



Submission to the Sentencing Advisory Council: Reforming Sentence Deferrals in Victoria

December 2022

Acknowledgement of country

This submission was written on the land of the Wurundjeri and Boon Wurrung people of the Kulin Nation. We acknowledge and pay our respects to Aboriginal and Torres Strait Islander peoples and Traditional Custodians throughout Victoria, including Elders past and present. We also acknowledge the strength and resilience of all First Nations people who today are still arrested and imprisoned at rates far higher than other Australians.

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Overview

Victoria Legal Aid (VLA) welcomes the opportunity to respond to the Sentencing Advisory Council's (SAC) consultation paper on reforming sentence deferrals in Victoria.

Our feedback is informed by our extensive practice experience in the Magistrates' Court of Victoria, including in our 15 offices across the state.

Deferrals are a critical sentencing tool. They enable courts to take flexible, problem-solving approaches to sentencing that consider the individual circumstances of each person. Deferring a sentence for a period recognises that people involved in the criminal justice system may be at a crisis point in their lives. Additional time in the community can support them to stabilise and take steps towards rehabilitation.

A flexible sentencing option such as deferral acknowledges that a person's journey to rehabilitation may not be linear – as they work through the complex drivers of offending and are connected with the supports necessary to address these in the community. Sentencing deferrals provide a supportive non-punitive approach to connecting someone with support services, recognising this may take time and multiple attempts of engagement. Significantly, they hold potential for the court to facilitate a sentence which links First Nations people with culturally safe and appropriate services which connect them with culture and community.

By the end of the deferral period, the court is in a better position to understand the person's rehabilitation prospects and to craft an appropriate and tailored sentence.

Given the clear benefits of sentence deferrals in supporting rehabilitation and reducing entrenchment in the criminal justice system, VLA supports SAC's consideration of ways to improve and increase the use of sentence deferrals in Victoria.¹

Informed by our practice experience, we consider there are a range of opportunities to increase the use of deferred sentences and ensure they are used as effectively as possible:

- Promoting the use of deferrals as a sentencing option
- Improving access to support services that address the underlying drivers of offending
- Expanding the legislative purposes and eligibility criteria for deferred sentences to reflect the broad application and circumstances of their potential use
- Providing education, guidance and support materials so that sentence deferrals are used in a way that best promotes their purpose and effectiveness
- Introducing an express provision that following engagement of a deferral, rehabilitation becomes the primary purpose of the sentence.

This submission is endorsed by WEstjustice and YouthLaw.



WEstjustice

If you have any questions about this submission, please do not hesitate to contact Mahnoor Sikandar, Senior Policy and Projects Officer at Mahnoor.sikandar@vla.vic.gov.au.

¹ The Inquiry into Victoria's Criminal Justice system highlights that therapeutic sentencing options and practices such as structured and supported deferral of sentences can provide support to certain cohorts of the community and reduce the likelihood that an individual will be sentenced to a term of imprisonment once their matters are finalised: *Inquiry into Victoria's Criminal Justice System: Volume 2* (Report, 2022) 513.

About Victoria Legal Aid

Victoria Legal Aid (**VLA**) is a statutory authority established under the *Legal Aid Act 1978*. Our vision is for a fair and just society where rights and responsibilities are upheld.

In 2020–21, VLA provided legal assistance to over 74,670 unique clients from our 15 offices across Victoria. This was a 16 per cent reduction in the number of people we usually help each year due to the COVID-19 restrictions and courts adjourning matters.

Legal assistance ensures fairness and helps ordinary people understand and participate in the legal system. It also helps to address the reasons people are in the justice system and works to address underlying causes to prevent recidivism.

As the image at the end of the submission shows, our clients are diverse and experience high levels of social and economic disadvantage. More than half of our clients are currently receiving social security and more than a third receive no income at all. More than a quarter of clients disclosed having a disability or experiencing mental health issues and a significant proportion live in regional Victoria or are from culturally and linguistically diverse backgrounds. These circumstances increase the likelihood and severity of legal problems and make it more difficult for people to navigate the system without help.

As the largest criminal defence practice in Victoria, VLA's legal services are provided through specialised programs including Youth Crime, Summary Crime, Indictable Crime and Chambers. As part of the Summary Crime practice, VLA represents clients in the Assessment and Referral Court (ARC) and the Neighbourhood Justice Centre (NJC). Both courts commonly use sentence deferrals as part of sentences and are examples of how the use of sentence deferrals can be optimised.

VLA's Summary Crime Program is our largest service delivery program and is the first point of entry to the criminal justice system for most of our clients. We provide duty lawyer assistance at all Magistrates' Courts throughout Victoria and assist people in a range of proceedings including summary plea hearings where sentence deferrals are common.

The extent and breadth of our work in the summary jurisdiction gives VLA significant practice experience in the operation of sentence deferrals as a sentencing option.

Promoting a person-centred and problem-solving approach to addressing the drivers of offending

When people enter the criminal justice system, there is an opportunity to intervene and address the underlying causes of offending. Sentence deferrals enable the court to craft a sentence at the end of the deferral period that reflects the individual's capacity for change and allows them the opportunity to stabilise and rehabilitate in the community with available supports.

Sentence deferrals can be administered through bail conditions or an undertaking. These options promote flexibility within the order, while addressing risk and compliance. As a result, sentence deferrals can be used for high-risk clients or clients charged with serious offending by providing a proportionate and appropriate level of intervention and case management.

In our experience, deferrals also provide an important opportunity to address multiple instances of offending over a period of time through one supported opportunity where a person can demonstrate their prospects of rehabilitation. By contrast, where multiple offences over a period of time are dealt with through individual sentences, such as fines and community correction orders, this can cause escalation through the sentencing hierarchy and increase the risk a person may be sentenced to a term of imprisonment. A deferred sentence enables a more holistic approach to be taken to multiple offences over a period of time that reflects the overall totality and rehabilitation prospects.

The effective use of sentence deferrals can provide a unique opportunity to avoid entrenchment in the criminal justice system and shift the trajectory of a person's life, as Ben's story demonstrates:

Ben is 18 years old and was placed into residential care at age 12 when a parent was imprisoned. He grew up in a chaotic environment, eventually developing complex post-traumatic stress disorder. Ben dropped out of school at age 16 and started getting into trouble with the police.

Ben committed his most serious offence of armed robbery when he was 18 years old. At the time he was on bail for property related offences. Ben spent several days in remand and was then granted bail on strict conditions including being supervised by youth justice bail program.

Ben faced significant hardship while on bail, including experiencing homelessness, but was given support through the youth justice program, including stable accommodation, a diagnosis and access to mental health supports.

At plea hearing in the County Court, the judge found that Ben was engaging well with youth justice and accepted that Ben's underlying drivers of offending were being addressed through the mental health supports arranged by youth justice. To enable the treatment to be continued, Ben's matter was deferred for a period of 6 months, and he remained subject to bail conditions that required him to continue to engage with youth justice, reside at an address and abide by a curfew.

Ben was able to remain in the community and continue to access the support provided by youth justice over the deferral period. These supports allowed Ben to remain out of trouble and comply with his bail conditions. At sentence hearing, the judge sentenced Ben to a 24 month community corrections order without conviction. Ben managed to remain in the community, access supports and employment despite the setbacks he faced.

Increasing the use of sentence deferrals

In our practice experience, deferrals are underused as a sentencing option. This is consistent with the data set out in the consultation paper and indicates that there is significant scope to increase the use of sentence deferrals. The data shows deferrals were used in an estimated 0.4% of sentenced cases in the Magistrates' Court between 2012 and 2020, compared to adjourned undertakings which were used as a sentencing outcome in an estimated 13.6% of sentenced cases.²

VLA considers the changes outlined below would assist with increasing access to sentence deferrals.

Recommendation 1

Address the range of barriers that prevent the greater use of deferred sentences in Victoria's courts by:

- **Better promoting deferral as a sentencing tool to the criminal justice workforce through training and information**
- **Increasing access and availability of support services and programs, including culturally safe services**
- **Extending the maximum length of deferrals beyond 12 months in appropriate circumstances**
- **Expanding the availability of deferred sentences to the Supreme Court of Victoria to promote consistency across jurisdictions**

Awareness of sentence deferrals

In our practice experience, a major driver of the low use of sentence deferrals is a lack of understanding and awareness of deferrals as a sentencing option. This issue cuts across the criminal justice workforce and includes both practitioners and the judiciary. We see wide variation in their use across the Magistrates' Court of Victoria and County Court. For example, we see instances where sentence deferrals are regularly used to promote therapeutic options and support the assessment of prospects of rehabilitation, whereas in other similar circumstances, deferrals do not appear to be considered as a potential option.

In addition, while formal deferrals made under section 83A of the *Sentencing Act 1991* are not common, in our practice experience, informal deferrals where a matter is adjourned pursuant to the court's general powers are more common.

There are many reasons an informal deferral may be pursued – for example, where relevant supports are not yet made available. However, in our practice experience we see examples where a formal deferral should be used rather than an informal deferral. These inconsistencies in approach can mean people do not have the benefit of consideration of all available sentencing options and may miss out on the benefits that come with following the structured and established processes of formal deferrals where appropriate.

As detailed further below, training and guidance for the criminal justice workforce would address these issues (**Recommendation 4**).

² Sentencing Advisory Council, *Reforming Sentence Deferrals in Victoria Consultation Paper* (2022) 5; Sentencing Advisory Council, *Reforming Adjourned Undertakings in Victoria Consultation Paper* (2022) 5.

Access to support services

Sentence deferrals provide the court with a unique opportunity to gain a detailed understanding of a person's prospects of rehabilitation prior to sentencing. The deferral period means that people can access programs and services that promote their rehabilitation and an opportunity to show progress before being sentenced. Ben's story (outlined earlier) demonstrates how high-risk clients, with appropriate and targeted support can give courts greater confidence to impose an appropriate sentence that promotes rehabilitation.

For deferred sentences to work effectively, there must be ready access to appropriate support services and programs, including court integrated support services (CISP). However, in our practice experience, there are a range of issues with access to support services and programs, including limitations and barriers for:

- rural and regional areas
- culturally safe services and programs
- accessing justice plans.

Rural and regional areas

The SAC's consultation paper outlines that there is a similar proportion of deferred sentences in rural and regional areas as compared with metropolitan areas. We consider there is a significant opportunity to increase the use of deferred sentences in rural and regional areas by improving and expanding access to services and programs to connect people with the support they need.

In our practice experience, deferred sentences are not pursued in rural and regional areas because of a lack of access to services. This experience is reinforced by data and research that demonstrates a limited availability of local community services and programs compared with metropolitan areas.³ For example, our clients' experience in rural and remote areas are that medical practices are not taking new patients and there are long waiting lists for bulk billing psychologists.

In rural and regional areas, we also see instances where sentence deferrals are accompanied by conditions or the opportunity to engage with services that people cannot comply with during the period of the order because of delays in accessing services. This is particularly common for in demand services such as Men's Behavioural Change Programs. In such cases, people's sentences continue to be deferred and they remain engaged with the court system through no fault of their own.

The impact of a lack of access to services is that sentence deferrals are underused, given the increased risk of people remaining on a court order, with little support or opportunity to meaningfully demonstrate rehabilitation. In turn, this can mean people are deprived of the opportunity to move down the sentencing hierarchy and can ultimately remain engaged with the criminal justice system in more intensive ways.

Research shows that recidivism is related to intensity of sentencing outcomes. Time in custody is criminogenic and people are much more likely to go back to prison once they have been there, even for short periods.⁴ This research demonstrates the strong need to support flexible sentencing options

³ Richard Coverdale, 'Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law' (2011) *Deakin Law Review* 16(1) 156, 164.

⁴ Dr McMahon cited a recent Texan study which compared two groups of 'similarly situated' people who had been arrested and charged with criminal offences. One group was granted bail and the other held on remand in prison, the participants were *all* assessed to be equal risk. During an 18-month follow-up period, those who had been remanded into prison were more likely to be charged with offences; this difference persisted even after controlling for offence, accused demographics, criminal history and legal representation. Pre-trial detention was associated with a 30% increase in new serious charges

to enable judicial officers to craft individualised sentencing outcomes that are tailored to the individual’s circumstances and prospects of rehabilitation.

Access to culturally safe services

First Nations people are disproportionately represented in the criminal justice system. This experience of disadvantage is directly linked to the experience of colonisation and the intergenerational trauma and dislocation associated with laws, policies and systems that have both caused and perpetuated racial inequality. Overrepresentation within the justice system is both a product of and a contributor to a uniquely First Nations experience of entrenched and continuing disadvantage.

Sentence deferrals can be an important tool to help address the complex, intersecting factors which drive incarceration rates, particularly where they facilitate access to culturally appropriate and targeted interventions. The Australian Law Reform Commission has highlighted that improved access to community-based sentences is even more important in reducing incarceration rates for First Nations people. As community supervision coupled with targeted treatment is one of the most effective ways of addressing the underlying causes of criminal behaviour, deferred sentences have potential to support the provision of culturally safe services at a critical time in a person’s life⁵.

However, as the Victorian Aboriginal Legal Service (VALS) has highlighted “Aboriginal specific rehabilitative programs, including drug and alcohol or behaviour change programs, regularly have limited capacity and long waiting times for admission”.⁶ We support VALS’ call to invest in and increase access to culturally appropriate services and programs to support First Nations people on community-based orders⁷.

We support the increased use of Aboriginal Community Justice Reports, as they empower individuals caught in the carceral system to tell their own story during the sentencing process. Coupled with a deferral, these reports assist to embed a strengths-based process throughout the deferral period, as well as in the ultimate sentencing outcome⁸.

We also support expanded access to a Koori Court Division for adults and children⁹. Once a matter is in the Koori Court, a person’s sentence may be formally deferred under section 83A of the Act. A deferral period allows the person to engage with Elders and the inclusion of culturally strengthening case management. As a result, Koori Court holds potential to decrease recidivism through the use of sentence deferrals, when coupled with the proper provision of culturally appropriate supports and treatment options.

and a 20% increase in new minor charges: Dr M McMahon, Parliament of Victoria Research Paper No. 3, *No bail, more jail? Breaking the nexus between community protection and escalating pre-trial detention*, August 2019, 22; citing P Heaton, S Mayson & M Stevenson (2017) ‘The downstream consequences of misdemeanor pretrial detention’, *Stanford Law Review*, 69(3), 714-716.

⁵ Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander people* (2017, Final report) 233.

⁶ Victorian Aboriginal Legal Service, *Submission to Sentencing Advisory Council, Adjourned Undertakings* (2022) 12.

⁷ Victorian Aboriginal Legal Service, *Victorian Aboriginal Legal Service Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal system* (2022) 58.

⁸ Victorian Aboriginal Legal Service, *Victorian Aboriginal Legal Service Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal system* (2022) 35.

⁹ Despite the community and cultural benefits of the Koori Court, it is not available state-wide; it is available in 12 Children’s Court locations, 11 Magistrates’ Court locations, and 4 County Court locations. Furthermore, in some regional locations it sits as infrequently as every six weeks, so in our experience a young person may go to the mainstream court instead of waiting for a Koori Court date. We also support the expansion of Koori court to consider matters involving family violence offending.

Justice plans

We support justice plans being made available as a condition of sentence deferrals, however emphasise the need to address some of the existing limitations.

In our practice experience, the availability of justice plans is unnecessarily restricted to people with an intellectual disability and there are significant delays in their preparation.

VLA supports the availability of justice plans for all people with a disability as defined within the *Disability Act 2006* and greater resourcing to reduce the period for preparation and to promote quicker connection to supports¹⁰.

An integrated case management approach

In our practice experience, the Neighbourhood Justice Centre (NJC) model highlights how the use of sentence deferrals can be enhanced where it is supported by multi-disciplinary intervention and problem-solving approach. The NJC model is demonstrably effective – its success is reflected in the 31% decrease in crime rates in the City of Yarra after the NJC was established and a 25% lower rate of offending than other magistrates' courts.¹¹

The NJC client services model includes 17 local treatment agencies who provide integrated assessment, treatment and referral services to any resident of the City of Yarra.¹² While the NJC is a multi-jurisdictional court that hears matters from first remand and mention up to contest mention, clients can be referred to these services at any time through the process, including through the commonly used option of sentence deferrals.

The client services model available at NJC is a good example of how to provide effective services to people to support sentence deferrals and we encourage the adoption of similar approaches elsewhere. Increasing access to services and treatment would also assist to alleviate some of the pressures of preparation time faced by practitioners.

Length of deferral period

Currently, the entire period of a sentence deferral cannot exceed 12 months. In our view, there are benefits in allowing a court to extend this period, in limited circumstances and if there are good reasons to do so. In our practice experience, particularly in rural and regional areas, there are instances where sentence deferrals contain conditions that cannot be complied with during the period of the order because of delays in accessing services. This is particularly common when conditions relate to services with high demand and long waiting lists, such as Men's Behaviour Change Programs. This change would promote increased access to deferrals in such instances.

VLA supports an exception but considers it should be constructed narrowly and used cautiously. The current 12 month maximum facilitates certainty and finality of sentencing proceedings. Delays in

¹⁰ Victoria Legal Aid, *Submission to the Sentencing Advisory Council: Reforming Adjourned Undertakings in Victoria* (2022) 9.

¹¹ In the period after the NJC was established, crime rates in Yarra have fallen at a rate greater than that observed in comparable inner urban LGAs (Melbourne, Darebin, Port Phillip, Maribymong and Stonnington) or LGAs with high levels of social disadvantage (Dandenong, Frankston). The NJC has also achieved significantly better results in the areas of community order compliance and recidivism: Stuart Ross "Evaluating neighbourhood justice: Measuring and attributing outcomes for a community justice program" (2015) *Trends and issues in crime and criminal justice no. 499*. 3.

¹² These support services are drawn from existing services provided for in the community and include senior koori justice worker, alcohol and other drug clinician, financial counselling, housing support, family violence support, mental health outreach support, mental health clinician, newly-arrived migrant support, Yarra youth Services.

finalising sentencing can be detrimental to everyone involved in the criminal justice process, including:

- prolonging the victim’s interaction with the criminal justice system
- exposure of an accused person to the potential consequences of Victoria’s bail laws for an extended period of time and the risk of remand
- reducing the ability of the system to provide timely and efficient outcomes.

Availability of deferred sentences in the Supreme Court

In response to the pandemic, we have seen an increase in matters being transferred to the Supreme Court under section 167(2) of the *Criminal Procedure Act 2009*. As a result of this practice, more matters where a deferred sentence may be considered are being heard in this jurisdiction, such as driving offences involving a fatality. To allow for consistency in sentencing across jurisdictions and equitable access to the benefits of a deferred sentence, we support the availability of sentence deferrals in the Supreme Court.

In addition, our practice experience is that the biggest barrier to using sentence deferrals in the Supreme Court is the severity of charges and lengthy periods of imprisonment. However, as outlined in **Recommendation 2**, we consider that an inevitable sentence of imprisonment should not always be a barrier to an order for a sentence deferral.

Funding for sentence deferral matters

The consultation paper outlines that legal and judicial stakeholders identified several barriers to the use of sentence deferrals. This included “insufficient funding for lawyers representing legally aided clients to cover all necessary preparation and appearances for cases where a sentence has been deferred”. The consultation paper suggests 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, could encourage greater use.

VLA funds appearances at initial applications for a sentence deferral. There is no specific fee for these applications. It can be claimed as part of the plea or appearance fee per Table A in the Handbook for Lawyers, which sets out the payment structures. In practice, this process means a practitioner would appear in/brief the plea or appearance fee and then appear in/brief the further appearance at the end of the deferral period, claimable as appearance on sentence or adjournment per Table A¹³. Existing summary crime fee structures include a lump sum preparation fee, payable in relation to a matter resolving in a plea of guilty and sentence.

Additional fees or different fee structures could be explored to encourage increased applications for sentence deferrals in appropriate cases, however VLA would require additional funding to support changes to existing fee arrangements.

Under the *Legal Aid Act 1978*, VLA is required to provide legal aid in the most effective, economic and efficient manner and manage its resources to make legal aid available at a reasonable cost to the community on an equitable basis. This means VLA must determine or vary priorities around who can access legal aid and the legal matters involved and what fees are available.

¹³ Victoria Legal Aid’s fees for summary proceedings are set out in Table A of the Handbook for Lawyers <[Table A – Fees for summary criminal proceedings | VLA Handbook for Lawyers](#)> (16 February 2022).

VLA faces ongoing and long-term challenges of increasing demand for legal assistance due to increased investment in the justice system in recent years without adequate levels of consequential funding for VLA.

Extending the legislative purposes

VLA supports expansion of the legislative purposes for sentencing deferrals in the *Sentencing Act 1991*, consistent with the flexible and wide-ranging application of sentencing deferrals.

Recommendation 2

The legislative purposes of sentence deferrals should be expanded to include consideration of:

- **The cultural background and experience of First Nations people**
- **Physical and financial caring responsibilities**
- **The potential to undertake restorative justice processes**

We consider these changes would prompt legal practitioners and the members of the judiciary to turn their minds to the diverse benefits of a sentence deferral and consider the particular ways in which they could address broader issues of fairness and equity.

While section 83A(1A) promotes a broad use of the order, a number of specific therapeutic and culturally relevant factors would promote a clearer, consistent understanding of the potential use of sentence deferrals.

Cultural background and experience of First Nations people

First Nations people experience far-reaching and intergenerational harms at the hands of the criminal justice system. The disadvantage experienced by First Nations people is directly linked to the experience of colonisation and the intergenerational trauma and dislocation associated with laws, policies and systems that have both caused and perpetuated racial inequality.

VLA supports better targeted responses at every stage of the criminal justice system so that criminal justice responses are used where they are really needed, and the criminal justice system can be an opportunity for intervention which can assist with rehabilitation rather than further entrench people in the cycle of offending.

As outlined above, sentence deferrals are an important tool to address the disproportionate impact of the criminal justice system on First Nations people. Community based sentences can facilitate access to appropriate supports and services tailored to respond to the factors that contribute to offending behaviour.

Given this, we support the inclusion of a specific legislative purpose that highlights the importance of considering the cultural background and experience of First Nations people in determining an application for a deferral, to support greater access.

We consider similar reasoning should apply to those who experience disproportionate impacts of the criminal justice system, such as people from culturally and linguistically diverse communities, women and people with disabilities.

Caring responsibilities

As the SAC highlights in its consultation paper, sentence deferrals for those people with caring responsibilities can provide an important mechanism to provide a pathway out of the justice system, particularly for women.

In addition, we consider a legislative purpose explicitly highlighting that caring responsibilities should be considered in determining an application for a deferral could increase and encourage consistency in the use of deferrals.

Caring responsibilities should include both physical and financial care for a person who has a physical or cognitive disability, who suffers from an illness, who is elderly or instances where young adults are caring for siblings or other family members.

We also consider any decision to defer sentence should take into account whether someone in this category may be rendered homeless or experience extreme hardship as a consequence of the imprisonment of their carer.

Opportunity to participate in restorative justice

VLA supports the expansion of restorative justice processes.¹⁴ There is evidence that participation in restorative justice processes can improve victims' experience of the criminal justice system and reduce the rate of reoffending. Research indicates that participation in a well prepared and facilitated restorative justice process can result in lessening the level of trauma experienced by victims in comparison to those who only experience the formal criminal justice system.

The inclusion of a specific legislative purpose encompassing restorative justice would send a clearer signal that deferred sentences can be used to enable and facilitate a restorative justice process.

Expanding eligibility criteria

Recommendation 3

The eligibility criteria for deferred sentences should encourage their greater use so that they can be more broadly applied than in current practice

Section 83A(1) of the Act presently restricts the eligibility criteria for sentence deferral to circumstances where it is in the interests of the offender. The range of circumstances and ways in which deferred sentences can be used is broad and can encompass a range of factors relating to fairness and equity that can arise during an individual sentence, beyond the interests of the offender. VLA supports expansion of the eligibility criteria so that it better reflects this potential broad-ranging application and to support the greater use of deferrals, such as to reduce the disproportionate impact of the criminal justice system on marginalised groups, such as First Nations people.

As noted earlier in this submission, these factors can include instances where a period of deferral would allow people to remain in the community to fulfill cultural responsibilities, caring responsibilities and allow victim centred dispute resolution such as restorative justice to occur. As Johnny's story highlights, sentence deferrals can offer important flexibility to avoid unfairness to the accused that cannot be achieved through other sentencing outcomes.

¹⁴ More generally, VLA supports the expansion of restorative justice processes, including legislated restorative justice processes for all suitable offenders where both parties agree, and at a range of times during a matter's progress through the system. See Victoria Legal Aid, Submission to the Victorian Parliamentary Inquiry into the Victorian Criminal Justice System (2021) 13.

Johnny is a 40-year-old man who is the sole earner of his family including three children. Johnny has no prior convictions and has never been in trouble with the police. He has a strong connection to the church and his community.

Johnny was charged with recklessly cause serious injury following an altercation in a parking lot in September 2020.

After he was charged, Johnny lost his employment and had to move interstate to support his family. At the plea hearing, both parties and the Magistrate agreed because the charges were serious, a Community Corrections Order would be appropriate. However, Corrections Victoria advised that a Community Corrections Order could not be administered interstate. In the absence of a Community Corrections Order being available, Johnny was at risk of imprisonment.

Johnny's VLA lawyer argued that lack of access to a sentencing option should not unfairly impact Johnny. The impact of imprisonment would have resulted in the loss of income for the family, separation from his young children and loss of supports and treatment options in the community. The lawyer was able to successfully argue that Johnny should be placed on a sentence deferral to demonstrate his capacity to rehabilitate himself following a period in the community. The Magistrate could then decide whether another community-based sentence was appropriate and within range.

The Magistrate agreed to place Johnny on a sentence deferral for a period of six months, on the bail condition that he undertake an anger management course. Johnny successfully engaged with the order over the period of deferral, completing an anger management course and making positive contributions to the community, in particular the youth centre connected to the church.

At the sentence hearing, the Magistrate accepted that Johnny had demonstrated his capacity to rehabilitate himself and therefore a period of imprisonment was not appropriate. In the absence of the availability of a community corrections order, Johnny was sentenced to a three-year adjourned undertaking with a fine to be paid by the end of the undertaking period.

As a result of the sentence deferral, Johnny has been able to remain in the community, find a new job, support his family, and continue his community service.

Interests of the victim

VLA supports measures that improve the experiences of victims in criminal proceedings. There is scope to engage with victims of crime to ensure they feel more informed about the criminal justice system and what to expect in the sentencing process, including the relevant guidelines and factors that are considered.

There has been significant focus in recent years on how the criminal justice system can better accommodate victims' rights, expectations and needs. A range of reviews and inquiries have made recommendations for changes to better facilitate and improve the participation of victims.¹⁵

These reviews and inquiries make clear that a system-wide response is necessary to ensure victims can meaningfully participate in criminal justice processes as a whole. They must also be effectively prepared and supported to do so.

We urge any changes to how the interests of victims are considered when determining whether to defer sentence is considered in the context of these holistic reforms recommended throughout the criminal justice system. This will ensure that changes are not isolated to specific points or processes and are underpinned by common principles and goals. The Victorian Law Reform Commission highlighted in its report into the role of victims in the criminal trial process a need for a consistent vision for the role of victims to ensure meaningful reform.¹⁶

In addition, most sentence deferrals occur in the Magistrates' Court of Victoria. Summary proceedings have been described as having a 'complex balance that cannot be understated' as a result of the need to achieve a range of often competing objectives – such as efficiency, certainty, consistency and flexibility.¹⁷ This description is consistent with our practice experience, and we note careful consideration should be given to change in the summary system to avoid creating barriers to speedy resolution, given the significant volume of matters proceeding through the system.

We further note the importance of lived experience to build a consumer-led and co-designed criminal justice system. Any changes should be informed by, and based on, the lived experience of victims and offenders.

Inevitable imprisonment

We also support the introduction of a provision that specifically indicates that a court may order a deferral even if it considers that the seriousness of the offence justifies a prison sentence.

In our practice experience, deferrals are most used when an offender is on the cusp of receiving a term of imprisonment. However, even when imprisonment is inevitable, there are a range of ways in which a deferral can be effectively used and extend beyond circumstances where participation would result in shorter prison sentences or non-parole periods.

This approach also ensures that individuals can be connected with services and programs that promote rehabilitation at the earliest opportunity. We consider there should be accompanying training and support provided to judicial officers that focuses on highlighting the importance of informed consent being obtained from clients before proceeding in this manner.

¹⁵ For example, Victorian Law Reform Commission, *The Role of Victims in the Criminal Trial Process* (Report, 2016); Victorian Law Reform Commission, *improving the Response of the Justice System to Sexual Offences* (Report, 2021); Victorian Government, *Review to improve victims' experience of summary criminal proceedings* (Report, 2021).

¹⁶ Victorian Law Reform Commission, *The Role of Victims in the Criminal Trial Process* (Report, 2016) xiii.

¹⁷ Victorian Government, *Review to improve victims' experience of summary criminal proceedings* (Report, 2021) 11.

Increase the effectiveness of deferred sentences through encouraging their appropriate and tailored use

Training, support and guidance

Recommendation 4

Provide education, guidance and supporting materials to the criminal justice workforce so that sentence deferrals are used in a way that best promotes their purpose and effectiveness

As noted earlier, in our practice experience, sentence deferrals can be used inconsistently. We see examples where sentence deferrals appear to depart from the criteria under section 83A of the *Sentencing Act 1991*. We also see instances where requirements accompanying sentence deferrals may be inappropriate or disconnected from a person's offending – such as obtaining a driver's license.

To ensure that sentence deferrals best promote the purposes of rehabilitation and support people to address the underlying drivers of their offending, we consider practical education and guiding material should be created. The materials should cover issues such as when a sentence deferral is appropriate, the length and whether it should involve bail conditions or an undertaking.

In our view, the most important principles that should guide the use of deferrals and appropriate form of the deferral should:

- be proportionate to the offending
- be no more restrictive than is required to meet the sentencing purposes set out in the *Sentencing Act 1991*
- only be imposed if they are capable of being fulfilled within the duration of the order
- reasonably relate to the purposes of imposing the order and be tailored to the individual's circumstances

Judicial monitoring

Guidance should also be developed for sentencing courts as to when a judicial monitoring condition is appropriate. Given deferred sentences are often imposed for low level offending, we consider judicial monitoring should be applied cautiously to ensure contact with the criminal justice system is reduced. This guidance should be supported by training for members of the judiciary in motivational interviewing techniques to ensure that judicial monitoring has the intended therapeutic benefits.

Administration of sentence deferrals

The SAC sought views from stakeholders in relation to taking a more prescriptive approach to the administration of deferrals such as through formally attaching conditions to orders, creating written deferral plans and requiring judicial officers to provide a more specific sentencing indication.

We consider sentence deferrals to be effective in their ability to address a number of competing sentencing considerations. We do not consider these steps are necessary and are concerned the introduction of these measures would reduce the flexibility of the order and place an emphasis on compliance and as a result, the impact of potential breaches. This can be detrimental as people's trajectory through rehabilitation is not linear and may involve setbacks. A key benefit of deferred sentences is the ability to support this process through flexibility and problem-solving approaches.

Sentence deferrals are also flexible in their ability to address and appropriately alleviate risk through bail conditions, demonstrated by their use in higher courts where the seriousness of the offending and risk are more pronounced factors. We consider the current ways in which a sentence deferral can be imposed to be sufficient in balancing the competing priorities of monitoring compliance, managing risk and maintaining flexibility, as highlighted by the case study of Ben.

Impact of bail laws

The consultation paper highlights that sentence deferrals can involve a person being placed on bail for the length of their deferral – for up to 12 months. In our experience, there are occasions where clients without support are placed on sentence deferrals involving bail conditions. This can be very detrimental because the operation of bail laws exposes our clients to potential criminal charges for breaching bail conditions and may result in people being placed in a reverse onus position.

VLA acknowledges that 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. We reiterate recommendations made to other inquiries that the *Bail Act 1977* should be amended to reduce the impact of minor offending while on bail. Importantly, this would mean people who are on a sentence deferral are not elevated into a higher bail threshold because they are arrested during the period of an undertaking and held on remand for low level offences where they would have not otherwise received a term of imprisonment. Increasing periods of remand as a result of the bail laws also disrupt the supports and continuity of community engagement which are essential to the success of sentence deferrals.

Rehabilitation at sentence

Recommendation 5

Introduce an express provision that following engagement of a deferral, rehabilitation becomes the primary purpose of the sentence.

Section 83A(1A) of the *Sentencing Act 1991* says the one of the key purposes of a deferral is to allow the offender to demonstrate rehabilitation. It is our practice experience that upon completion of a deferral, the court may not give sufficient weight to the principle of rehabilitation, particularly where there are onerous bail conditions, and a lengthy period of deferral has been completed.

We support the introduction of an express provision that following engagement of a deferral, rehabilitation becomes the primary purpose of the sentence. This prioritisation already exists for children and young people¹⁸ and drug treatment orders¹⁹.

We also emphasise that any non-compliance over the period of the deferral should be viewed as a factor which can be considered in mitigation, rather than as an aggravating factor in the final sentencing exercise.

¹⁸ *R v Mills* [1998] 4 VR 235, *Azzopardi v The Queen* [2011] 35 VR 43.

¹⁹ Section 18X(2) *Sentencing Act 1991*.

Our clients

Service snapshot

The number of clients we worked with and services we delivered reduced overall in 2020–21 due to COVID-19 restrictions, courts adjourning matters and the challenges of providing services remotely.

74,670

total number of unique clients

16% down on 2019–20



40,486

number of grants of legal assistance

11% down on 2019–20

In-house

5,787 – 14% of total services delivered

Private Practitioners

34,086 – 84% of total services delivered

Community Legal Centres

643 – 2% of total services delivered

57,049

number duty lawyer services

45% down on 2019–20

Inhouse

36,499 – 64% of total services delivered

Private Practitioners

8,697 – 15% of total services delivered

Community Legal Centres

11,853 – 21% of total services delivered

Family Dispute Resolution Service

1,245 conferences in 2020–21
26% increase on 2019–20



Supporting remote service delivery

To provide continuity of services while working remotely and reduce the need for staff and clients to attend the office, we continued our transition to digital file management and digital service records.



Digital mail room

15,785 documents digitised in 2020–21
157,906 pages digitised

Legal Help

112,939 total requests for help responded to

41,267 number of webchat services
54% increase on 2019–20

46,211 number of webchat requests answered, or **89%** of incoming requests

147,631 number of incoming calls
6% decrease on 2019–20

71,672 number of calls answered, or **49%** of incoming calls

Family violence priority channels

3,395 number of webchats answered, or **90%** of the **3,791** total incoming

6,804 number of calls answered, or **59%** of the **11,470** total incoming



Who are our clients

38% women

61% men

Less than **1%** gender diverse

Less than **1%** self described



7% identified as Aboriginal or Torres Strait Islander people



54% were receiving some form of government benefit



38%

had no income*



26% disclosed having a disability or mental illness

8% were at risk of homelessness



4% required the assistance of an interpreter

15% were in custody, detention or psychiatric care



31% were living in regional Victoria



14% were younger than 19 years of age



19% were from culturally and linguistically diverse backgrounds**

These figures do not include clients seen by a private practitioner duty lawyer or who accessed information services.

* Examples include children and young people, people experiencing homelessness, people in custody and immigration detention, and psychiatric patients.

** This is based on the Australian Bureau of Statistics definition of people from culturally and linguistically diverse backgrounds. It includes people who speak a language other than English at home and people who were born in a non-English speaking country.