

We refer to the Sentencing Advisory Council's consultation paper, *Reforming Sentence Deferrals in Victoria*.

The Court provides its feedback to the questions posed in the consultation paper.

Question 1 – Should sentence deferrals be available in the Supreme Court?

1. The Supreme Court would be best placed to provide feedback on the desirability or otherwise of sentence deferrals in its jurisdiction.

Question 2 – 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?

2. The Court has not identified any barriers in addition to those described in the consultation paper. The availability of services and amenities will always be a hurdle for such programs. Greater success on a disposition such as a sentence deferral may be linked to greater access.
3. The Court sees value in the profession having greater awareness of sentence deferrals as an available pre-sentence disposition to be raised for the court's consideration in appropriate cases.
4. The Court also sees value in the Court Integrated Services Program ('CISP') being made available during a deferral period to foster rehabilitation and insight by the offender. The County Court Pilot Program for CISP has been made available to those on deferred sentences but is more commonly used in the context of bail.
5. A potential issue the Court has identified is the incompatibility of the length of time a participant is on CISP, compared with the length of a deferred sentence. The deferred sentence will often be longer. As far as the County Court Pilot Program for CISP is concerned, the Court considers there would be value in having a power to extend the period on CISP for as long as is necessary while a person is on a deferral of sentence.

Question 3 – Are there any issues with the current criteria and considerations courts must take into account before ordering a sentence deferral?

6. The Court considers that the current criteria and considerations listed under s 83A are sufficient because an applicable court may defer sentence for 'any other purpose that the court considers appropriate'.
7. Further, as the process is discretionary, the Court considers that there may not be a need for a note indicating that a deferred sentence can be ordered even where prison is inevitable. Adding such a note may lead to a more difficult sentencing exercise as yet another factor in addition to those under s 5 of the *Sentencing Act* to take into consideration. The Court considers that a case where an offender is appropriate for a deferred sentence and a sentence of imprisonment is inevitable would be quite apparent and not require that reminder.

Question 4 – 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?

8. The Court acknowledges that access to justice plans on a deferred sentence is a worthwhile proposition, particularly given the length of time justice plans take to be initiated. A deferral of sentence would allow the time that is required to put in place appropriate supports, as well as provide an opportunity for a participant on a justice plan to make progress prior to eventually being

sentenced. The Court considers this a particularly useful approach, given the often-complex challenges those who are eligible for justice plans face. For an offender subject to a justice plan, the success on the deferred sentence may have significant consequences and be the difference between an ultimate sentence of an adjourned undertaking as opposed to a punitive community correction order.

9. The Court considers that for offenders who require drug and alcohol treatment, deferred sentences can provide a valuable opportunity to seek those services. However, the Court considers the need for structure and routine for many of those who require such rehabilitation. As can be seen in the Drug Court, structure is an important aspect of the rehabilitation process. This may be supervised with judicial monitoring, but coupled with the access to programs consideration, it may be more beneficial for offenders in such circumstances to explore the Drug Court route, where eligible.
10. The Court sees value in extending the availability of support programs such as CISP to those throughout Victoria to work in conjunction with sentence deferrals. Currently, the pilot program is only available in the Melbourne metropolitan area in the County Court. Allowing for a greater geographical catchment would also increase participation from marginalised groups such as Aboriginal persons. Currently, Aboriginal persons make up approximately 12% of all CISP participants, however the pilot program for CISP in the County Court has seen success in its implementation.

Question 5: Should the current legislative purposes of sentence deferral in s 83A(1A) of the Sentencing Act be amended? If so, what changes would you recommend, and why?

11. A specific consideration for 'child-related responsibilities' may be worthwhile in drawing attention to the availability of a deferral of sentence for such an offender. As the deferral of sentence consideration is entirely discretionary, it would allow those who are on the borderline of imprisonment to demonstrate responsibility and a change in circumstances. Further, it may afford those who cannot fully benefit from the scheme to make arrangements, so children are not further negatively impacted by a parent or guardian being imprisoned.

Question 6: Should there be any changes to the maximum length of 12 months deferral in the Magistrates' and County Courts? If so, what changes would you propose, and why?

12. The Court acknowledges that there may be value in an extension of the deferral period, for example, to 18 months, particularly to ensure that offenders with special needs are adequately provided for. As the power to order the deferral is discretionary, so is the length of time on deferral.
13. The Court considers that providing for exceptions or allowing applications for extensions while retaining the 12-month maximum term may be less suitable, as it may cause uncertainty and unexpected delays in finalising proceedings.

Question 7: Should section 83A of the Sentencing Act 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.

14. It may be counterintuitive to have a deferral as a condition of bail. As set out in the consultation paper, bail is a matter of risk, whereas a deferral of sentence is a consideration of rehabilitation, restorative justice (if applicable), and a demonstration of contrition through providing opportunity

to offenders. Attaching conditions to a deferral may lead to a program that is unduly onerous and would operate as a sentence in itself, with consequences for non-compliance such as a community correction order.

15. The purposes of bail conditions do not sit comfortably with the purposes of a deferral, and the Court considers that judicial monitoring can more appropriately track progress on a deferred sentence, provide incentive and ultimately address concerns around any failure to engage with the opportunities afforded on a deferred sentence.

Question 8: Is there scope to increase or improve the use of judicial monitoring during sentence deferrals? If so, how?

16. The Court considers that judicial monitoring is an important part of the deferred sentence scheme and that the same factors preventing the Magistrates' Court may not be as prevalent in the County Court. There does not appear to be a need for a judicial monitoring condition or the like, as there are provisions for setting review dates under the existing s 83A(1B).

Question 9: Should justice plans be made available as a condition of sentence deferral? If so, why? If not, why not?

17. As discussed above at Question 4, the Court considers that access to justice plans on a deferred sentence is a worthwhile proposition, particularly given the length of time justice plans take to be initiated. A deferral of sentence could allow the time that is required to get appropriate supports in place and initiated, particularly if the maximum period of deferral is extended to 18 months.

Question 10: 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?

18. The Court considers that the extension to an 18-month maximum duration could be a way to make programs more accessible to participants due to the considerable waiting times that exists for such service. This may require extending maximum time-periods that currently exist for those services, such as CISP.

19. The Court sees value in expanding the availability of CISP for sentence deferrals as a way to assist with rehabilitation and acclimate a person to being supervised in the community, in order to prepare them for a community correction order if this is an appropriate sentencing disposition. Extending the period of time a person can be on support services such as CISP would assist in providing continuous supervision during the deferral period. This is something that can be achieved at the Melbourne County Court as CISP is already available for at least 8 to 9 months and can be extended on a formal deferral of sentence.

Question 11: Should offenders receive a written deferral plan outlining what they have agreed to do during the deferral period and the potential consequences for not engaging positively with those requirements?

20. The imposition of a deferral plan that contains consequences for non-compliance may be unduly burdensome. Such consequences may not be in line with the purpose of deferral in providing an opportunity to demonstrate the offender's willingness to change their behaviour.

21. A suitable middle ground may be discretionary provision of a written deferral plan where the court considers it would be helpful and appropriate in a particular matter, where that document outlines

the programs the offender has been offered to participate in and the expectations around their engagement. This would allow the offender to track their own progress during a lengthy deferral period, and enable structured judicial monitoring and ongoing adjustments to parts of the plan as the circumstances of an offender may require.

22. Further, having this structure and seeing the progress on a deferral plan may further incentivise an offender to engage more fully with the plan, leading to the potential of a more favourable sentencing outcome.

Question 12: Should courts be expressly permitted or required to tell the offender the sentence they can expect if they successfully engage with the deferral?

23. Requiring a Court to make an express statement to an offender of the consequences of not engaging on a deferral of sentence may not be beneficial. It may effectively constrain the Court in terms of the ultimate sentence the Court could impose.

24. A broad range of positive and negative circumstances may occur whilst an offender is on a deferral. The Court considers that communications in the courtroom can equally provide an incentive to participate in the program and set the expectation without imposing conditions on the offender to participate.

25. The Court also considers that the 'catch-all' purpose under 83A(1A)(e), namely 'any other purpose that the court considers appropriate' adequately provides for those communications. A sentencing judge passing sentence could utilise that section, stating that the circumstances of the case warranted a deferral because prison was a consideration, but an opportunity has been given to the offender to avoid prison.

Question 13: To what extent should the requirements imposed on an offender during a sentence deferral be taken into account at sentencing?

26. As a sentencing deferral is an opportunity prior to sentence, rather than imposing conditions to try and reduce the ultimate sentence, that proportionality may be relevant only to the offending itself. Positive progress could be taken into account whilst the offender was on a deferral of sentence, but it may be counter-intuitive to have a negative impact on an offender if they do not take up the opportunity. Should conditions on deferral be a part of the scheme, then non-compliance could be more appropriately regarded as an absence of mitigation.

Question 14: If an offender has engaged positively with the conditions of their deferral, should rehabilitation become the primary purpose of sentencing?

27. The Court considers that while rehabilitation is an important factor for deferrals of sentence, it may not necessarily need to be the primary purpose. This approach may not be in line with other sentencing principles relevant to the particular offending. Section 5 of the *Sentencing Act* makes provision for an offender to make appropriate submissions to persuade a judge in passing the ultimate sentence that rehabilitation should be the primary consideration, leaving the sentencing discretion unaffected. This approach may be more in line with the overall sentencing regime, without disrupting the nature of a deferral of sentence being primarily therapeutic.

Further feedback

28. The Court appreciates the opportunity to provide feedback on the proposed reforms and can endeavour to provide further feedback or clarification if it would assist the Council.