and Children as Victims and Offenders: Background, Prevention, Reintegration (2016) 35–84. Another example is the UN Convention on the Rights of the Child, opened for signature 20 November 1989, UNTS 1577 (entered into force 2 September 1990). Article 6 requires states to ‘ensure to the maximum extent possible the survival and development of the child’, and Article 24 upholds the child’s right to ‘the enjoyment of the highest attainable standard of health’. In R v Togias [2001] NSWCCA 522 the court discussed Australia’s ratification of that convention in concluding that the sentence should have been deferred for arrangements to be made for contact between the offender and her baby: at [120]–[121], [123]. [↑](#footnote-ref-118)
119. . Minson et al. (2015), above n 117, 17. See also Legal and Social Issues Committee, Parliament of Victoria, Inquiry into Children Affected by Parental Incarceration (2022) 124. [↑](#footnote-ref-119)
120. . R v Togias [2001] NSWCCA 522. [↑](#footnote-ref-120)
121. . R v Togias [2001] NSWCCA 522, [7]. Contra Western Australia v Hatch [2008] WASCA 162, where the court held that a woman’s sentence should not have been deferred, for reasons including that there was no evidence that the offender’s children would not be adequately cared for by her extended family and that legislation in Western Australia only permits sentence deferral if imprisonment is not inevitable: at [21]–[22]. [↑](#footnote-ref-121)
122. . See, for example, R v Togias [2001] NSWCCA 522. [↑](#footnote-ref-122)
123. . Sentencing Act 1991 (Vic) s 83A(1). [↑](#footnote-ref-123)
124. . Crimes (Sentencing Procedure) Act 1999 (NSW) s 11(2); Sentencing Act 2017 (SA) s 29(2); Crimes (Sentencing) Act 2005 (ACT) s 122(1). [↑](#footnote-ref-124)
125. . Sentencing Act 2017 (SA) s 29(3). [↑](#footnote-ref-125)
126. . Sentencing Act 2020 (UK) s 5(2); Sentencing Act 1997 (Tas) s 7A(1); Criminal Procedure (Scotland) Act 1995 s 202(1). [↑](#footnote-ref-126)
127. . Sentencing Amendment Act 2010 (Vic) s 21; Sentencing Advisory Council (2008), above n 4, 592. These same recommendations had also been made six years earlier: Freiberg (2002), above n 80, 184. [↑](#footnote-ref-127)
128. . Sentencing Advisory Council (2008), above n 4, 584–591. [↑](#footnote-ref-128)
129. . Bail Act 1977 (Vic) s 4AA(3), sch 2 cl 1(d). A compelling reason is one that is ‘difficult to resist’: Re Ceylan [2018] VSC 361, [47]. It can also be based on a combination of factors. [↑](#footnote-ref-129)
130. . Bail Act 1977 (Vic) s 4AA(2)(c), sch 2 cl 1. [↑](#footnote-ref-130)
131. . Re CT [2018] VSC 559, [64]. [↑](#footnote-ref-131)
132. . Re Gloury-Hyde [2018] VSC 393, [30]; Re CT [2018] VSC 559, [65]; Re Logan [2019] VSC 134, [13]. [↑](#footnote-ref-132)
133. . Re CT [2018] VSC 559, [64], citing Armstrong v The Queen [2013] VSC 111. [↑](#footnote-ref-133)
134. . See, for example, John H. Laub and Robert J. Sampson, ‘Understanding Desistance from Crime’ (2001) 28(1) Crime and Justice 1. [↑](#footnote-ref-134)
135. . This was recommended by this Council: Sentencing Advisory Council (2008), above n 4, 593 (‘the Council does not support courts being permitted to impose formal obligations on the offender as a condition of deferral’). [↑](#footnote-ref-135)
136. . Sentencing Act 1991 (Vic) s 83A(2)(b). [↑](#footnote-ref-136)
137. . Bail Act 1977 (Vic) s 5AAA(1); Marilyn McMahon, No Bail, More Jail? Breaking the Nexus Between Community Protection and Escalating Pre-Trial Detention (2019) 12. [↑](#footnote-ref-137)
138. . Sentencing Act 1991 (Vic) s 83A(1A). [↑](#footnote-ref-138)
139. . Email from Victorian Aboriginal Legal Service to Sentencing Advisory Council, 29 December 2021. [↑](#footnote-ref-139)
140. . See above at [6.4]–[6.7] on the consequences of deferral requirements being made conditions of bail. [↑](#footnote-ref-140)
141. . Freiberg and Morgan (2004), above n 82, 230. [↑](#footnote-ref-141)
142. . Ibid. Concerns about onerous conditions are one of the reasons that Freiberg and Morgan criticise the ‘pre-sentence order’ available instead of a deferred sentence in Western Australia (under Sentencing Act 1995 (WA) s 33B). See also Sentencing Advisory Council (2008), above n 4, 583–584. [↑](#footnote-ref-142)
143. . Sentencing Act 1991 (Vic) ss 83A(1)(B)–(C). [↑](#footnote-ref-143)
144. . Michael Trood et al., ‘Magistrates’ Experiences of Judicial Supervision in Mainstream Courts’ (2022) 31(3) Journal of Judicial Administration 115. [↑](#footnote-ref-144)
145. . Sentencing Act 1991 (Vic) s 83A(1D). [↑](#footnote-ref-145)
146. . Sentencing Act 1991 (Vic) s 83A(1E). [↑](#footnote-ref-146)
147. . See also Sentencing Advisory Council (2008), above n 4, 49, 589, 593. [↑](#footnote-ref-147)
148. . Victoria, Parliamentary Debates, Legislative Council, 7 October 2010, 5302 (John Lenders, Treasurer). [↑](#footnote-ref-148)
149. . Magistrates’ Court Observation (23 February 2022). For a more detailed discussion of the Council’s court observation see Sentencing Advisory Council, Reforming Adjourned Undertakings in Victoria: Consultation Paper (2022) 38–39. [↑](#footnote-ref-149)
150. . Brian MacKenzie, ‘The Judge Is the Key Component: The Importance of Procedural Fairness in Drug-Treatment Courts’ (2016) 52(1) Court Review 8, 9 (citations omitted). [↑](#footnote-ref-150)
151. . Trood et al. (2022), above n 144. [↑](#footnote-ref-151)
152. . Sentencing Act 1991 (Vic) ss 3(a) (definition of justice plan condition), 72(3), 75(3), 80(1)(a), 80(4). See also section 44A(1)(b)(ii) requiring mandatory treatment and monitoring orders to include either a treatment and rehabilitation condition or a justice plan condition. [↑](#footnote-ref-152)
153. . Sentencing Advisory Council, Community Correction Orders: Monitoring Report (2014) 17; Sentencing Advisory Council, Community Correction Orders: Second Monitoring Report (Pre-Guideline Judgment) (2015) 16; Sentencing Advisory Council, Community Correction Orders: Third Monitoring Report (Post-Guideline Judgment) (2016) 17. [↑](#footnote-ref-153)
154. . Sentencing Advisory Council (2022), above n 149, 44. [↑](#footnote-ref-154)
155. . Magistrates’ Court of Victoria (2018), above n 13. [↑](#footnote-ref-155)
156. . Sentencing Advisory Council, ‘Deferrals and Adjourned Undertakings Stakeholder Survey’, Survey Monkey (March 2022). [↑](#footnote-ref-156)
157. . Research consistently shows a high rate of mental illness among people who come into contact with the justice system, especially those in prison: see, for example, Royal Commission into Victoria’s Mental Health System, Final Report Volume 3: Promoting Inclusion and Addressing Inequities (2021) 352; Department of Corrections (NZ), Change Lives Shape Futures – Investing in Better Mental Health for Offenders (2016) 4. [↑](#footnote-ref-157)
158. . Meeting with Magistrates’ Court (21 January 2022). CISP aims to reduce the likelihood of reoffending by addressing an offender’s health and/or social needs and assisting them to access support services. To be eligible, the offender must consent and be experiencing a physical or mental disability or illness; drug or alcohol dependency or misuse issues; inadequate social, family and economic support; or homelessness: Magistrates’ Court of Victoria, ‘Bail Support (CISP)’ (mcv.vic.gov.au, 2019). The indictable crime/County Court CISP pilot at Melbourne Magistrates’ Court and County Court provides for longer periods of engagement (up to eight months). [↑](#footnote-ref-158)
159. . Meeting with Magistrates’ Court (9 December 2021). [↑](#footnote-ref-159)
160. . Centre for Justice Innovation (UK), Delivering a Smarter Approach: Deferred Sentencing (2020) 2. [↑](#footnote-ref-160)
161. . Magistrates’ Court of Victoria, Submission to The Royal Commission Into Victoria’s Mental Health System (2019) 12. [↑](#footnote-ref-161)
162. . In the adjourned undertakings context, this occurs through the signing of an CP230-9 adjourned undertaking form by both the magistrate and the offender: see Sentencing Advisory Council (2022), above n 149, 60–62. [↑](#footnote-ref-162)
163. . Sentencing Act 1991 (Vic) s 95. [↑](#footnote-ref-163)
164. . Sentencing Act 2020 (UK) s 5(3). [↑](#footnote-ref-164)
165. . Crimes (Sentencing) Act 2005 (ACT) s 121. [↑](#footnote-ref-165)
166. . Crimes (Sentencing) Act 2005 (ACT) s 121. [↑](#footnote-ref-166)
167. . The other sentence type includes discharges and dismissals (68), suspended sentences (59), youth justice centre orders (17), Commonwealth orders (9) and diversion (8). [↑](#footnote-ref-167)
168. . Freiberg and Morgan (2004), above n 82. [↑](#footnote-ref-168)
169. . DPP v Hassan [2017] VCC 219, [54]. [↑](#footnote-ref-169)
170. . DPP v Cheong [2016] VCC 1423, [1]. [↑](#footnote-ref-170)
171. . DPP v Cheong [2016] VCC 1423, [21]. [↑](#footnote-ref-171)
172. . DPP v Cheong [2017] VCC 1262, [5], [7]. [↑](#footnote-ref-172)
173. . DPP v Cheong [2017] VCC 1262, [9]. [↑](#footnote-ref-173)
174. . Criminal Procedure Act 2009 (Vic) ss 60, 207. [↑](#footnote-ref-174)
175. . Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Act 2022 (Vic) s 111. [↑](#footnote-ref-175)
176. . Criminal Procedure Act 2009 (Vic) ss 60(1)(b), 207(1)(a). [↑](#footnote-ref-176)
177. . Criminal Procedure Act 2009 (Vic) ss 60(1), 207(1) (emphasis added). [↑](#footnote-ref-177)
178. . Crimes (Sentencing) Act 2005 (ACT) s 118. [↑](#footnote-ref-178)
179. . DPP v Mayoum [2017] VCC 442, [163]. See also DPP v Mawien [2018] VCC 565, [21], [30]. [↑](#footnote-ref-179)
180. . DPP v Tanti [2019] VCC 2124, [49]. [↑](#footnote-ref-180)
181. . Freiberg and Morgan (2004), above n 82, 232. [↑](#footnote-ref-181)
182. . Sentencing Act 1991 (Vic) s 83A(3). [↑](#footnote-ref-182)
183. . Sentencing Act 1991 (Vic) s 18. [↑](#footnote-ref-183)
184. . Akoka v The Queen [2017] VSCA 214, [105]–[110]. See also DPP v Wallis (A Pseudonym) [2020] VCC 1100, [64]. [↑](#footnote-ref-184)
185. . DPP v Cassidy [2019] VCC 2121, [34]. [↑](#footnote-ref-185)
186. . Roberts (2022), above n 21, 222. [↑](#footnote-ref-186)
187. . Veen v The Queen (No 2) [1988] HCA 14, [7]–[8]; Hoare v The Queen [1989] HCA 33, [7]; Fox (1994), above n 81, 492, 495. [↑](#footnote-ref-187)
188. . Roberts (2022), above n 21, 217. [↑](#footnote-ref-188)
189. . R v Mills [1998] 4 VR 235, 241. See also Azzopardi v The Queen [2011] VSCA 372, [34]–[36]; Sentencing Advisory Council, Rethinking Sentencing for Young Adult Offenders (2019) 24–26. [↑](#footnote-ref-189)
190. . Sentencing Act 1991 (Vic) s 6D. [↑](#footnote-ref-190)
191. . Sentencing Act 1991 (Vic) s 18X(2). [↑](#footnote-ref-191)
192. . Sentencing Act 1991 (Vic) s 70(1)(a). [↑](#footnote-ref-192)
193. . See, for example, DPP v Wharton [2014] VCC 1844, [20]:

You have spent a week in custody, and you have now spent about 16 months in residential rehabilitation, successfully so. Your time has not been your own, and in a significant way you gave up your liberty to complete the course and ensure that you did not offend again. This is quite unusual, and obviates the need for me to place great weight on the need for general deterrence, as I otherwise would. [↑](#footnote-ref-193)
194. . The only previous cohort with a comparable reoffending rate was threat offenders, also at 58% within three years: Sentencing Advisory Council, Threat Offences in Victoria: Sentencing Outcomes and Reoffending (2021) 43. See also Sentencing Advisory Council, Sentencing Stalking in Victoria (2022) 63 (52% reoffending within three years); Sentencing Advisory Council, Sentencing Breaches of Personal Safety Intervention Orders in Victoria (2022) 65 (53% reoffending within three years); Sentencing Advisory Council, Contravention of Family Violence Intervention Orders and Safety Notices: Prior Offences and Reoffending (2016) 33 (40.3% reoffending within three years). [↑](#footnote-ref-194)
195. . Sentencing Advisory Council (2022), above n 149, Appendix 2. [↑](#footnote-ref-195)
196. . Ibid Appendix 3. [↑](#footnote-ref-196)