



Community
driven justice.

Fitzroy Legal Service Submission to the Sentencing Advisory Council regarding *“Reforming Sentence Deferrals in Victoria”* (2022)

12 January 2023

Fitzroy Legal Service acknowledge that our offices are located on the lands of Wurundjeri People of the Kulin Nation whose sovereignty was never ceded. We pay our respects to their Elders past, present and emerging.

About Fitzroy Legal Service

Fitzroy Legal Service ('FLS') was established in 1972 and has been operating for 50 years to support access to justice. In 2019 we merged with the Darebin Community Legal Centre and now operate from three offices across Fitzroy, Reservoir and the Neighbourhood Justice Centre in Collingwood. FLS provides criminal, family, family violence and generalist legal services to socially and economically disadvantaged clients with a particular focus on people stigmatised and criminalised due to poverty, homelessness, childhood abuse, family violence, trauma, drug use, psycho-social disability, contact with the criminal justice system and incarceration.

The FLS lawyers who participated in providing perspectives to this submission work as:

- (a) Duty lawyers at the NJC – adopting a holistic, integrated service model with a wide array of professionals working in support services; all criminal proceedings finalising at NJC are by way of plea, with a strong focus on supported and realistic approaches to rehabilitation; most criminal proceedings resolve in an adjourned undertaking or deferral of sentence.
- (b) Senior criminal lawyer & generalist legal services lawyers– includes a broad range of indictable and summary criminal matters, and a number of lawyers working across criminal and civil jurisdictions to support holistic outcomes for community impacted by poverty, health and other factors in their engagement with legal systems.
- (c) Drug outreach lawyers – operating an outreach-based health justice partnership for over twenty years, with a focus on acknowledging and providing support around AOD and homelessness drivers of criminalisation; the majority of clients are engaged in low level recidivist offending.
- (d) Community outreach lawyer – working in partnership with St Vincent's Hospital Complex Care Services with a focus on homelessness and mental health drivers of criminalisation and other legal issues.

A majority of clients accessing our service for criminal law matters experience disability in the form of chronic mental health, cognitive impairment, in addition to poverty, homelessness/ housing insecurity and victimisation. A significant proportion of our criminal law clients are CALD, Aboriginal and/or women.

About this submission

This submission is in response to the Discussion Questions posed in the Sentencing Advisory Council "Reforming Sentencing Deferrals in Victoria" Consultation Paper (October 2022).

The basis of this submission was formed from two meetings between criminal lawyers from the FLS Crime and Generalist Services team.

Discussion Question 1: Should sentence deferrals be available in the Supreme Court? If so, why? If not, why not?

Suggested reform:

- For sentence deferrals to be available in the Supreme Court to promote community protection by accounting for circumstances where a person's rehabilitation could benefit from a deferral period.

Discussion 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?

- Limited resources, including time limitations for magistrates and limited support services.
- Lack of awareness from the bench around the option and benefits of deferral.
- The risks to accused people if remaining on bail for the duration of the deferral, including the heightened risk of remand while on bail;
- The risks to accused people if being required to attend multiple future court dates, in particular where they are experiencing marginalisation and/or vulnerability, and the consequences of non-attendance.

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

- While the views and interests of the victim are important, this needs to be balanced against the interest of the accused person looking at a serious sentence. This should be done in a manner that favours rehabilitation, given the broader public interest in reducing the risk of re-offending.

Suggested reforms:

- Matters should not be unnecessarily adjourned to obtain view of the victim due to unfairness to the accused person. The victim's view is already made available through the Victim Impact Statement. There can also be a benefit to victims in not having the resolution of a matter delayed.
- S 83A should specify that a court may order deferral even if it considers that the seriousness of the offence justifies a prison sentence. This could have significant benefits in reducing the risk of re-offending and improving the safety of custody – for example where it enables a person to attend drug rehabilitation prior to serving a prison sentence.

Discussion 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?

Suggested reforms:

- **Over-emphasis on appointment attendance**
- As it currently stands, the system is highly focused on appointment attendance, with reports often including a table of attendance. This represents an over-emphasis on this one aspect of engagement, rather than qualitative engagement with a service or an explicit requirement to place greater weight on engagement where someone has barriers to appointment attendance.
- Barriers to appointment attendance can include, amongst other things:
 - Memory issues, particularly for people with Acquired Brain Injuries,
 - People not speaking English where appointment reminders are often conveyed in English,
 - People experiencing homelessness and losing diaries or phones or having them stolen,
 - People experiencing substance dependence, and
 - People having intellectual or other disabilities. For example, one FLS client was missing appointments for a year while they accidentally used a 2021 calendar instead of 2022 calendar. Once this issue was resolved, they were able to attend appointments.
- There is also usually no consideration in court of whether support services have taken adequate steps to support a person's engagement where these marginalisation factors are present. Although such consideration would need to account for lack of resources for community services, consideration of these factors should occur and would mitigate present unfairness to an accused person if a lack of engagement was due to services being insufficiently tailored to their marginalisation and/or disability.
- **Addressing the lack of appropriate services**
- We recommend increased funding for services. In particular, resourcing the areas where deferrals have proven effective, and on-site supports, such as those currently available at the NJC.
- The CISP program should be expanded to anyone on a sentence deferral, rather than requiring a person to be on bail.
- **Over-utilisation of bail for sentence deferrals**
- In our experience, there are inconsistent and at times, in our view inappropriate instances where people are placed on bail during a sentence deferral.
- The onerous nature of the current bail act and the heightened risk of remand means the risk of being placed on bail during a deferral period is a deterrent to an accused person.
- We suggest that bail should be freshly reconsidered at the point of placing someone on a sentence deferral, and that there should be an assumption bail is discharged upon the entering of the plea. We suggest that bail should only be used in exceptional situations and reserved for very serious offending.

Discussion Question 5: 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?

Suggested reforms:

- We recommend the addition of the following further purposes:
 1. To reduce the impact of criminalisation on people who are marginalised, including but not limited to young adults, culturally and linguistically diverse peoples, Aboriginal and Torres Strait Islander people, people experiencing mental health diagnoses, people experiencing addiction to drugs or alcohol, and people experiencing homelessness;
 2. To consider gaps in offending, and
 3. To address the underlying causes of offending.

Discussion Question 6: 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?

Suggested reforms:

- We do not recommend changing the maximum length of 12 months in either court except for with the consent of the accused, based on the issue of unfairness to the accused caused by such significant delay.
- This consent needs to be fully-informed consent. For this, we suggest the following:
- That at the 12-month period, the judicial officer informs an accused person of:
 - What sentence they would receive if the sentence deferral were to be finalised,
 - What the purpose of the further deferral period is,
 - The additional length of the deferral, and
 - What possible sentence improvement an accused person would receive if they continue on the deferral.
- We suggest a carve-out exception to the 12-month period where a person is going into residential rehabilitation.

Discussion Question 7: 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?

Suggested reforms:

- We do not support an amendment that allows for conditions to be attached to deferral orders, due to the risk of unnecessary criminalisation of marginalised people for breaches. Given the purpose of a deferral order is to benefit the accused person, we believe an amendment that allows for conditions to be attached is contrary to the purpose of a deferral.

- We support a prohibition on deferral conditions being made a condition of bail. If deferral conditions were made a condition of bail, we worry that the person would be found to be in contempt of court, criminalizing them further.
- We recommend a legislative requirement on the Magistrate to explain the reason behind a deferral order. We believe this would circumvent confusion in cases where the Magistrate wishes to extend a person's deferral.

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

Suggested reforms:

- To assist with current court resourcing issues, and avoid unnecessary attendance at court, it may be beneficial to have the option to administratively adjourn deferral hearings where a person is meeting their conditions and engaging well, with evidence on this from a report.
- Greater resourcing of the judiciary so that the choice to put someone on a deferral does not increase the already large workload of the judicial officer.

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

Suggested reforms:

- We consider that imposing a justice plan as part of a deferral would effectively be a sentence imposed before sentencing.
- We would consider it more appropriate to keep justice plans as an available part of a final sentencing order.
- We do not recommend justice plans being made available as a condition of sentence deferral as we do not perceive a benefit to our client groups.

Discussion 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?

Suggested reforms:

- We recommend that support services for people on sentence deferrals be fully funded by the Court.
- We consider it imperative that it is the role of the Court to make services available. The person on a deferral should not be on deferral only to find services or be put on waitlists. NJC is a testament to the success of a model where the Court is active in providing a bridge between the person and services, although we note though there are still gaps even at the NJC.
- Given the significant number of our clients who have drug or alcohol dependency, we would recommend that the services provided by Forensicare include drug and alcohol assessments as well as mental health assessments.

Discussion Question 11: 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?

Suggested reforms:

- We are broadly supportive of this measure, however we would want to see this measure not only outline the consequences of non-compliance, but also the means by which people meet the requirements. An example of this could be the names and phone numbers of the service providers that the person is required to engage with.
- Similarly, we recommend that the plan includes the positive consequences of compliance, not just the negative ramifications of non-compliance.

Discussion Question 12: 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?

Suggested reforms:

- Courts should be required to tell the person the broad sentence that they can expect if they are successful in their engagement with the deferral, without being bound to this indication and it being subject to positive engagement on the sentence deferral. The information given to the person would avoid an unwarranted fear of prison hanging over the person's head. Because many of our clients have backgrounds of complex trauma, the impact of having an unknown sentence hanging over a person's head should not be underestimated. In our experience, even clients who are not at risk of imprisonment are usually highly anxious about this possibility until their case finalises.
- In addition, Courts should also be required to give an indication of what the sentence would be if the matter were finalised with no sentence deferral.

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

Suggested reforms:

- Sentencing principles already require what is achieved on deferral be taken into account at sentencing
- We are not supportive of non-compliance with deferral resulting in a higher penalty for original offending.

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

Suggested reforms:

- We are of the view that rehabilitation should always be the primary purpose of sentencing, due to its individual and utilitarian benefits. We do not have a conclusive view on this question but would not want to see people being refused sentence deferrals for serious

offending if this were introduced. We would also be concerned by the possible further unintended consequence of a judicial officer de-prioritising rehabilitation if a person did not engage well on a sentence deferral.