Sentencing Advisory Council

Reforming Sentence Deferrals in Victoria
Final Report

VICTORIA State Government

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- gauge public opinion on sentencing
- consult on sentencing matters
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May 2024

VICTORIA State Government

Acknowledgement of Country

The Sentencing Advisory Council acknowledges the Traditional Owners of the lands and waters on which we live and work, and we pay our respects to them, their culture and their Elders past and present.

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Contributors

Authors
Felicity Stewart
Dr Paul McGorrery

Sentencing Advisory Council

Council Directors
Fiona Dowsley
David Glynn
Anoushka Jeronimus
Professor Marilyn McMahon
Dan Nicholson
Anne O'Brien
Paul Smallwood
Wendy Steendam
Nathan Watt

Chief Executive Officer
Dr Paul McGorrery

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We also extend our thanks to Court Services Victoria for providing the data used in this report, and Melanie Hull for her research assistance.

Executive summary and recommendations

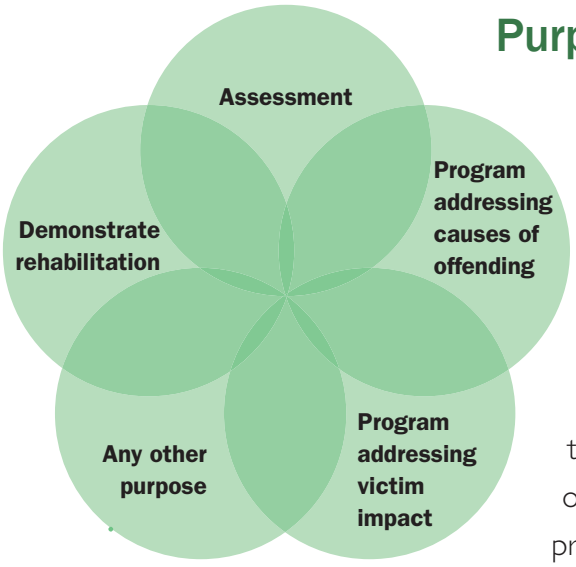
Deferring (or postponing) sentencing for a short time, up to 12 months, is one of the ways that courts can achieve the various purposes of sentencing in Victoria (for example, community protection and rehabilitation) and ensure that judicial officers have all the information they need in deciding an appropriate sentence in a case.

Introduced in the adult criminal jurisdiction in 2002, sentence deferral has evolved into a vital, but potentially underutilised, part of the Victorian sentencing landscape. Over the last two years, those who work in the criminal justice system have told us that sentence deferral can be a highly effective therapeutic tool. Sentence deferral can support complex and vulnerable offenders in their rehabilitation and can protect the community in the long term by allowing offenders to participate in programs that reduce their risk of reoffending. In some cases, a person's progress during the deferral period can make the difference between receiving a prison sentence and receiving a community order.

This law reform project is the first examination of sentence deferrals in Victoria since various legislative changes to the order were made in 2012 (based on our advice). We consulted stakeholders in the justice system to identify key issues, conducted an online survey of the legal profession and judiciary, published a consultation paper, received and reviewed written submissions, tested our draft recommendations, and prepared this final report.

In this report, we make 10 recommendations for reform that have been informed by our research, data analysis and consultation. In developing these recommendations, we were mindful not to 'fix what isn't broken', in particular, not to disrupt the aspects of sentence deferral that make it work well, especially its flexibility and lack of formality. We have only made recommendations where there was strong evidence for change.

Purposes of sentence deferral



Legislative purposes of sentence deferral

Sentencing legislation in Victoria currently outlines five purposes for which a court can defer sentencing. Three relate to the offender's rehabilitation (assessment, demonstrating rehabilitation and programs addressing causes of offending). Another (providing for participation in a program addressing the impact of the offending on the victim) was originally intended to enable restorative justice processes. We were told, however, that the broad wording of this purpose has created uncertainty. The final purpose allows deferral 'for any … purpose that the court considers appropriate'. Notwithstanding this 'catch-all' purpose, we were persuaded that there is merit in adding five new legislative purposes of deferral:

1. **Restorative justice**: This new purpose is directed at participation in a restorative justice process, to provide much needed clarity about this use of deferral.
2. **Dependent children**: Our data suggests that sentence deferral is currently under-utilised for female offenders, while stakeholders told us that sentence deferral can be a useful option in sentencing women, particularly those with caregiving responsibilities. Victoria has the potential to become a pioneer in implementing human rights obligations in relation to the rights of the child by specifically enabling courts to defer sentencing if doing so would be in the best interests of the offender's unborn, newborn or dependent child.
3. **Aboriginal and Torres Strait Islander people**: While data is not available about the prevalence of sentence deferral for Aboriginal and Torres Strait Islander people, sentence deferral can be especially useful as a means of addressing some of the systemic issues that cause over-incarceration and over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system.
4. **Medical treatment**: In appropriate cases, sentence deferral can enable a person to receive critical medical treatment or surgery while in the community rather than in custody. This reduces the traumatic experience of medical treatment by enabling the person to recover in the community, with family support if available, and may ensure continuity of medical care.

5. **Young adults**: Sentence deferrals were originally introduced in the Victorian adult jurisdiction as an option for young adults. Our data and consultation suggest that people in this group are primary recipients of sentence deferrals. A legislative purpose would reflect the origins of deferral as an option for young adults and its importance for this group.

Recommendations 1 to 5

That the government amend section 83A of the *Sentencing Act* to add the following purposes of sentence deferral:

- to allow the offender and, where relevant, the victim to participate in a restorative justice process;
- to consider or reflect the best interests of the offender's unborn, newborn or dependent child;
- to allow the offender to receive or recover from medically necessary treatment or surgery;
- if the offender is an Aboriginal person, for any reason relating to their cultural background, responsibilities, particular needs, or experience;
- if the offender is aged under 26, for any reason relating to their vulnerability, developmental maturity, or rehabilitative, educational or vocational needs.

Availability of sentence deferral

Sentence deferral is currently only available in the Magistrates' Court and County Court in Victoria. It is not available in the Supreme Court, although the Supreme Court may informally defer sentencing through its general power to adjourn proceedings. The Supreme Court itself outlined the benefits of making sentence deferral available in that court as an additional tool in appropriate cases, and there was strong support among other stakeholders for extending the power to formally defer sentencing to the Supreme Court. This is not only because non-custodial sentences are imposed in 17% of cases in the Supreme Court but also because sentence deferral can be just as important (if not more so) in cases involving an actual or a possible prison sentence. It would also ensure that the Supreme Court did not need to resort to its general adjournment power in order to defer sentencing, giving deferrals in the Supreme Court the same clarity,

consistency and approach that they currently have in the County Court and Magistrates' Court. The Supreme Court would also exercise its discretion whether sentence deferral is appropriate in any given case, as the other courts already do.

Recommendation 6

That the Government amend section 83A of the *Sentencing Act 1991* (Vic) to allow sentence deferral in the Supreme Court.

Sentence deferral in 'the interests of justice'

Currently, before a court can defer sentencing, it must consider whether doing so is in the 'best interests of the offender' and the offender must consent. In our consultations, and in numerous submissions, stakeholders queried the priority given to the offender's interests. A more balanced approach to sentence deferral decisions would incorporate the best interests of not only the offender but also others, such as any victims, the community and the offender's child. Therefore, we recommend that 'the interests of the offender' be substituted for 'the interests of justice'. We note that the offender would still need to consent to the sentence deferral, which they would be unlikely to do if it weren't in their best interests. We have also suggested highlighting the purposes of deferral by elevating them to section 83A(1).

Recommendation 7

That the Government amend section 83A of the *Sentencing Act 1991* (Vic) to replace 'the interests of the offender' with 'the interests of justice', and to move the purposes of deferral into section 83A(1).

Sentence deferral where prison is likely or inevitable

Currently in Victoria a court may defer sentencing even if the offender is facing a likely or inevitable prison sentence. Understandably, though, courts are sometimes reluctant to defer sentencing in such cases. One of the strongest themes we heard from stakeholders is that those are sometimes precisely the cases where deferral can be most valuable. For someone facing a likely prison sentence, performing well during deferral could be the tipping point that keeps them out of prison and halts their offending pathway. Even for someone who will inevitably receive a prison sentence, there may be good reasons to consider deferring sentence, such as enabling a pregnant offender to give birth outside prison or enabling an offender to receive critical medical treatment or surgery. Given the potential value of deferral in these instances, and the need for express clarification to promote consistency, we believe section 83A should be amended to confirm – as legislation in the Australian Capital Territory does – that sentence deferral is permitted even if a prison sentence is likely or inevitable.

Recommendation 8

That the Government amend section 83A of the *Sentencing Act 1991* (Vic) to specify that a court may defer sentencing even if it considers the seriousness of the offence justifies a sentence of imprisonment.

Funding for deferral hearings

During our consultations, some legal practitioners suggested that limited funding, and uncertainty around funding, can be barriers to making deferral applications. To overcome any potential uncertainty, we recommend that Victoria Legal Aid clarify its existing fee structure as to which deferral hearings are funded. We also recommend that Victoria Legal Aid consider opportunities to change its fee structure to better enable sentence deferrals, while acknowledging that this may require additional resourcing to avoid negatively affecting other critical areas of Victoria Legal Aid's work.

Recommendation 9

That Victoria Legal Aid:

- clarify in its existing fee structure the extent to which sentence deferral applications and review hearings are funded; and
- consider whether there are opportunities for changes to the fee structure relating to sentence deferral applications and review hearings.

Maximum length of sentence deferrals

Currently, courts may defer sentencing for up to 12 months. We heard some concerns that 12 months is not always long enough, especially as certain rehabilitation programs can have long waiting lists, and some programs go longer than a year. There was considerable support for increasing the maximum length of sentence deferrals. Ultimately, we decided that this was best done as an extension to the initial deferral period, rather than as an increase in the maximum deferral period of 12 months. A requirement to apply for an extension of six months ensures that the court has an opportunity to check on the offender's progress as well as confirm the availability and provision of programs and services.

We also heard that there is uncertainty, or at least discomfort, about courts using their adjournment power once a deferral period has expired. We believe it would be helpful to clarify that the power to defer sentencing does not limit any general powers of a court to manage a case and adjourn proceedings as necessary.

Recommendation 10

That the Government amend section 83A of the *Sentencing Act* to:

- permit the court (on its own motion or on an application) to extend a sentence deferral for an additional period of up to six months in appropriate circumstances; and
- clarify that section 83A does not limit any power that a court has to adjourn proceedings.

The recommendations we didn't make

Almost as important as explaining the rationale behind the recommendations in this report is explaining the reasons we did not make certain recommendations. In our consultation paper, we asked several questions, informed by our preliminary consultations, some of which did not lead to recommendations. In most instances, this is because there was insufficient evidence or stakeholder support to justify change. For example, we did not recommend the introduction of formal deferral conditions or written deferral plans. Nor did we recommend that courts be required to indicate the likely sentence that an offender will face at the end of their deferral. We also did not recommend any change to the approach to judicial monitoring (through the deferral review provision) or the current approach to sentencing after a deferral. The main opposition to each of these potential reforms was that they could undermine the flexibility that lies at the heart of the effectiveness of deferral as a pre-sentence option.

Concluding observations

When used effectively, sentence deferral can be a powerful tool that brings about real change, particularly for offenders who are chronically disadvantaged or marginalised. The strengths of deferral are that it provides a flexible approach that is responsive to the individual circumstances of each case; it ensures that courts are better informed when making sentencing decisions, and it better ensures that people have genuine opportunities to rehabilitate, participate in the community, and reduce their own risk of reoffending. Deferral can be especially useful for offenders who are on the cusp of alternative sentencing options, for example:

- a custodial sentence versus a non-custodial sentence;
- an adjourned undertaking versus a community correction order; or
- a sentence with conviction versus a sentence without conviction.

The recommendations in this report are intended to increase the effectiveness of deferral as a therapeutic option for a broad range of offenders and circumstances. The recommendations are also intended to function as a package of reforms, many of which are interrelated. For example, we recommend clarifying that sentence deferral is possible despite an inevitable prison sentence (Recommendation 8), which is partly designed for cases where sentence deferral is in the best interests of the offender's child (Recommendation 2).

Finally, the success of sentence deferral largely depends on the availability of suitable, effective, accessible, and culturally safe and appropriate programs and services, although this consideration is outside the scope of our review. Notwithstanding, we strongly support any measures intended to improve access to rehabilitation services, especially in regional Victoria. Investing in rehabilitation offers an alternate pathway out of the criminal justice system for offenders who are marginalised or who have complex needs. And such investment enhances the protection of the community in the long term by interrupting offending trajectories, including intergenerational cycles of offending and incarceration.

1. Sentence deferral in Victoria

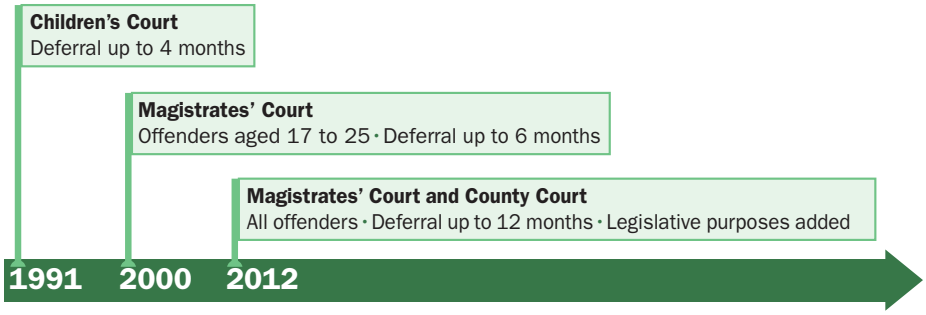
1.1 In late 2021, we committed to a law reform project investigating whether there is scope to improve the use of sentence deferral in Victoria. Our aim was to examine the current use of sentence deferral in Victoria, identify any issues and opportunities for reform, and provide advice to the Attorney-General. In October 2022, we published a consultation paper, outlining key issues and asking a series of consultation questions. This final report presents our recommendations.

1.2 In its current form, sentence deferral is a pre-sentence option available under section 83A of the *Sentencing Act 1991* (Vic) ('the *Sentencing Act*'). After an offender has been found guilty of an offence, section 83A allows the court to postpone ('defer') the offender's sentence for a specific purpose.

> **Section 83A(1)**
>
> If the Magistrates' Court or County Court finds a person guilty of an offence and—
>
> * * *
>
> (b) the court is of the opinion that sentencing should, in the interests of the offender, be deferred; and
>
> (c) the offender agrees to a deferral of sentencing—
>
> the court may defer sentencing the offender for a period not exceeding 12 months.

1.3 Sentence deferral commenced in Victoria in 1991 in the Children's Court.[1] It was introduced in the Magistrates' Court in 2000 for offenders aged 17–25 and expanded to people of all ages and to the County Court in 2012.[2] Sentence deferral is now an established and vital part of the Victorian sentencing landscape.

Figure 1: Timeline of legislative deferral schemes in Victoria



1. *Children and Young Persons Act 1989* (Vic) s 190, repealed by *Children, Youth and Families Act 2005* (Vic) s 601. Sentence deferral is now available in the Children's Court under section 414 of the *Children, Youth and Families Act 2005* (Vic). We did not examine the Children's Court deferral scheme.
2. *Sentencing (Amendment) Act 1999* (Vic) s 9; *Sentencing Amendment Act 2010* (Vic) s 21. Sentence deferral is also available in several other jurisdictions in Australia and elsewhere: Sentencing Advisory Council, *Reforming Sentence Deferrals in Victoria: Consultation Paper* (2022) (hereafter '*Consultation Paper*') 1–2.

1.4 Sentence deferral gives a person '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'.[3] The most common reason courts defer sentencing is to give the offender an opportunity to demonstrate their willingness and ability to rehabilitate.[4] Courts can defer sentencing for other reasons, such as enabling a restorative justice process between the victim and the offender in appropriate cases.[5] The offender must agree to the deferral, and the deferral must be in the offender's interests.[6]

1.5 A court also has other ways to give the offender time before sentencing to address factors that contributed to their offending. A court may refer the person to the Court Integrated Services Program, refer the case to the Assessment and Referral Court, or transfer the case to the Koori Court for a sentencing conversation.[7] 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.[8] This power can be used to 'informally' defer sentencing. We have considered sentence deferrals in the context of these other pre-sentence options.

The benefits of sentence deferral

1.6 During this project, we consulted a wide range of organisations and individuals about the current operation of sentence deferrals.[9] We also received 13 detailed and thoughtful submissions in response to our consultation paper. Stakeholders were overwhelmingly positive about sentence deferral, identifying the following key benefits:

3. 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).
4. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders,* Report 103 (2006) 227; Julian V. Roberts, 'Deferred Sentencing: A Fresh Look at an Old Concept' (2022) 3(1) *Criminal Law Review* 210, 211. Participants in our online survey of legal practitioners and the judiciary also identified rehabilitation-focused purposes as the most common reason for sentence deferrals: *Consultation Paper* 26.
5. *Sentencing Act 1991* (Vic) s 83A(1A)(d).
6. *Sentencing Act 1991* (Vic) ss 7(2), 83A(1).
7. See further *Consultation Paper* 2–3.
8. *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.
9. See Appendix for a list of organisations consulted during the sentence deferrals project.

- it can better protect the community in the long term by supporting offenders in their rehabilitation and providing earlier access to rehabilitation;
- it can address the vulnerabilities and/or over-representation in custody of marginalised groups by responding to the individual circumstances and needs of the offender;
- it can enable offenders to avoid a conviction (and thereafter a criminal record) by allowing them to demonstrate their rehabilitation to the court;
- it can prevent people from escalating up the sentencing hierarchy by providing an opportunity for people to engage with their deferral and make a genuine effort to change their behaviour;
- it can provide an alternative to an immediate prison sentence, in appropriate cases, by giving offenders an opportunity to actively demonstrate to the court their potential to avoid further offending and to participate in programs;
- it can facilitate restorative justice processes by allowing offenders and victims to participate in programs that address the impact of the offending on victims; and
- it can provide a highly flexible response to offending, in terms of both duration and requirements.

1.7 To illustrate, stakeholders told us:

> 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.
>
> **Online survey participant, March 2022**

> Sentencing deferrals, accompanied by accessible services, would assist many people and reduce community risk going forward. With positive achievements throughout the deferred sentence noted in the sentencing disposition, sentencing deferrals may be part of the broader solution in addressing the critical and enduring failures of our justice system.
>
> **Submission 1 (Victorian Alcohol and Drug Association)**

> [E]ffective use of deferred sentencing can act as a circuit breaker for people in contact with the justice system.
>
> **Submission 3 (Jesuit Social Services)**

> 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 … 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.
>
> **Submission 5 (Victoria Legal Aid)**

> The CIJ supports the use of justice system mechanisms that provide opportunities for the underlying causes of offending to be addressed, and for offenders to be connected with support and treatment. … [J]udicial officers should have at their disposal a broad range of sentencing tools and options to enable them to craft orders that are tailored to the individual case and the particular circumstances of each offender.
>
> **Submission 8 (RMIT Centre for Innovative Justice)**

> [D]eferred sentencing has the potential to reduce crime rates and thereby improve community safety, reduce costs to the State, and improve the socioeconomic wellbeing of offenders by helping them to 'deal with factors contributing to their criminal behaviour', which may stem from trauma, poor mental health, or addiction.
>
> **Submission 10 (Law Institute of Victoria)**

How are sentence deferrals currently used?

1.8 The current use of sentence deferral was raised by a number of stakeholders during consultation for this project. A regular theme was that sentence deferral could, and should, be used more frequently.[10] In our consultation paper, we examined the use of sentence deferral in Victoria based on the available data.[11] Our findings are summarised below.

Magistrates' Court

1.9 In the nine years from 2012 to 2020, the Magistrates' Court sentenced 3,507 cases that were recorded as involving a sentence deferral. However, due to data limitations, the actual number of sentence deferrals may be higher.[12]

1.10 We found that the recorded use of sentence deferrals increased steadily after the 2012 extension of sentence deferral to people of all ages (see [1.2]): from 85 cases in 2012 to 753 cases in 2019 (1% of all sentenced cases in 2019). A drop in the use of deferral in 2020 most likely reflects the effect of COVID-19 on court operations.

1.11 We also found that:

- women were slightly under-represented in recorded sentence deferrals – women constituted 19% of recorded deferral recipients (682 women), whereas women constituted 22% of all sentenced offenders;
- sentence deferral was well used for people aged 18–25 – 33% of recorded deferral cases involved people aged 18–25, whereas people aged 18–25 made up 25% of the general offender population, highlighting the importance of sentence deferral as an option for this age group;
- the most common principal offences in recorded deferral cases were assault and injury offences (32% of deferral cases);
- about one-third of deferral cases involved family violence offending (35%);[13] and

10. For example, 23 of the 24 participants in our online survey of the legal profession and judiciary thought that sentence deferrals should be more common: *Consultation Paper* 13. Several roundtable participants also commented that sentence deferrals could be more frequently used: Stakeholder Roundtable (10 August 2023).
11. Recording limitations in Courtlink mean that while the recorded deferrals are a reliable sample, some, or many, deferral cases would not have been captured (see *Consultation Paper* 4, 16). Improved recording and collection of data on sentence deferrals would enable a more exhaustive examination in any future review.
12. See *Consultation Paper* 5.
13. A family violence flag is typically transferred from Victoria Police's LEAP database to the Magistrates' Court system and indicates that at least one of the offences in the case occurred in a family violence context. 2016 is the first full calendar year for which family violence flags were reliable. This rate of 35% is more than triple the rate of family violence indicators in *all* Magistrates' Court cases (11%): Sentencing Advisory Council, *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders: Discussion Paper* (2017) 34.

- although deferral is sometimes perceived as a 'low-end' option for first-time or low-level offenders, 68% of deferral recipients had been convicted of other offending in the three years prior to their deferral (only 32% had not), and almost half of all deferral cases resulted in a prison sentence (22%) or a community correction order (26%).

County Court

1.12 There is currently no available data on the use of sentence deferral in the County Court. By reviewing sentencing remarks, we identified 32 deferral cases between 2012 and 2020, as well as a further 14 cases where the offender was sentenced after an unsuccessful deferral application.[14]

1.13 Of the 32 identified deferral cases, most involved male offenders (27) and about one-third involved offenders aged 18–25 (10). In more than half of deferral cases (17), courts imposed a prison sentence (17); in the other 15 cases, courts imposed 11 community correction orders, two adjourned undertakings and two wholly suspended sentences.[15]

1.14 Since publishing our consultation paper, we have examined more recent sentencing remarks (cases sentenced in 2021 and 2022) to identify any changes in the use of sentence deferrals in the County Court. We identified 20 deferral cases from 2021 and 18 deferral cases from 2022. The total number of identified deferral cases in those two years (38 cases) is higher than the total number in the years between 2012 and 2020 (32 cases). This could suggest that sentence deferral is already increasing in use, possibly as a result of the extension of the Court Integrated Services Program (CISP) to the County Court in January 2021.[16] The County Court agreed, telling us that it 'continues to see value in the utilisation of sentencing deferrals in combination with CISP'.[17]

14. *Consultation Paper* 9–10.
15. See further *Consultation Paper* 51.
16. County Court of Victoria, 'Court Integrated Services Program (CISP) Pilot Aboriginal and Torres Strait Islander Support' (countycourt.vic.gov.au, 2022); County Court of Victoria, 'Accused Persons Now Have the Ability to Access the Court's CISP upon Making a Bail Application, Bail Variation, Plea of Guilty or Deferral of Sentence in the County Court', Media Release (11 January 2021).
17. Email from County Court of Victoria to Sentencing Advisory Council (26 October 2023).

Barriers to the effective use of sentence deferral

1.15 While stakeholders were overwhelmingly positive about sentence deferral, they also identified some barriers to its use, such as:

- limited awareness among some members of the legal profession about the existence, benefits, purposes and use of sentence deferral (see further [3.50]);[18]
- inconsistent judicial approaches to sentence deferrals,[19] including an apparent reluctance to defer sentencing in certain cases;[20]
- the potential effects on victims of delaying criminal proceedings by deferring sentence, especially in family violence cases where the offender may pose a greater risk;[21]
- inadequate communication with victims about sentence deferrals, particularly in the summary jurisdiction, which can result in victims feeling 'blindsided' when they discover that their matter has been deferred without their knowledge;[22]
- concerns about the interaction between sentence deferral and bail laws,[23] though some of those concerns have been addressed in the recent *Bail Amendment Act 2023* (Vic), which commenced 12 February 2024;[24]
- limited availability of many services (such as housing) and programs (such as men's behaviour change programs) and long waiting lists (see further [3.52]–[3.54]);
- limited availability of therapeutic courts where sentence deferral is more readily available,[25] and time pressures in mainstream courts that limit the use of deferrals (see further [3.51]);[26] and

18. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)); Submission 10 (Law Institute of Victoria); Submission 11 (Fitzroy Legal Service).
19. Submission 13 (Law and Advocacy Centre for Women).
20. Submission 10 (Law Institute of Victoria).
21. Meeting with Safe and Equal (2 September 2022); Submission 6 (No to Violence); *Consultation Paper* 14. The Supreme Court of Victoria noted that the Court 'is conscious of the impact of delay on victims and weighs this with other relevant factors including community benefits', citing the following examples in the context of the adjournment power: *McGrath v The Queen* [2018] VSCA 134 and *R v Furlan* [2014] VSC 361: Email from Supreme Court of Victoria to Sentencing Advisory Council (26 June 2023).
22. Meeting with representative of the Victims of Crime Commissioner (22 August 2023).
23. Submission 3 (Jesuit Social Services); Submission 4 (Australian Community Support Organisation); Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 7 (Professor Felicity Gerry KC); Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)); Submission 11 (Fitzroy Legal Service); Submission 12 (Victorian Aboriginal Legal Service); Submission 13 (Law and Advocacy Centre for Women).
24. For example, stakeholders identified that extending a person's period on bail can place that person at enhanced risk of being remanded if they commit an indictable offence while on bail and become subject to reverse-onus bail provisions. The new legislation narrows the application of the reverse-onus provisions: *Bail Amendment Act 2023* (Vic) s 8; Victoria, *Parliamentary Debates*, Legislative Assembly, 16 August 2023, 2890 (Anthony Carbines, Minister for Police, Minister for Crime Prevention, Minister for Racing).
25. Submission 13 (Law and Advocacy Centre for Women).
26. Submission 11 (Fitzroy Legal Service); Submission 12 (Victorian Aboriginal Legal Service).

- inadequate legal aid funding for deferral hearings, and client resistance to paying, or inability to pay, a subsequent day fee for a lawyer to attend court for a sentence deferral.[27]

1.16 We have carefully considered all the issues and suggestions raised in consultation. Where suggestions relate directly to sentence deferral, and evidence and consensus support changing the provision, we have recommended reforms aimed at improving the operation of sentence deferral. However, no matter how well designed the sentence deferral scheme is, its success also depends on external factors, especially the availability of suitable, effective, accessible, and culturally safe and appropriate programs and services, particularly in regional Victoria.

Phases of the project

1.17 This project was informed by stakeholder feedback about the strengths of sentence deferrals, and the barriers to their effective operation in the Victorian criminal justice system. The project, which ran concurrently with our project on adjourned undertakings, had five phases:

1. **Preliminary consultation and research**: we examined court data, coded County Court sentencing remarks to identify deferral cases, reviewed literature and case law, and met with stakeholders to identify key issues (December 2021–March 2022).
2. **Online survey**: we surveyed judicial officers and criminal law practitioners about their perceptions of sentence deferral (February–March 2022).
3. **Consultation paper**: we published a consultation paper on 11 October 2022 and received 13 submissions as well as feedback from other stakeholders.
4. **Draft recommendations and final consultation**: we developed draft recommendations drawing on our consultation, research and data analysis; we then met with stakeholders individually and held a stakeholder roundtable on 10 August 2023 to seek feedback on the draft recommendations (July–November 2023).
5. **Final report**: we delivered this final report with recommendations to the Attorney-General and published it on our website.

27. Submission 8 (RMIT Centre for Innovative Justice); Submission 10 (Law Institute of Victoria); Submission 12 (Victorian Aboriginal Legal Service). See also Victorian Aboriginal Legal Service, *Submission to Sentencing Act Reform Project* (2020) 9.

Human rights

1.18 As a public statutory authority, the Council is required in making decisions to give proper consideration to relevant human rights.[28] In developing our recommendations in this report, we have had regard to the various rights enunciated in the *Charter of Human Rights and Responsibilities*. For reasons discussed throughout this report, we have reached the view that the recommendations in this report would promote the following rights under the *Charter*:

- the right to liberty and security of a person (section 21);
- the right not to be punished in a cruel, inhuman or degrading way (section 10);
- cultural rights (section 19);
- the right to recognition and equality before the law (section 8);
- the protection of families and children (section 17);
- the right not to have a person's family unlawfully or arbitrarily interfered with (section 13(a)); and
- rights in criminal proceedings, including the right to legal assistance and to be tried without unreasonable delay (section 25).

The importance of consultation

1.19 Consultation is an essential cornerstone of our work. It provides a crucial source of evidence for the reforms that we consider. From November 2021 to November 2023, we met with over 20 organisations, many on multiple occasions, including representatives of the Supreme Court, County Court and Magistrates' Court, as well as police, defence lawyers, organisations that work with victims of crime, academics and community organisations. The aim of these consultations was to seek views on issues affecting sentence deferrals and potential areas for improvement, and to test draft reform options. We also received 25 responses to our online survey of the legal profession and judiciary and 13 written submissions in response to our public consultation paper. In August 2023, we hosted a roundtable to seek stakeholder feedback on the proposed reforms, and we met with individual stakeholders between July and November 2023.

28. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38.

1.20 A full list of the organisations and individuals we consulted and the submissions we received is set out in the Appendix. The knowledgeable, considered, and practical input from stakeholders has been instrumental in both the identification of issues and the development of our recommendations.

Structure of this report

1.21 This report is structured around the suggested reforms as follows:

Chapter 2: The purposes of sentence deferral (Recommendations 1–5);

Chapter 3: Availability of sentence deferral (Recommendations 6–9);

Chapter 4: Maximum length of sentence deferral (Recommendation 10); and

Chapter 5: The recommendations we didn't make.

2. The purposes of sentence deferral

2.1 This chapter discusses the legislative purposes of sentence deferral. In it, we recommend four new purposes of deferral be added to section 83A of the *Sentencing Act*. Each of the recommended new purposes relates to groups of people who are vulnerable in some way in the criminal justice system. We also recommend adding another purpose to clarify that allowing restorative justice processes to occur is an appropriate reason to defer sentencing.

The current purposes of sentence deferral

2.2 Since 2012, the *Sentencing Act* has specified five distinct but overlapping purposes for which a court may defer sentencing. 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 the underlying causes of the offending;
- the offender to participate in a program addressing the impact of the offending on the victim; and
- any other purpose that the court considers appropriate in the circumstances.[29]

2.3 These purposes are intended as both a guide and a safeguard to help ensure that courts only defer sentencing when 'it will be of most benefit' and 'deferral is not used by defendants as a means of unnecessarily prolonging proceedings'.[30]

2.4 Victoria's legislated purposes of sentence deferral are similar to those in comparable jurisdictions, for example, assessing the offender's rehabilitative prospects or needs;[31] allowing the offender to address the causes of their behaviour,

29. *Sentencing Act 1991* (Vic) s 83A(1A). These purposes were inserted into the *Sentencing Act* based on our advice from 2008: Sentencing Advisory Council (2008), above n 3, 274. The New South Wales provision is very similar: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11(1).
30. Sentencing Advisory Council (2008), above n 3, 274.
31. See, for example, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11(1)(a). See also Australian Law Reform Commission (2006), above n 4, 227; Roberts (2022), above n 4, 211.

demonstrate rehabilitation or undertake rehabilitative interventions;[32] and allowing the offender to take part in restorative justice processes or agreements.[33] Catch-all purposes ('any other reason') are also common.[34]

2.5 Participants in our online survey of legal practitioners and the judiciary identified rehabilitation-focused purposes as the most common current reason for sentence deferrals.[35] No other purpose was nominated as the most common reason for deferral.

2.6 In our consultation paper, we asked whether any reforms to the list of purposes were warranted. Stakeholder feedback focused on:

- the current fourth legislative purpose (participation in a program addressing the impact on the victim) and its relationship with restorative justice; and
- new purposes that might usefully be added to section 83A.

2.7 In considering the range of additional purposes suggested in submissions, we balanced two competing considerations:

1. A legislative purpose signals parliament's intent that sentence deferral be available in particular circumstances, promoting clarity, transparency and consistency in its use.
2. Section 83A(1A) already includes a catch-all purpose, permitting a court to defer sentencing 'for any other purpose that the court considers appropriate in the circumstances'. Not every purpose requires legislative inclusion. And there are benefits to reducing legislative complexity.

2.8 We have only recommended new legislative purposes where there was a strong case for their inclusion, including support from multiple stakeholders.

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32. See, for example, *Crimes (Sentencing) Act 2005* (ACT) s 27(1)(d); *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 11(1)(a)–(b); *Sentencing Act 2017* (SA) ss 29(1)(a)–(b); *Sentencing Act 1997* (Tas) ss 57A(2)(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 rehabilitative efforts: *Sentencing Act 2020* (UK) s 3(1). See also Australian Law Reform Commission (2006), above n 4, 227; Roberts (2022), above n 4, 211.
33. See, for example, *Sentencing Act 2002* (NZ) s 25(1)(b); *Sentencing Act 2020* (UK) s 3(b).
34. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11(1)(c); *Sentencing Act 2017* (SA) s 29(1)(e); *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).
35. Online Survey of legal practitioners and the judiciary (February 2022). The most common purposes were identified as the offender demonstrating that rehabilitation has taken place (10 participants), the offender participating in a rehabilitation program (8 participants) or the offender having their rehabilitative prospects assessed (6 participants).

Clarify restorative justice as a purpose of sentence deferral

2.9 There is growing support for restorative justice as a complementary process within the criminal justice system,[36] and recognition that sentence deferral can be a mechanism for utilising restorative justice processes in a case.[37] The fourth purpose of sentence deferral, set out in section 83A(1A)(d), was intended to give effect to our recommendation that a purpose of sentence deferral should be 'to allow the offender to participate in restorative justice or other programs'.[38] However, the wording of the provision ('for the offender to participate in a program addressing the impact of the offending on the victim') does not specifically mention restorative justice.

Stakeholder views

2.10 Stakeholders told us that the broader language of section 83A(1A)(d) creates uncertainty about whether the provision is intended to enable restorative justice processes,[39] which may lead to inconsistency in its interpretation. The RMIT Centre for Innovative Justice (the CIJ) noted that 'there is not universal agreement among sentencing judges about the application of section 83A of the *Sentencing Act* to restorative justice processes' and '[s]ome judges have expressed a preference for a specific legislative scheme to support the process and their decision making in this area'.[40]

2.11 Stakeholders who addressed this question supported amending section 83A to clarify that enabling restorative justice processes is an appropriate purpose of sentence deferral.[41] To achieve this change, stakeholders supported adding a

36. See, for example, Australian Association for Restorative Justice, *Submission to the Parliamentary Inquiry into the Victorian Criminal Justice System* (2021) 1–8; State of Victoria, 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.
37. Victorian Law Reform Commission (2021), above n 36, 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 3, 202, 267–269, 275; RMIT 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; England and Wales Ministry of Justice, *A Smarter Approach to Sentencing* (2020) 52.
38. Sentencing Advisory Council (2008), above n 3, 275 (Recommendation 13–3).
39. *Consultation Paper* 29; Submission 8 (RMIT Centre for Innovative Justice). See also Victorian Law Reform Commission (2016), above n 37, 177; RMIT Centre for Innovative Justice, *Submission to the Victorian Law Reform Commission Review on Improving the Justice System Response to Sexual Offences* (2021) 24.
40. RMIT Centre for Innovative Justice (2021), above n 39, 24.
41. Submission 3 (Jesuit Social Services); Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 8 (RMIT Centre for Innovative Justice); Meeting with Law Institute of Victoria (4 September 2023); Stakeholder Roundtable (10 August 2023).

new specific restorative justice purpose, rather than clarifying the wording of the current purpose.[42]

- Roundtable participants unanimously supported amending section 83A to make it clear that restorative justice is an intended purpose of sentence deferral. One participant commented that, although 'the existing provision may have been intended to enable participation in restorative justice, that hasn't turned out to be the case' and a specific restorative justice purpose 'would assist to make it a more viable option'.[43]
- Victoria Legal Aid said that it would 'send a clearer signal that deferred sentences can be used to enable and facilitate a restorative justice process'.[44]
- The Law Institute of Victoria told us that they are 'strongly supportive of bolstering the strength of existing pathways to include restorative justice processes in all aspects of the criminal justice system'.[45]
- The CIJ said that a specific restorative justice purpose would 'send the message that restorative justice is a valid feature of the criminal justice landscape' and 'raise awareness within the legal sector about the restorative justice purpose of the sentence deferral power'.[46]
- Jesuit Social Services said that 'when appropriate, deferring a person's sentence so that they can demonstrate their willingness to engage in rehabilitation and restorative processes, while being held to account, can play an important role in … a justice system that is based on the principles of prevention, early intervention and restorative justice'.[47]

2.12 There was no opposition to a clarified restorative justice purpose. However, the CIJ and Victim Services, Support and Reform (a business unit of the Department of Justice and Community Safety) expressed concern about the availability, capacity and resourcing of suitable restorative justice programs.[48] Victim Services, Support and Reform told us that '[t]here are only a small number of restorative justice programs available', mostly for young offenders.

42. Stakeholder Roundtable (10 August 2023); Submission 8 (RMIT Centre for Innovative Justice); Meeting with Law Institute of Victoria (4 September 2023); Meeting with County Court of Victoria (10 October 2023); Email from County Court of Victoria to Sentencing Advisory Council (26 October 2023). Meeting with Professor Arie Frieberg (28 August 2023).
43. Stakeholder Roundtable (10 August 2023).
44. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice.
45. Meeting with Law Institute of Victoria (4 September 2023).
46. Submission 8 (RMIT Centre for Innovative Justice).
47. Submission 3 (Jesuit Social Services).
48. Submission 8 (RMIT Centre for Innovative Justice); Email from Victim Services, Support and Reform to Sentencing Advisory Council (19 December 2022).

They said that '[e]ven where victims and offenders wish to engage in [restorative justice] processes, the programs have limited capacity'. They highlighted the importance of adequate resourcing 'to ensure it is a safe, appropriate and restorative process'.[49] The CIJ noted that there are 'currently a limited number of restorative justice providers in Victoria', commenting that:

> [i]f there is an increased use of sentence deferrals for the purpose of restorative justice, which, in the CIJ's view, should occur, greater resourcing of the restorative justice sector will need to take place.[50]

2.13 Two stakeholders suggested that a court should only be persuaded to defer sentencing for a restorative justice process if certain criteria are met. First, the court should be satisfied that both the victim and the offender have agreed to participate. Second, an appropriate restorative justice provider is available. Third, a restorative justice process can occur within a reasonable timeframe.[51] As Victim Services, Support and Reform observed, if the restorative justice process is 'incomplete before the end of the sentence deferral period, victims' expectations will not be met and they may be left disappointed and/or experiencing further trauma'.[52] The CIJ also emphasised the need for restorative justice processes to be 'victim-oriented', that is, 'designed to meet victims needs and give them choice and agency in the processes'.[53] The CIJ said that, for some victims, it is important 'that the offender knows that [the victims] do not wish them ill, and do not wish for them to be heavily punished', whereas for other victims, the sentence 'is extremely significant [and the victims] feel very strongly that they would not want to contribute in any way to a process that might result in a lighter sentence for the offender'.[54] The CIJ commented that if restorative justice is offered through sentence deferral, there needs to be clarity for victims about how the process could affect the sentence imposed:

> the possible effect on the offender's sentence should be clearly explained to the victims (and to the offender). Victims who have concerns about this potential effect of the sentence might choose not to take part. However, given that each victim has a different experience and has different priorities, the fact that some victims may object to offenders receiving sentencing benefits due to participation in restorative justice should not prevent those victims who might want to engage in the process at a pre-sentence stage from doing so.[55]

49. Email from Victim Services, Support and Reform to Sentencing Advisory Council (19 December 2022).
50. Submission 8 (RMIT Centre for Innovative Justice).
51. Submission 8 (RMIT Centre for Innovative Justice); Email from Victim Services, Support and Reform to Sentencing Advisory Council (19 December 2022).
52. Email from Victim Services, Support and Reform to Sentencing Advisory Council (19 December 2022).
53. Submission 8 (RMIT Centre for Innovative Justice).
54. Submission 8 (RMIT Centre for Innovative Justice).
55. Submission 8 (RMIT Centre for Innovative Justice).

The Council's view

2.14 Given stakeholder feedback, we see merit in amending section 83A to make it clear that restorative justice is a purpose of sentence deferral. In our view, it is preferable to achieve this clarity by adding a new purpose expressly providing for restorative justice, rather than reframing the existing purpose set out in section 83A(1A)(d). Stakeholders told us that the existing purpose has evolved in a different way, to support offenders accessing programs relating to the impact of their offending on victims.[56] Stakeholders strongly supported adding a new purpose on the basis that it would clarify that a restorative justice process is an appropriate reason to defer sentencing without interrupting the current use of 83A(1A)(d).

2.15 We agree that certain criteria should be met before a court defers sentencing for this new purpose:

- the court should be satisfied that a plan is in place about how, when and where the restorative justice process would occur, including assurances that the process would occur during the deferral period;
- the victim must agree to participate, to ensure the process is victim-focused and the victim has choice and agency; and
- the offender and the victim must have had clearly explained to them how the process could affect the sentence imposed.

2.16 There is, however, more work to be done before restorative justice becomes a regular feature of the criminal justice landscape in Victoria. Among other things, as the CIJ observed, it may be beneficial to introduce a legislative framework governing when, how and why restorative justice processes are used.[57] There is also an identified need for greater availability of appropriate and sufficiently funded restorative justice programs. For sentence deferral to work effectively as a mechanism to achieve restorative justice, these broader issues will need to be addressed.

Recommendation 1

That the Government amend section 83A of the *Sentencing Act* to add the following purpose of sentence deferral: 'to allow the offender and, where relevant, the victim to participate in a restorative justice process'.

56. One such program is a road trauma awareness seminar, which is 'designed to educate drivers on the potential and actual outcomes of traffic offences and the reality of road trauma': Amber Community, 'Education' (ambercommunity.org.au, 2024).
57. Submission 8 (RMIT Centre for Innovative Justice).

Women and the interests of an offender's unborn, newborn or dependent child

2.17 In our consultation paper, we identified that sentence deferral seems to be underutilised for women, compared with men, potentially due to women's different criminal trajectories and offending profiles.[58] Female offenders, especially prisoners, have been identified as a particularly vulnerable group due to:

- the increased likelihood that their offending stems from their own past trauma and victimisation – such as childhood neglect or abuse, and family violence – and the 'extreme distress' that a prison sentence can cause to women given their past trauma;[59]
- the often close link between poverty and their offending, 'such as theft, fraud, and minor drug related offences' with '[o]nly a small minority of women … convicted of violent offences, and a large majority of them [having] been victims of violence themselves';[60]
- fewer female prisons being available, due to the low number of female prisoners, meaning that women may be incarcerated far from their children, family, and other support networks;[61] and
- pregnancy, breastfeeding, and sole or primary carer responsibilities for dependent children, and the resulting grief and trauma caused by women being separated from their children – women often also have other carer roles, such as for older relatives.[62]

> "Women are more commonly primary carers and can suffer devastating loss of home, work and children if sentenced to a custodial setting. Pregnant women and women with small children enter prison, sometimes for financial offending which means their children suffer for their offending.
>
> **Submission 7 (Professor Felicity Gerry KC)**

58. *Consultation Paper* 6.
59. 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; England and Wales Ministry of Justice (2020), above n 37, 52, 109; Violet Handtke et al., 'Easily Forgotten: Elderly Female Prisoners' (2015) 32(1) *Journal of Aging Studies* 1, 1–2; Submission 7 (Professor Felicity Gerry KC); Submission 13 (Law and Advocacy Centre for Women); Submission 3 (Jesuit Social Services); Submission 12 (Victorian Aboriginal Legal Service), referring to Yoorrook Justice Commission, *Transcript of Day 8 – Wurrek Tyerrang* (2022) 462.
60. Submission 7 (Professor Felicity Gerry KC).
61. Gerry and Harris (2016), above n 59, 8–12; Barry et al. (2019), above n 59, 184; England and Wales Ministry of Justice (2020), above n 37, 109; Handtke et al. (2015), above n 59, 1–2; Submission 12 (Victorian Aboriginal Legal Service), citing Yoorrook Justice Commission, *Transcript of Day 8 – Wurrek Tyerrang* (2023) 462.

2.18 Academics, lawyers, and policy-makers in Victoria and elsewhere have advocated for the increased use of sentence deferral to enable vulnerable women to address past trauma, break the cycle of their offending, and mitigate the effects of custody on their dependent children.[63] In our consultation paper, we raised the possibility of introducing a legislative purpose of sentence deferral aimed specifically at offenders who are pregnant, breastfeeding or sole or primary carers of dependent children.

Stakeholder views

2.19 Stakeholders highlighted the important role that sentence deferral can play for women. They also overwhelmingly supported a new legislative purpose of sentence deferral focusing on the interests and wellbeing of an offender's dependent child.[64] They told us that a specific legislative purpose would:

- be consistent with Australia's human rights obligations (see further [2.30]);
- draw 'attention to the availability' of sentence deferral for offenders with dependent children,[65] which would promote consistency and transparency in the application of sentence deferral; and
- help address the link between parental incarceration and negative outcomes for children, reducing intergenerational trauma and cycles of offending.[66]

2.20 For primary or sole carers 'on the borderline of imprisonment', sentence deferral could give them an opportunity 'to demonstrate responsibility and a change in circumstances' to remain in the community,[67] and 'demonstrate their capacity to

62. Department of Justice and Community Safety, Corrections Victoria (2019), above n 59, 5; Gerry and Harris (2016), above n 59, 8–12; Barry et al. (2019), above n 59, 184; England and Wales Ministry of Justice (2020), above n 37, 109; Handtke et al. (2015), above n 59, 1–2; Submission 7 (Professor Felicity Gerry KC); Submission 12 (Victorian Aboriginal Legal Service), citing Yoorrook Justice Commission, *Transcript of Day 8 – Wurrek Tyerrang* (2023) 462; Submission 13 (Law and Advocacy Centre for Women); Submission 3 (Jesuit Social Services); Submission 10 (Law Institute of Victoria).
63. See, for example, England and Wales Ministry of Justice (2020), above n 37, 12, 36, 38, 52; Submission 7 (Professor Felicity Gerry KC); Shona Minson et al., *Sentencing of Mothers: Improving the Sentencing Process and Outcomes for Women with Dependent Children – A Discussion Paper* (2015) 17; Rona Epstein et al., *Why Are Pregnant Women in Prison?* (2021); Roberts (2022), above n 4, 224.
64. Submission 2 (County Court of Victoria); Submission 3 (Jesuit Social Services); Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 7 (Professor Felicity Gerry KC); Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)); Submission 12 (Victorian Aboriginal Legal Service); Submission 13 (Law and Advocacy Centre for Women); Meeting with Law Institute of Victoria (4 September 2023); Meeting with Emeritus Professor Arie Frieberg (28 August 2023); Email from Victim Services, Support and Reform to Sentencing Advisory Council (19 December 2022); Stakeholder Roundtable (10 August 2023).
65. Submission 2 (County Court of Victoria).
66. Submission 10 (Law Institute of Victoria); Submission 12 (Victorian Aboriginal Legal Service), citing Council of Europe, *Recommendation CM/Rec (2018) 5 of the Committee of Ministers to Member States Concerning Children with Imprisoned Parents* (2018) [10].
67. Submission 2 (County Court of Victoria).

comply with community requirements [that] the court may be considering'.[68] For a parent or guardian who faces an inevitable prison sentence, deferral may allow them 'to make arrangements', so their 'children are not further negatively impacted' by the prison sentence.[69]

2.21 Several stakeholders advocated for a presumption in favour of sentence deferral if an offender is the sole or primary carer of dependent children, as recommended by the UK Prison Reform Trust.[70] The Victorian Aboriginal Legal Service (VALS) advocated for a general presumption in favour of deferral for women and/or non-violent sole or primary carers of children to address the link between incarceration and the removal of children into care, noting that 'Aboriginal women are the fastest growing cohort in Victoria's prisons' and incarceration is 'a driver for the high rates of Aboriginal child removal'.[71] Similarly, Safe and Equal recommended that sentencers should 'take into consideration the parenting and care-giver status of women and non-violent parents when sentencing, and only use custodial sentences as a last resort'.[72] Safe and Equal particularly supported the use of sentence deferral for women who have experienced family violence and/or have carer responsibilities.[73]

Professor Felicity Gerry KC told us that

> "[T]he offending behaviour of women is more likely to be rooted in prior victimisation, which heightens the importance of their access to rehabilitative treatment to address underlying causes of criminal behaviour. They are also more likely to have primary caring responsibilities, meaning that their incarceration will have higher costs for themselves, their children, the community, and the state. This is especially true for offenders who are pregnant or breastfeeding. Incarceration is especially detrimental for these groups because it risks failing to effectively treat root causes of offending while simultaneously creating trauma through family separation. Incarceration also increases social marginalisation, reduces employment opportunities, and for parents, increases the likelihood of intergenerational patterns of imprisonment.
>
> **Submission 10 (Law Institute of Victoria)**

68. Minson et al. (2015), above n 63, 17. See also Felicity Gerry, 'Deferred Sentences – Used Again but Not Used Enough' (2017) 181(21) Criminal Law and Justice Weekly 358; Legal and Social Issues Committee, Parliament of Victoria, Inquiry into Children Affected by Parental Incarceration (2022) 124.
69. Submission 2 (County Court of Victoria).
70. Submission 12 (Victorian Aboriginal Legal Service), citing Council of Europe (2018), above n 66, [10]; Safe and Equal, *Submission to the Inquiry into Children Affected by Parental Incarceration* (2022) 13; Submission 7 (Professor Felicity Gerry KC).
71. Submission 12 (Victorian Aboriginal Legal Service), citing Council of Europe (2018), above n 66, [10].
72. Safe and Equal (2022), above n 70, 13.
73. Meeting with Safe and Equal (2 September 2022).

custody should be reserved 'for women in only the most extreme of circumstances' and that 'in all but the most serious of cases there should be a presumption against sending a pregnant or perinatal women to prison'.[74] And the Law Institute of Victoria considered it 'important that the negative impacts of incarceration on women, pregnant offenders, and those with dependent children are mitigated as much as possible'.[75]

The Council's view

2.22 We have reached the view that section 83A should be amended to expressly enable sentence deferral in appropriate cases if it would be in the best interests of the offender's unborn, newborn or dependent child. This view is supported by the compelling arguments made by stakeholders, the significant support for (and no opposition to) this amendment, research into the experiences of female offenders and the children of incarcerated parents, and Victoria's human rights obligations.

A new purpose would enable pregnancy and childbirth in the community

2.23 A specific legislative purpose of sentence deferral may facilitate an offender's pregnancy and childbirth in the community, rather than in prison, in appropriate cases, thereby reducing the risk of harm and trauma to both the offender and their child (for example, by enabling and supporting breastfeeding and attachment).[76]

> "Prison is not a safe space for pregnant woman and in all but the most serious of cases there should be a presumption against sending a pregnant or perinatal women to prison … Deferral for all but the most serious of cases is a logical solution.
>
> **Submission 7**
> **(Professor Felicity Gerry KC)**

74. Submission 7 (Professor Felicity Gerry KC).
75. Submission 10 (Law Institute of Victoria).
76. See, for example, Submission 7 (Professor Felicity Gerry KC); Submission 13 (Law and Advocacy Centre for Women), citing K. P. Moloney and Lars F. Moller, 'Good Practice for Mental Health Programming for Women in Prison: Reframing the Parameters' (2009) 123(6) *Journal of Public Health* 431; Mitchell K. Bryne and Kevin Howells, 'The Psychological Needs of Women Prisoners: Implications for Rehabilitation and Management' (2002) 9(1) *Psychiatry, Psychology and Law* 34. Even where a prison sentence is inevitable, courts have recognised sentence deferral as a mechanism to enable the offender to make arrangements so that they can maintain attachment with their baby and continue breastfeeding while in prison: *R v Edwards* [2011] QCA 331; *R v Togias* [2001] NSWCCA 522. See also Carol A. Hooper, *Abuse, Interventions and Women in Prison: A Literature Review* (2003).

2.24 There have been concerning examples of childbirth in Australian prisons. In Case Study 1, a woman in custody in Victoria gave birth wearing handcuffs. In Western Australia in 2018, an Aboriginal woman gave birth alone in a locked cell '[d]espite pleading for help multiple times for over an hour'.[77] In another Western Australian case, an Aboriginal mother was told that her three-day-old baby would be removed from her due to insufficient capacity in the prison nursery.[78] And in another Victorian case highlighted by VALS, a woman's one-day-old baby was taken into care, preventing attachment and breastfeeding, meaning (among other things) that 'her baby did not get colostrum'.[79]

Case Study 1: Pregnancy in custody

A client … entered custody at Thomas Embling Hospital, which is a high-security forensic mental health services institution. After spending approximately three months in custody she was transported to a hospital to give birth. The birthing process was extremely traumatic for our client as she was forced to wear handcuffs for the entire process and was surrounded by security officers. Upon [our client] giving birth, her child was removed by child protection services and she returned to Thomas Embling Hospital for the remainder of her custodial sentence.

A sentence deferral would have allowed our client a humane and dignified birthing process. The deferral period would have allowed her to make appropriate arrangements for her child so child protection involvement may also have been avoided. There is ample research to show that a mother's physical and emotional presence provides babies with protection from stress and supports emotional regulation, both of which are important to healthy brain development and the child's future well-being. Birthing out of custody is critical for mothers and children alike.

Submission 13 (Law and Advocacy Centre for Women)

77. Inspector of Custodial Services (WA), 'The Birth at Bandyup Women's Prison in March 2018', Media Release (12 December 2018). See also Laura Abbott et al., 'Pregnancy and Childbirth in English Prisons: Institutional Ignominy and the Pains of Imprisonment' (2020) 42(3) *Sociology of Health & Illness* 660.
78. Human Rights Law Centre, 'Aboriginal Baby to Stay with Her Mother at Bandyup Women's Prison', Media Release (27 April 2018).
79. Victorian Aboriginal Legal Service, *Submission to the Inquiry into Children of Imprisoned Parents* (2022) 40.

A new purpose would provide another way to consider hardship to an offender's dependent children in the sentencing process

2.25 Evidence demonstrates that the children of incarcerated parents are vulnerable to emotional and behavioural problems, separation from siblings and extended family, and social isolation, as well as 'disrupted education, poor health and unstable housing, all of which are factors that heighten the risk of a young person entering the child protection or justice systems'.[80]

2.26 For example, one New South Wales study found that 16.9% of adult prisoners and 52.6% of young people in youth justice centres reported that at least one of their parents had been imprisoned.[81] A previously incarcerated parent was more common for women, Aboriginal people, younger people, and those with less schooling and/or with experience of out-of-home care.[82] The study concluded that there was a 'need for interventions to support parents in prison and at-risk children whose parents are incarcerated'.[83] Further, the South Australian Commissioner for Children and Young People spoke to the children of incarcerated parents, who said that 'everything changes' when a parent goes to prison, 'from what [children] eat and where they live to how much money they have and how they sleep, feel and communicate'.[84] The children described not eating because of different food, no longer being kissed goodnight, losing contact with their friends, having no money, and feeling stressed and empty inside.[85]

2.27 Although the harm caused to children by parental incarceration is well documented,[86] as a sentencing factor, hardship to an offender's family must be 'exceptional' to justify mitigating the offender's sentence.[87] Victoria's 2022 *Inquiry into Children Affected by Parental Incarceration* found that, as a sentencing factor,

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80. Submission 13 (Law and Advocacy Centre for Women). See also Submission 7 (Professor Felicity Gerry KC); Legal and Social Issues Committee (2022), above n 68; South Australian Commissioner for Children and Young People, *Join the Dots: Considering the Impact of Parental Incarceration on Children and Young People* (2022); Committee on Children and Young People, Parliament of New South Wales, *Support for Children of Imprisoned Parents in New South Wales* (2022); Marc Rémond et al., *Intergenerational Incarceration in New South Wales: Characteristics of People in Prison Experiencing Parental Imprisonment*, Trends & Issues in Crime and Criminal Justice no. 663 (2023).
81. Rémond et al. (2023), above n 80, 1.
82. Ibid.
83. Ibid.
84. South Australian Commissioner for Children and Young People (2022), above n 80, 26.
85. Ibid.
86. See, for example, Legal and Social Issues Committee (2022), above n 68; South Australian Commissioner for Children and Young People (2022), above n 80; Committee on Children and Young People (2022), above n 80; Rémond et al. (2023), above n 80, 1.
87. *R v Edwards* (1996) 90 A Crim R 510; Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (3rd ed., 2014) 420–423; *R v Togias* [2001] NSWCCA 522 (14 December 2001) [13]–[16].

'exceptional' hardship to an offender's children is a 'high bar' that is rarely proven in practice.[88] Sentence deferral provides an alternate pathway to reduce harm to children in circumstances that are not considered 'exceptional' or where there is insufficient information to assess the likely effect of the offender's incarceration on their children, while still enabling the final sentence to reflect the gravity of the offence.

2.28 The 2022 inquiry also found that 'children's interests are rarely considered across the justice system',[89] and that this needs to change, particularly given that parental incarceration can be such an adverse childhood experience.[90] The inquiry found that the separation of Aboriginal children from their incarcerated parents 'can disrupt connection to culture, land and family' and that the removal of children 'from communities into out of home care, particularly into non-Aboriginal care placements, can perpetuate the impacts of historic trauma'.[91] The inquiry recommended, among other things, that the Victorian Government 'review the justice system to identify points at which children's interests can be better considered'.[92]

2.29 Sentencing, including pre-sentencing, could be one of those key points in the justice system at which children's interests could be better considered. A specific legislative purpose of sentence deferral, based on the best interests of an offender's unborn, newborn or dependent child, would provide a mechanism for recognising and addressing the effect of the sentencing process on an offender's children. Indeed, a recent New South Wales parliamentary inquiry into children of imprisoned parents specifically said that 'there should be greater capacity for … deferring offenders to non-custodial orders and rehabilitative or early intervention programs',[93] given the long-term fiscal costs of parental imprisonment and the lifelong impacts of parental incarceration.[94] The parliamentary inquiry noted that these measures would 'better support the children of parents who are facing potential imprisonment', would offer 'parents a better opportunity at rehabilitation' and was also 'an important consideration in addressing the overarching social, intergenerational and fiscal costs of recidivism'.[95]

88. Legal and Social Issues Committee (2022), above n 68 (Finding 35).
89. Ibid 91.
90. Ibid 23–30. See also South Australian Commissioner for Children and Young People (2022), above n 80, 22–25.
91. Legal and Social Issues Committee (2022), above n 68, 30.
92. Ibid xvii, 101.
93. Committee on Children and Young People (2022), above n 80, 66.
94. Ibid 65.
95. Ibid 65–66.

A new purpose would be consistent with Victoria's human rights obligations

2.30 The introduction of a new purpose is also consistent with Victoria's human rights obligations, including under the Victorian *Charter of Human Rights and Responsibilities* and United Nations human rights instruments to which Australia is a signatory:

- The *Charter of Human Rights and Responsibilities* provides that '[e]very child has the right, without discrimination, to such protection as is in the child's best interests and is needed by the child by reason of being a child'.[96]
- Article 3.1 of the *United Nations Convention on the Rights of the Child* requires signatories to 'ensure to the maximum extent possible the survival and development of the child';[97] upholds the child's right to 'the enjoyment of the highest attainable standard of health';[98] and provides that 'in all actions concerning children', including actions undertaken by courts and legislative bodies, 'the best interests of the child shall be a primary consideration'.[99]
- The *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders* ('the Bangkok Rules') requires signatories to provide that, before or on admission into custody, 'women with caretaking responsibilities for children shall be permitted to make arrangements for those children, including the possibility of a reasonable suspension of detention, taking into account the best interests of the children'[100] and that '[n]on-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate'.[101]

96. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2).
97. *UN Convention on the Rights of the Child*, opened for signature 20 November 1989, UNTS 1577 (ratified in December 1990), Article 6.2. On the application of this right in a criminal law context, see *R v Togias* [2001] NSWCCA 522; *R v Edwards* [2011] QCA 331 [69].
98. *UN Convention on the Rights of the Child*, opened for signature 20 November 1989, UNTS 1577 (ratified in December 1990), Article 24.1.
99. *UN Convention on the Rights of the Child*, opened for signature 20 November 1989, UNTS 1577 (ratified in December 1990), Article 3.1. On the application of this right in a criminal law context, see *R v Togias* [2001] NSWCCA 522; *R v Edwards* [2011] QCA 331 [69].
100. *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders ('the Bangkok Rules')*, GA Res 65/229, UN Doc A/RES/65/457 (6 October 2010, adopted 21 December 2010), Rule 2.2.
101. *Bangkok Rules,* Rule 64. See also Shona Minson, *Safeguarding Children When Sentencing Parents: Information for Sentencers*, Briefing Paper (2020); Submission 12 (Victorian Aboriginal Legal Service), citing Council of Europe (2018), above n 66, [10].

2.31 The Council of Europe has recommended that:

> before a judicial order or a sentence is imposed on a parent, account shall be taken of the rights and needs of their children and the potential impact on them. The judiciary should examine the possibility of a reasonable suspension of pre-trial detention or the execution of a prison sentence and their possible replacement with community sanctions or measures … Where a custodial sentence is being contemplated, the rights and best interests of any affected children should be taken into consideration and alternatives to detention be used as far as possible and appropriate, especially in the case of a parent who is a primary caregiver.[102]

Conclusion

2.32 For all the above reasons, we are persuaded that there is merit in introducing a new legislative purpose of sentence deferral to consider and reflect the best interests of an offender's unborn, newborn or dependent child.[103] Sentence deferral provides an opportunity to see offenders' children not just as a 'personal circumstance' of an offender,[104] but instead as unique and individual persons in their own right who should not be harmed by 'the sins and trauma of fathers and mothers'.[105] A legislative purpose provides an alternative pathway in circumstances that may fall short of the standard for considering hardship to the offender's family as a mitigating circumstance.

2.33 A specific legislative purpose may be useful in circumstances such as the following:

- to facilitate pregnancy and childbirth in the community rather than in prison, thereby reducing the risk of harm and trauma to both the offender and their child or children (for example, by enabling and supporting breastfeeding and attachment);[106]
- to enable an offender in a 'borderline imprisonment' case to demonstrate their ability to comply with community requirements and remain in the community with their children;[107]

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102. Council of Europe (2018), above n 66, [10], cited in Submission 12 (Victorian Aboriginal Legal Service).
103. We intend 'child' to include the offender's child through avenues such as adoption, foster care, permanent care, kinship care, and other similar circumstances.
104. Children of Prisoners Europe, *Keeping Children in Mind: Moving from 'Child-Blind' to Child-Friendly Justice During a Parent's Criminal Sentencing* (2019) 14.
105. *S v M* [2007] ZACC 18 [18].
106. See, for example, Submission 7 (Professor Felicity Gerry KC); Submission 13 (Law and Advocacy Centre for Women), citing Moloney and Moller (2009), above n 76; Bryne and Howells (2002), above n 76. Even where a prison sentence is inevitable, courts have recognised sentence deferral as a mechanism to enable a person to make arrangements so that they can maintain attachment with their baby and continue breastfeeding while serving a prison sentence: *R v Edwards* [2011] QCA 331; *R v Togias* [2001] NSWCCA 522. See also Hooper (2003), above n 76.
107. In borderline imprisonment cases, the UK Prison Reform Trust has recommended a presumption in favour of deferral to enable an offender who is the primary or sole carer of dependent children to demonstrate their ability to comply with community requirements and remain in the community with their children: Minson et al. (2015), above n 63, 17. See also Gerry (2017), above n 68, 358; Legal and Social Issues Committee (2022), above n 68, 124.

- to obtain a pre-sentence report about the potential consequences of a prison sentence on the offender's children;[108] and
- to enable caring arrangements to be put in place, including in circumstances where a sole carer of children is facing an inevitable prison sentence.[109]

2.34 We do, though, note one caution about the use of sentence deferral in cases in which a prison sentence is either borderline or likely, as raised by a roundtable participant and the Law Institute of Victoria:

> the focus on ensuring that judges are aware deferrals can be ordered even where terms of imprisonment will be imposed, may have the unintended consequence of making judges less disposed to not imposing a term of imprisonment owing to hardship (for e.g., in the case of breastfeeding) – a judge may defer sentence for a year then impose a sentence, whereas otherwise they may have utilised another sentencing device that would not result in imprisonment.[110]

2.35 If a court is considering a sentencing option other than prison due to exceptional hardship arising from the person's circumstances relating to their children, the court should not use deferral to stabilise the circumstances and thereby enable a prison sentence. If an alternative sentencing disposition is appropriate (for example, a community correction order), it should still be imposed, in line with the principle of parsimony, which requires the least restrictive sentencing option in all the circumstances. The overarching aim of sentence deferral in this context is to reduce harm to the children of sentenced offenders, improve children's long-term outcomes, support the parent–child bond and, in the longer term, protect the community by interrupting the cycle of intergenerational offending.

Recommendation 2

That the Government amend section 83A of the *Sentencing Act 1991* (Vic) to add the following purpose of sentence deferral: 'to consider or reflect the best interests of the offender's unborn, newborn or dependent child'.

108. A group of organisations in England and Wales has developed a briefing paper 'designed to help parents who are awaiting a sentencing hearing in a criminal court' by prompting them to consider information that might assist the court, such as who will care for their children if they are imprisoned, whether any dependent children will need to change school, whether any dependent children have particular health or emotional needs, and whether their children are able to visit them while in prison: Shona Minson, *Safeguarding Children When Sentencing Parents: Information for Primary Carers Facing Sentencing in a Criminal Court*, Briefing Paper (2018).

109. See, for example, Submission 2 (County Court of Victoria) (sentence deferral may allow offenders 'to make arrangements, so children are not further negatively impacted by a parent or guardian being imprisoned'). The UK Prison Reform Trust has recommended a presumption in favour of deferral where a sole carer is facing a prison sentence, to 'allow arrangements to be made for the children' which 'would reduce the trauma commonly experienced by both mother and children': Minson et al. (2015), above n 63, 17.

Medical treatment or surgery

2.36 Sentence deferral is sometimes used to enable an offender to receive or recover from necessary medical treatment or surgery.[111] A potential reform we tested with stakeholders was whether an express purpose to that effect should be introduced to section 83A of the *Sentencing Act*.

2.37 In one example, in a 2015 case in the County Court, the offender had 'Charcot Marie Tooth Syndrome', a 'form of peripheral neuropathy, in which the feeling and motor control of the limbs is gradually reduced'.[112] Prior to his plea hearing, the offender had two hip replacement surgeries and after the second was further hospitalised after developing deep vein thrombosis, pulmonary embolism and complications from pneumonia. The court deferred sentencing for about a month to enable 'follow up treatment'. After the deferral, he was sentenced to four years' imprisonment.

2.38 In another example, in a 2016 case in the County Court, the offender was remanded in custody after pleading guilty to negligently causing serious injury and unlicensed driving. Due to the offender's own serious injuries from the incident, the court deferred sentencing for about nine months to enable the offender to receive leg-lengthening surgery, and medical treatment and rehabilitation for his right hand. A medical report tendered to the court had emphasised that without the treatment, the offender might have been left with permanent serious disability. At the end of the nine-month deferral period, the court extended the deferral for another three months for the offender to have further procedures and treatment as the surgery had initially been unsuccessful. After that additional three months, the court sentenced the offender to three years' imprisonment, stating that it fixed a shorter minimum prison sentence than it would have otherwise.[113]

110. Stakeholder Roundtable (10 August 2023); Email from Law Institute of Victoria to Sentencing Advisory Council (15 September 2023).
111. *Consultation Paper* 30; *DPP v Hampson* [2015] VCC 916; *R v Trindall* [2002] NSWCCA 364; Roberts (2022), above n 4, 224; Australian Law Reform Commission (2006), above n 4, 227.
112. *DPP v Hampson* [2015] VCC 916 [23].
113. Unpublished sentencing remarks provided to the Council.

Stakeholder views

2.39 Roundtable participants unanimously supported a new legislative purpose for necessary surgery or medical treatment, though opinions differed as to how the purpose should be constructed. Participants variously suggested that medically necessary treatment should include matters such as:

- recovering from treatment (not just receiving treatment);
- attending a specialist medical appointment, particularly if the offender has been awaiting an appointment for some time;
- finishing a partially complete National Disability Insurance Scheme assessment;
- undertaking drug treatment or participating in a withdrawal health check; and/or
- undertaking comprehensive health assessments before sentencing, particularly for Aboriginal and Torres Strait Islander people, to ensure that undiagnosed medical issues are detected and a treatment regime established, especially if the offender is facing a possible or likely prison sentence.[114] VALS told us that undiagnosed or untreated medical conditions are a common factor in cases involving deaths in custody (discussed further at [2.55]).[115] A sentence deferral would enable Aboriginal and Torres Strait Islander people to receive a comprehensive health assessment and any required treatment prior to sentencing, which could improve their health outcomes as well as provide the court with important information relevant to their sentencing.

The Council's view

2.40 In our view it would be useful to expand the legislative purposes of deferral to specify that sentencing may be deferred to enable the offender to receive or recover from medically necessary surgery or treatment (including mental health treatment). Deferral for treatment can provide the sentencing court with additional information about the offender's medical circumstances, such as the severity of their condition, the progress of their treatment and their ongoing medical needs.

2.41 For offenders facing an inevitable prison sentence, sentence deferral could reduce the trauma of medical treatment or surgery, as well as decrease the offender's reliance on the prison service for recovery and rehabilitation. It would also reduce the burden on the prison system in organising treatment and recovery

114. Stakeholder Roundtable (10 August 2023).
115. Submission 12 (Victorian Aboriginal Legal Service).

in a custodial setting and would allow people to maintain contact with their regular treating physicians. For Aboriginal and Torres Strait Islander people, sentence deferral would enable them to receive medical assessment and treatment in the community, give them more agency in their health treatment, and better enable them to seek treatment and support that is culturally safe and appropriate (see further [2.44]–[2.65]).

2.42 A new purpose would also promote human rights obligations, such as the right to life,[116] which 'includes an obligation on the State to ensure that the health and wellbeing of people in detention are adequately secured'.[117] In some cases, the health and wellbeing of people facing a prison sentence may be better secured through medical assessment and/or treatment in the community first.

> "The period of deferment can be used to assess the effects of voluntary treatment, after which medical practitioners will be better placed to make a recommendation when the offender returns to court for sentencing ... A deferral offers an opportunity to determine the seriousness of the [trauma] and whether this should affect the sentence ultimately imposed.
>
> **Julian V. Roberts, 'Deferred Sentencing: A Fresh Look at an Old Concept' (2022), 224 (citations omitted)**

2.43 Sentence deferral has already been used at least twice in this way in Victoria. A legislative purpose would clarify that medically necessary treatment or surgery is an appropriate reason for deferral and encourage consistency by ensuring appropriate cases are considered. Ultimately, the court has discretion to determine whether it is appropriate to defer sentencing in all the circumstances of the case, as with any deferral decision.

Recommendation 3

That the Government amend section 83A of the *Sentencing Act 1991* (Vic) to add the following purpose of sentence deferral: 'to allow the offender to receive or recover from medically necessary treatment or surgery'.

116. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 9.
117. *Inquest into the Passing of Veronica Nelson,* COR 2020 0021 (30 January 2023) 305. See also Yoorrook Justice Commission, *Yoorrook for Justice: Report into Victoria's Child Protection and Criminal Justice Systems* (2023) 267; Case of *Pitalev v Russia* (European Court of Human Rights, Fifth Section, Application No 34393/03, 30 October 2009) [54].

Aboriginal and Torres Strait Islander peoples

2.44 In our consultation paper, we asked whether, and how, sentence deferral might play a role in reducing the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system generally, and in prison specifically.[118]

Stakeholder views

2.45 Most submissions touched on the important role of sentence deferral as a circuit-breaker to address the systemic issues that contribute to the entrenchment of Aboriginal and Torres Strait Islander people in the criminal justice system and their over-representation in prison.[119] VALS told us that 'all avenues should be exhausted to prevent imprisonment of Aboriginal people and ensure that "imprisonment is a sanction of last resort"'.[120] Jesuit Social Services discussed the adverse government interventions to which Aboriginal and Torres Strait Islander people have been subjected since colonisation, noting the 'ongoing impacts of dispossession, structural racism, intergenerational trauma and disadvantage' and the potential role of sentence deferral to address over-representation in this context.[121] Similarly, the Australian Community Support Organisation, Victoria Legal Aid and the Law and Advocacy Centre for Women (LACW) discussed the importance of sentence deferral as

> "Due to the inherent and well-known harm created by the carceral system, VALS' firm position is that all avenues should be exhausted to prevent imprisonment of Aboriginal people and ensure that 'imprisonment is a sanction of last resort'. This is further supported by evidence demonstrating that Aboriginal community based alternatives to prison are far more effective at supporting healing and promoting community safety.
>
> **Submission 12 (Victorian Aboriginal Legal Service)**

118. *Consultation paper* 31.
119. See, for example, Submission 2 (County Court of Victoria); Submission 3 (Jesuit Social Services); Submission 4 (Australian Community Support Organisation); Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 6 (No to Violence); Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)); Submission 10 (Law Institute of Victoria); Submission 11 (Fitzroy Legal Service); Submission 12 (Victorian Aboriginal Legal Service); Submission 13 (Law and Advocacy Centre for Women).
120. Submission 12 (Victorian Aboriginal Legal Service).
121. Submission 3 (Jesuit Social Services).

a flexible tool to reduce the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system. These organisations highlighted the capacity of sentence deferral to provide access to tailored, culturally responsive support and services that respond to the individual needs of the offender and the factors that contributed to the offending behaviour.[122]

2.46 Case Study 2 shows the important role that sentence deferral can play to support Aboriginal and Torres Strait Islander people in their rehabilitation journey.

Case Study 2

Through our clients, [Law and Advocacy Centre for Women] has seen the potential that deferred sentences have to reduce the overrepresentation of First Nations people in prisons and facilitate rehabilitative efforts. For example:

A LACW client who is First Nations was charged with an offence after which she spent 89 days in custody on remand. The court was considering sentencing her to further time in custody but her sentence was deferred instead so she could engage with support services in the community to assess if the underlying causes of her offending could be addressed. Our client engaged with an Aboriginal Community Controlled Organisation which provided her with culturally-responsive counselling for alcohol and other drug use and mental illness. As a result of receiving these supports, our client was able to demonstrate a significant shift in her state of mind and circumstances. Ultimately, the court imposed a good behaviour bond.

The offending was clearly linked to our client's struggles with mental illness and drug use. The deferred sentence created the motivation and means to engage with support services, where previously this had not been available to her. Through her engagement in the community she was able to satisfy the court of her prospects of rehabilitation and increase the sentencing options available.

Submission 13 (Law and Advocacy Centre for Women)

122. Submission 4 (Australian Community Support Organisation); Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 13 (Law and Advocacy Centre for Women).

2.47 Many stakeholders supported the introduction of a purpose of sentence deferral specific to the cultural backgrounds and the particular needs and circumstances of Aboriginal and Torres Strait Islander people,[123] and roundtable participants unanimously supported this purpose.[124] For example:

- Fitzroy Legal Service recommended a new purpose to 'reduce the impact of criminalisation on people who are marginalised, including but not limited to … Aboriginal and Torres Strait Islander people';[125]
- LACW said that sentence deferrals 'have the potential to be a vehicle' for ending the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system. LACW supported reforms to allow 'consideration of a person's First Nations background in deciding the availability of sentence deferral to promote community-based options instead of incarceration';[126] and
- Victoria Legal Aid supported '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'.[127]

2.48 VALS suggested that courts should be legislatively required to consider 'the unique systemic and background factors affecting Aboriginal peoples in relation to sentence deferrals' and emphasised that 'this should be framed as a mandatory legislative requirement rather than a legislative purpose'.[128] VALS further recommended that section 83A should require courts to 'demonstrate the steps taken to discharge this obligation and provide reasons if an application for a sentence deferral for an Aboriginal person is not granted'.[129] Although the reforms suggested by VALS extended beyond a legislative purpose, VALS supported the recommendation to include a purpose specific to Aboriginal and Torres Strait Islander people in the suite of new purposes recommended by the Council.[130]

2.49 Stakeholders identified several functions and benefits of a specific purpose of sentence deferral for Aboriginal and Torres Strait Islander people.

123. Submission 3 (Jesuit Social Services); Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)); Submission 11 (Fitzroy Legal Service); Meeting with Law Institute of Victoria (4 September 2023).
124. Stakeholder Roundtable (10 August 2023).
125. Submission 11 (Fitzroy Legal Service).
126. Submission 13 (Law and Advocacy Centre for Women).
127. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)).
128. Submission 12 (Victorian Aboriginal Legal Service).
129. Submission 12 (Victorian Aboriginal Legal Service).
130. Meeting with Victorian Aboriginal Legal Service (4 August 2023).

A specific purpose may increase awareness and consistency

2.50 A specific purpose may support the increased use of sentence deferral in appropriate cases by highlighting considerations relevant to Aboriginal and Torres Strait Islander people.[131] For example, sentence deferral may assist in sentencing Aboriginal and Torres Strait Islander people who have kinship responsibilities, such as caring for extended family or Elders.

A specific purpose may provide a mechanism for identifying culturally safe and appropriate programs and services

2.51 Sentence deferral creates an opportunity to link Aboriginal and Torres Strait Islander people with culturally safe and appropriate services and programs 'which connect them with culture and community'.[132] This opportunity 'places the court in a better position to understand the person's rehabilitation prospects and to craft an appropriate and tailored sentence' at the end of the deferral period.[133] In this way, sentence deferral may 'help address the complex, intersecting factors which drive incarceration rates, particularly where [deferral] facilitate[s] access to culturally appropriate and targeted interventions'.[134]

2.52 However, stakeholders pointed out that while deferral can broaden the opportunity for linking an offender with culturally safe and appropriate programs and services, this opportunity depends on such programs being available, effective and

> "I just raise that as one example, amongst the many, of the continuing impacts of dispossession, segregation, subjugation, assimilation policies, systemic racism and discrimination that Aboriginal communities have suffered and that have led to disadvantage and further trauma. Alongside that history, of course, sits the amazing resilience, leadership and strength shown by many of your community and family and that your Elders have set as examples and urge you to look towards for inspiration in the future.
>
> ***DPP v Rotumah***
> **[2022] VCC 1532 [47]**

131. See, for example, Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)).
132. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)).
133. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)).
134. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)).

accessible, including in regional Victoria.[135] VALS told us that 'Aboriginal specific rehabilitative programs, including drug and alcohol or behaviour change programs, regularly have limited capacity and long waiting times for admission'.[136] In relation to sentence deferral, VALS emphasised that 'there is a critical need for funding reform to increase the capacity of Aboriginal organisations to develop, implement and evaluate culturally safe deferral programs'.[137] Jesuit Social Services also emphasised the need for sentence deferral to be 'accompanied by initiatives that are designed, controlled, and delivered by the Aboriginal community to ensure the best outcomes for Aboriginal people involved with the justice system'.[138] And both VALS and the County Court supported extending the availability of the Court Integrated Services Program (CISP) to 'increase participation from marginalised groups such as Aboriginal persons'.[139]

A specific purpose could facilitate attendance at funerals and participation in sorry business

2.53 A roundtable participant commented that a specific purpose of sentence deferral would enable Aboriginal and Torres Strait Islander people to attend funerals and participate in sorry business prior to sentencing.[140] A consequence of the lower life expectancy of Aboriginal and Torres Strait Islander people is that they are likely to more frequently experience loss and grief throughout their lifetime than non-Aboriginal people. The experience of frequent grief and loss compounds other trauma, as identified in a 1995 report on Aboriginal and Torres Strait Islander mental health:

> trauma and grief [are] the most serious issue, both related to past history of loss and traumatisation, and to current frequent losses as a result of high mortality rates and ongoing losses through removal of children and incarceration. Traumatic loss was seen as a cause of mental health problems and as a major problem in its own right, fundamental to Aboriginal health and well-being.[141]

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135. See, for example, Submission 2 (County Court of Victoria); Submission 3 (Jesuit Social Services); Submission 4 (Australian Community Support Organisation); Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 6 (No to Violence); Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)); Submission 10 (Law Institute of Victoria); Submission 11 (Fitzroy Legal Service); Submission 12 (Victorian Aboriginal Legal Service); Submission 13 (Law and Advocacy Centre for Women).
136. Victorian Aboriginal Legal Service, *Submission to Sentencing Advisory Council's Consultation on Adjourned Undertakings Reform* (2022) 12. See also Victorian Aboriginal Legal Service, *Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System* (2022); Victorian Aboriginal Legal Service, *Submission to the Inquiry into Victoria's Criminal Justice System* (2021); Victorian Aboriginal Legal Service, *Submission to the Commission for Children and Young People Inquiry: Our Youth, Our Way* (2019).
137. Submission 12 (Victorian Aboriginal Legal Service).
138. Submission 3 (Jesuit Social Services).
139. Submission 12 (Victorian Aboriginal Legal Service); Submission 2 (County Court of Victoria).
140. Stakeholder Roundtable (10 August 2023).

2.54 The importance of sorry business in the context of bail applications has also been recognised in caselaw.[142] In one example, the Supreme Court of New South Wales commented that 'the marking of a death of a beloved person is an important aspect of all human cultures' and 'with regard to the cultures of First Nations people of this country, funerals and "sorry business" are exceptionally important'.[143] In another case, the Supreme Court of Victoria noted that:

> the applicant and his family are grieving the loss of his sister, and his period of remand prevents him being with family and community during the period of grief. Part of the grieving process for the applicant's community involves being in the company of family for extended periods after the loss. In that context, the prohibition on visits by family members and others to prison would render the applicant's period of remand even more onerous.[144]

A specific purpose could facilitate a pre-sentence health assessment

2.55 VALS noted that a purpose of sentence deferral specific to Aboriginal and Torres Strait Islander people may also facilitate a practice of getting comprehensive health assessments prior to sentencing, particularly for people facing a prison sentence.[145] This purpose would augment the health-based purpose discussed above (Recommendation 3). VALS noted that Aboriginal and Torres Strait Islander people experience worse health outcomes in the community, and they often do not get the same level of assessment, treatment and care as non-Aboriginal and Torres Strait Islander people.[146] VALS told us that undiagnosed or untreated medical conditions are a particular issue for people in custody and a preventable contributor to Aboriginal deaths in custody. VALS suggested that it should become standard practice for Aboriginal and Torres Strait Islander people to get comprehensive health assessments prior to sentencing and that this could be facilitated by sentence deferral.[147]

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141. Megan Wynne-Jones et al., 'Aboriginal Grief and Loss: A Review of the Literature' (2016) 16(3) *Australian Indigenous HealthBulletin* 1, 2, citing Pat Swan and Beverley Raphael, '*Ways Forward': National Consultancy Report on Aboriginal and Torres Strait Islander Mental Health* (1995).
142. See, for example, *Re Kennedy* [2020] VSC 187 (Kaye JA); *Director of Public Prosecutions (NSW) v PH* [2022] NSWSC 1245 (Button J).
143. *Director of Public Prosecutions (NSW) v PH* [2022] NSWSC 1245 (Button J).
144. *Re Kennedy* [2020] VSC 187 (Kaye JA).
145. Meeting with Victorian Aboriginal Legal Service (4 August 2023).
146. Meeting with Victorian Aboriginal Legal Service (4 August 2023).
147. Submission 12 (Victorian Aboriginal Legal Service); Meeting with Victorian Aboriginal Legal Service (4 August 2023). See also *Inquest into the Passing of Veronica Nelson,* COR 2020 0021 (30 January 2023) 305.

A specific purpose could facilitate a community justice report

2.56 Several stakeholders told us that a specific purpose would help to provide time for the preparation of an 'Indigenous experience report',[148] such as the 'community justice reports' currently being piloted by VALS. Such reports are modelled on Canada's *Gladue* reports and aim to 'improve sentencing processes and outcomes for Aboriginal and Torres Strait Islander defendants' and to reduce their over-incarceration.[149] Community justice reports are a culturally specific pre-sentence report providing 'a more holistic account of individual circumstances, including as they relate to a person's community, culture and strengths'.[150]

> "Community Justice Reports referrals made as part of a deferral plan will allow the court to make a more culturally informed, grounded and holistic sentencing decision, increase the court's ability to fully 'see' the person appearing before them, and strengthen their ability to take into account the ongoing impacts of colonisation, trauma and dispossession on the person they are sentencing, their family and their community. Further, Community Justice Reports can empower courts to understand culture as an inherently protective factor, grounded in strength and resilience.
>
> **Submission 3 (Jesuit Social Services)**

2.57 Community justice reports may be particularly useful combined with sentence deferral.[151] Sentencing can be deferred to obtain a report and/or to create space prior to sentencing for an offender to engage with the services and programs set out in the report.[152] The reports include 'recommendations to

148. Submission 12 (Victorian Aboriginal Legal Service). See also Submission 3 (Jesuit Social Services); Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)).
149. Victorian Aboriginal Legal Service, 'Community Justice Reports' (vals.org.au, 2023) (referred to in Submission 3 (Jesuit Social Services).
150. Ibid.
151. Submission 3 (Jesuit Social Services); Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw).
152. Submission 3 (Jesuit Social Services); Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)); Victorian Aboriginal Legal Service (2023), above n 149. See also Victorian Aboriginal Legal Service, *Addressing Over-Incarceration: Discussion Paper* (2017).

the court [about] therapeutic and culturally appropriate sentences',[153] and details about the community-based support options available to the person. VALS emphasised that 'Aboriginal people in the justice system respond much better to prevention, diversion and other justice programs when they are community led and culturally based'.[154] And in a 2022 case, the County Court discussed the benefits of community justice reports in sentencing Aboriginal and Torres Strait Islander people, noting that the reports provide the court 'with an evidentiary basis to consider all of the relevant circumstances that have shaped [a person and their] responses through life'.[155]

2.58 Section 83A already provides for pre-sentence reports to be prepared and considered when courts defer sentencing.[156] However, community justice reports differ from other pre-sentence reports in terms of content and focus; in particular, community justice reports have the capacity to include evidence 'that relates directly to the unique experiences of Aboriginal people and the impacts of colonisation, particularly from a community perspective'.[157] Community justice reports are 'consistent with recommendations from the Royal Commission Into Aboriginal Deaths In Custody relating to Aboriginal participation and accessibility in the Court process' and:

> provide a wider lens that brings perspective on the collective experiences of the individual, family and community. They provide a relevant history of colonisation and its impacts, as well as an outline of contemporary interventions, circumstances, policies and laws and their impacts on Aboriginal communities.[158]

153. Victorian Aboriginal Legal Service (2017), above n 152, 6–7.
154. Ibid. Community justice reports are 'prepared by independent, Aboriginal community writers and researchers' who 'consult with the offender, their family and relevant community members (with permission)'. Community justice reports also include 'academic information relevant to the person's experience[,] for example, inter-generational trauma and the impacts of child removal': Victorian Aboriginal Legal Service (2023), above n 149.
155. *DPP v Tirris* [2022] VCC 1575 [126]–[129].
156. *Sentencing Act 1991* (Vic) ss 83A(2)(c), 83A(3)(b).
157. Victorian Aboriginal Legal Service (2017), above n 152, 6–7.
158. *DPP v Tirris* [2022] VCC 1575 [125], [126]–[129]. The Yoorrook Justice Commission's report recommended that the *Sentencing Act* be amended to 'require courts to take into account the unique systemic and background factors affecting First Peoples', and 'require the use of Gladue-style reports for this purpose': Yoorrook Justice Commission (2023), above n 117, 37 (Recommendation 37(c)).

The Council's view

2.59 The Council is persuaded by submissions highlighting the need for a purpose of sentence deferral specific to the 'unique systemic and background factors affecting Aboriginal peoples'.[159]

2.60 The 1991 report of the Royal Commission into Aboriginal Deaths in Custody called attention to the systemic and policy issues that contributed to the 'disproportionate number of Aboriginal people being held in all forms of custody and in most locations throughout Australia'.[160] The Royal Commission emphasised the importance of including a broad range of sentencing options in state justice systems to give meaning to the requirement that imprisonment is the sentence of last resort.[161] Yet as recently as 2021–22, Aboriginal and Torres Strait Islander people accounted for 19% of Australian deaths in prison custody but only 3% of the Australian population.[162]

> "Care and treatment that is culturally safe for Aboriginal people and delivered by staff who are culturally competent is likely to promote the rights of Aboriginal people to enjoy their identity and culture by incorporating Aboriginal cultural practices and holistic understanding of health as well as social, emotional, spiritual and cultural wellbeing and allowing Aboriginal people to safely express their culture and identity when seeking and receiving care.
>
> ***Inquest into the Passing of Veronica Nelson*, COR 2020 0021 (30 January 2023) 30–31**

2.61 Even where a custodial sentence is unavoidable, a sentence deferral may be an important first option. For example, sentence may be deferred for the offender to get a comprehensive health assessment to ensure that any underlying health conditions are diagnosed and treated (or at least a treatment regime is established) prior to the offender entering custody. As discussed at [2.55], there is an established link between undiagnosed and/or untreated health conditions and deaths in custody.[163] In the findings of the inquest into the death of Veronica Nelson, the Victorian Coroner

159. Submission 12 (Victorian Aboriginal Legal Service).
160. Commonwealth of Australia, *Royal Commission into Aboriginal Deaths in Custody, Final Report*, vol. 1 (1991) [9.1.1].
161. Ibid [1.10.5].
162. Australian Institute of Criminology, *Deaths in Custody in Australia 2021–22*, Statistical Report 41 (2022) 7; Submission 12 (Victorian Aboriginal Legal Service).
163. Stakeholder Roundtable (10 August 2023); Meeting with Victorian Aboriginal Legal Service (4 August 2023).

identified 'fundamental failings in Veronica's custodial healthcare'[164] finding that she 'did not have access to health services equivalent to those available to her in the community'.[165] Sentence deferral is one crucial mechanism for addressing this issue by providing an alternate pathway for Aboriginal and Torres Strait Islander people to obtain a comprehensive health check and medical treatment prior to sentencing.

2.62 When accompanied by effective culturally safe and appropriate programs and services, options such as sentence deferral provide a mechanism for effecting genuine change. A specific purpose for Aboriginal and Torres Strait Islander people is intended to ensure that sentence deferral is considered in any case where rehabilitation and risk to the community could be addressed through a deferral and ultimately a community sentence.

2.63 The Council takes the view that a specific purpose of sentence deferral for Aboriginal and Torres Strait Islander people is a measure 'taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination' and therefore does not constitute discrimination under the Victorian *Charter of Human Rights.*[166] A specific purpose would facilitate culturally safe medical assessments and treatments and also protect human rights such as the right to life and the cultural rights of Aboriginal and Torres Strait Islander people, including their right to maintain kinship ties and to enjoy their identity and culture.[167]

2.64 The recommended specific purpose is intended to cover sentence deferral in a broad range of circumstances, including those discussed in this chapter, such as:

- for the offender to engage with a culturally safe and appropriate program or service;
- for the offender to attend a funeral and participate in sorry business;
- for the offender to obtain a comprehensive health check, attend a medical appointment or receive medical advice or treatment;
- for the preparation of a community justice report;

164. *Inquest into the Passing of Veronica Nelson,* COR 2020 0021 (30 January 2023) 305.
165. *Inquest into the Passing of Veronica Nelson,* COR 2020 0021 (30 January 2023) 3, 149.
166. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(4). See, for example, Victoria, *Parliamentary Debates*, Legislative Assembly, 2 September 2010, 3600 (Rob Hulls, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Assembly, 16 August 2023, 2895–2896 (Anthony Carbines, Minister for Police, Minister for Crime Prevention, Minister for Racing).
167. *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 9, 19; *Inquest into the Passing of Veronica Nelson,* COR 2020 0021 (30 January 2023) 30–31.

- for the offender to make arrangements where they have carer responsibilities such as parental, kinship or Elder caring responsibilities;
- for the offender to access support that promotes their social and emotional wellbeing and healing, and to address any experience of trauma, including the effect of that trauma on the offender's development and capacity to avoid problematic behaviour;
- to address or avoid systemic racism, increased disadvantage and postcolonial and intergenerational trauma experienced by Aboriginal people, including any culturally inappropriate responses that may have worsened the effects of trauma;
- to address the risk that incarceration poses for Aboriginal people;
- for young adults, in particular, to address issues arising from existing or previous disruption to their living situation or education and to support their need to have a safe, stable and secure living arrangement.

2.65 The wording of the recommendation was informed by our consultation, particularly with VALS, who supported the specific purpose and proposed wording.[168] Roundtable participants also unanimously supported the specific purpose and its proposed wording.[169] If this recommendation is implemented, we suggest that the wording of the new purpose is developed in further consultation with Aboriginal and Torres Strait Islander peoples and with Aboriginal Community Controlled Organisations including VALS.

Recommendation 4

That the Government amend section 83A of the *Sentencing Act* to add the following purpose of sentence deferral: 'If the offender is an Aboriginal person, for any reason relating to their cultural background, responsibilities, particular needs, or experience.'

168. Meeting with Victorian Aboriginal Legal Service (4 August 2023); Email from Victorian Aboriginal Legal Service to Sentencing Advisory Council (9 October 2023).
169. Stakeholder Roundtable (10 August 2023).

Young adult offenders

2.66 As discussed at [1.3], sentence deferral started in Victoria in 1991 as an option for children, extending to the Magistrates' Court in 2000 as an option for young people aged 17–25. It wasn't until 2012 that sentence deferral was extended to all adult offenders sentenced in the Magistrates' Court and County Court.

2.67 We found that sentence deferral is well used for young adult offenders (offenders aged 18–25 at sentencing), reflecting the origins of sentence deferral in Victoria. Young adult offenders comprised 33% of the deferral population from 2012 to 2020, but only 25% of the general offender population in the Magistrates' Court.[170]

2.68 Several submissions highlighted the importance of sentence deferral as an option for young adults.[171] For example, Jesuit Social Services commented that:

> [w]e believe sentence deferral is a key strategy to divert young adults away from future contact with the adult justice system and provides a crucial opportunity to engage young adults with important supports to address factors related to their offending.[172]

2.69 Young adult offenders differ from older adult offenders in several ways, as summarised in our 2019 report *Rethinking Sentencing for Young Adult Offenders*:

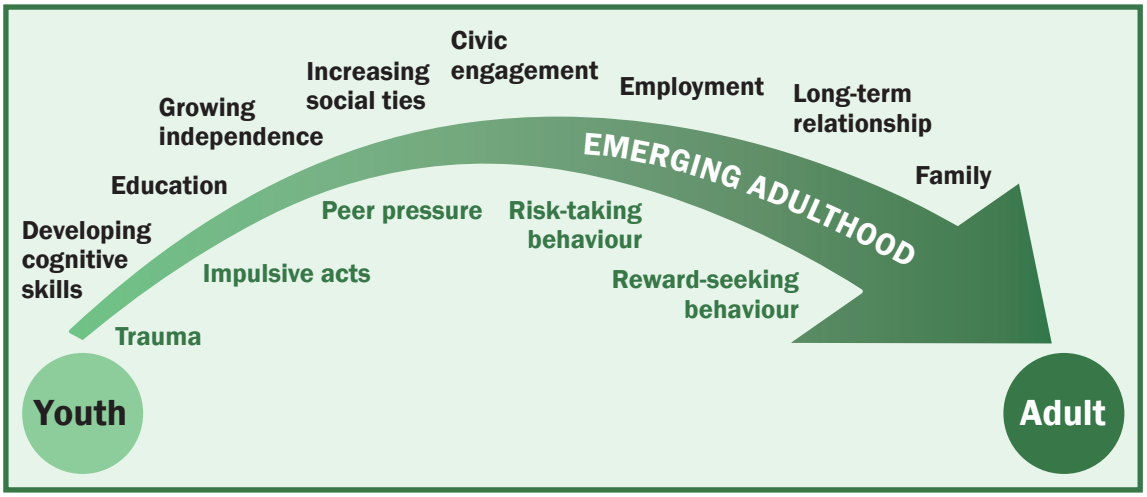
> The immaturity of adults in their late teens and early twenties is characterised by incomplete neurological development and psychological limitations that include impaired understanding of consequences, impulsiveness, disproportionate emotional arousal and disproportionate reward sensitivity. These limitations can lead to offending behavioural patterns that are typical of young people: opportunistic, public and often group-related.
>
> There is mounting scientific evidence that young adults aged 18–25 are developmentally distinct from older adults and should be treated as such by the justice system. Research in neurology and developmental psychology has demonstrated that cognitive skills and emotional intelligence continue to develop into a person's mid-20s, and even beyond.[173]

170. *Consultation Paper* 6.
171. Submission 3 (Jesuit Social Services); Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)); Submission 11 (Fitzroy Legal Service); Submission 12 (Victorian Aboriginal Legal Service).
172. Submission 3 (Jesuit Social Services).
173. Sentencing Advisory Council, *Rethinking Sentencing for Young Adult Offenders* (2019) xii.

2.70 In that report, we observed that, compared to older adults, young adult offenders have lower completion rates on community sentencing orders and higher reoffending rates. The most prolific offenders are also the most vulnerable. However, research also shows that 'young adult offenders generally reduce their offending behaviour as they mature into adulthood, and most will eventually stop'.[174] The report suggested a new, specific sentencing factor relating to young adult offenders' developmental, or 'psychobiological' maturity,[175] and concluded that:

> [t]his natural desistance [in offending behaviour], along with the fact that behaviour patterns are not as firmly entrenched in young adults as in older adults, means that young adult offenders can be more responsive to rehabilitative interventions than older adults. There is potential to improve outcomes for both society and young adult offenders if they can be supported into this reduction in offending behaviour as early as possible. Criminogenic environments, including prison, can be counterproductive to this process, as they can entrench patterns of offending behaviour.[176]

Figure 2: Developmental factors and milestones in transition to adulthood (adapted from Columbia Justice Lab)



2.71 Measures like sentence deferral are therefore particularly important for young adult offenders. A strength of sentence deferral for this group is its capacity to enable their rehabilitation in the community away from the criminogenic influence of other offenders. The possibility of a lesser sentence also provides a powerful incentive for young adult offenders to demonstrate their willingness and ability to rehabilitate.

174. Ibid xiii.
175. Ibid 69.
176. Ibid xiii.

These benefits are illustrated in Case Study 3, 'Ben', provided by Victoria Legal Aid, who considered that a 'key benefit of deferred sentencing' is the ability to support the rehabilitation process 'through flexibility and problem-solving approaches'.[177]

Case Study 3: Ben

Ben, who is 18 years old, 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 on remand and was then granted bail on strict conditions, including being supervised by the youth justice bail program.

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

At the 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 continue, Ben's matter was deferred for a period of 6 months, and Ben 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 the sentence hearing, the judge sentenced Ben to a 24 month community correction order without conviction. Ben managed to remain in the community, and access supports and employment despite the setbacks he faced.

Submission 5 (Victoria Legal Aid)

177. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)). These benefits are also illustrated in Case Study 1 of our consultation paper (based on *DPP v Wharton* [2014] VCC 1844): *Consultation paper* 37.

Stakeholder views

2.72 Our consultation paper found that deferral is regularly used for young adult offenders (aged 18–25). Several submissions advocated for a specific purpose of sentence deferral focusing on the distinct rehabilitation challenges and needs of this group.[178] VALS supported the introduction of a new legislative purpose that would encourage sentence deferral to '[s]upport young adults aged 18–25 years to access age-appropriate services'. VALS explained that such a purpose would 'underline the importance of sentence deferrals for young adults aged 18–25 years', commenting that 'opportunities for healing … are particularly important for young offenders where all avenues for diversion away from the criminal legal system must be prioritised'.[179]

2.73 Roundtable participants unanimously supported a specific purpose for young adult offenders. Participants emphasised the need for the purpose to encompass a young person's vocational needs, which we have included in Recommendation 5, and issues around youth homelessness, which are intended to be covered by the word 'vulnerability' in Recommendation 5.[180]

2.74 Consistent with the findings of our 2019 report,[181] many submissions also noted that there are insufficient specialist services for young adult offenders. This is concerning given the particular vulnerability of young adult offenders and the importance of rehabilitation for this group. Endorsing Victoria Legal Aid's submission, Youthlaw added that a lack of availability and access to services can be a 'real barrier' to sentence deferral for young adults. For example, Youthlaw commented that Youth Justice is 'often not available for young adults' because of limited resources and age eligibility. Further, 'CISP is often not available to young adults unless there is a risk of a term of imprisonment'.[182] Similarly, Jesuit Social Services called for funding for a 'specialised young adults case management and outreach service for 18–25 year olds appearing in the adult courts with a focus on addressing needs holistically that may be related to their court matters'.[183]

178. Submission 3 (Jesuit Social Services); Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw); Submission 11 (Fitzroy Legal Service); Submission 12 (Victorian Aboriginal Legal Service).
179. Submission 12 (Victorian Aboriginal Legal Service).
180. Stakeholder Roundtable (10 August 2023).
181. Sentencing Advisory Council (2019), above n 173, 1, 65, 73.
182. Submission 9 (Youthlaw).
183. Submission 3 (Jesuit Social Services).

The Council's view

2.75 We cannot overstate the importance of sentence deferral as a therapeutic option to divert young adults away from the criminal justice system. Successful rehabilitation of young adult offenders benefits not only them but also the community, which is spared the consequences of potentially decades of criminal behaviour and justice involvement.

2.76 We analysed recorded deferral cases in the Magistrates' Court from 2012 to 2020 and found that sentence deferral is well used for young adults, reflecting the importance of deferral for this group. In light of this finding and our consultation, we were persuaded that a new, youth-related purpose of sentence deferral should be inserted into section 83A. A youth-related purpose would reflect the origins of deferral, ensuring that the young people for whom deferral was initially designed remain at the forefront of deferral practice. A youth-related purpose would also serve as a reminder to practitioners and the judiciary that they should explore any prospects to engage young adult offenders in rehabilitation prior to sentencing.

2.77 A youth-related purpose is designed to support sentence deferral in appropriate cases for reasons including:

- identifying and accessing age-appropriate programs or services;
- addressing the offender's vulnerabilities, such as homelessness or disconnection from family;
- linking the offender back into education, training or vocational opportunities;
- recognising issues relating to the offender's developmental immaturity, such as their impressionability or susceptibility to be influenced by others; and
- assessing or considering their neurological, biological and psychosocial development and or specific needs relating to their youth.

Recommendation 5

That the Government amend section 83A of the *Sentencing Act 1991* (Vic) to add the following purpose of sentence deferral: 'If the offender is aged under 26, for any reason relating to their vulnerability, developmental maturity, or rehabilitative, educational or vocational needs'.

Other suggestions for reform

2.78 Stakeholders suggested a range of other purposes of sentence deferral, in addition to the purposes recommended in this chapter. Some suggestions covered similar ground but were framed differently, such as a purpose framed around disadvantage that was intended to include groups like young adult offenders within its ambit. For example, Fitzroy Legal Centre suggested an additional purpose 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.[184]

2.79 Other stakeholders went further than the purposes proposed in this chapter, for example, explicitly including specific health issues such as drug and alcohol dependency or specific groups such as people from culturally and linguistically diverse backgrounds.

2.80 In framing the recommendations in this chapter, we have been mindful of the need to balance two competing considerations: one, the need to keep the deferral provision relatively simple and the order itself flexible in scope, and two, the need to ensure the provision provides adequate guidance to ensure that sentence deferral is not overlooked in appropriate cases where it may be beneficial. We are confident that other suggestions for reform to the purposes of sentence deferral are adequately addressed by the new purposes proposed in this chapter together with the purposes already in section 83A.

184. Submission 11 (Fitzroy Legal Service).

3. Availability of sentence deferral

3.1 Currently, section 83A of the *Sentencing Act* specifies that the Magistrates' Court or County Court may defer an offender's sentence if:

- the court has found the offender guilty of an offence;
- the offender agrees to deferral; and
- the court is of the opinion that deferral is in the interests of the offender.[185]

3.2 This chapter explores these eligibility criteria, recommending changes to the availability of sentence deferral and the matters that a court must consider.

Extend sentence deferral to the Supreme Court

3.3 Sentence deferral became available in the Magistrates' Court for offenders aged 17 to 25 in 2000 and on our recommendation was extended to all adult offenders in the Magistrates' Court and the County Court in 2012 (see [1.3] and [2.66]). At the time, we decided not to recommend that the power to defer sentencing be extended to the Supreme Court 'due to the nature of the offences dealt with in that court'.[186]

3.4 In our consultation paper, we asked whether it is time to introduce sentence deferral in the Supreme Court. The Supreme Court may already informally defer sentencing via the general power to adjourn criminal proceedings for any reason the court considers appropriate.[187] For example, while the application was unsuccessful, in 2020 an offender applied to adjourn proceedings for six months because of the then unknown effect of COVID-19 on prisoners.[188] In 2004, a young adult offender's plea hearing was adjourned for approximately six months to enable him to continue his education and rehabilitation in a youth unit at Port Phillip Prison (the youth unit would not have been available to the offender after sentencing).[189]

185. *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].
186. Sentencing Advisory Council (2008), above n 3, 274.
187. *Criminal Procedure Act 2009* (Vic) ss 331(1)–(2).
188. *Guest v DPP* [2020] VSC 218.
189. *R v Tipas* [2004] VSC 25 [2]. Although this is a useful example, the wording of section 83A makes it unlikely that sentence deferral would be used for an offender who remained in custody.

And in 2023, an offender's plea hearing was adjourned so he could continue his progression on a community correction order (Case Study 4).

Case Study 4

After the offender had pleaded guilty to aggravated burglary. the offender's counsel requested the longest period possible before the plea was listed. The offender was on bail, was subject to a community correction order and was said to be progressing well with the rehabilitative aspects of that order. The plea hearing was listed for three months later. On the plea, the offender's counsel urged the court to impose a non-custodial disposition to avoid hindering the rehabilitation that was being achieved. That submission was not accepted in the circumstances.

***DPP v Fahal* [2023] VSC 272**

Stakeholder views

3.5 Most stakeholders supported extending deferral to the Supreme Court, even if it would only be used in rare cases.[190] The Supreme Court itself outlined the benefits of making sentence deferral available as an additional tool in appropriate cases, for example:

> An accused may be charged with assist offender before the Court, but have played a minor role in the offence, have pleaded guilty and offered to give evidence against the main offender but that trial is some time away. They may be linked into a rehabilitation service and potentially be at risk of retribution from other offenders. Deferral of sentence may be a useful tool in such situations.[191]

190. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 7 (Professor Felicity Gerry KC); Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)); Submission 10 (Law Institute of Victoria); Submission 11 (Fitzroy Legal Service); Submission 13 (Law and Advocacy Centre for Women); Stakeholder Roundtable (10 August 2023).
191. Email from Supreme Court of Victoria to Sentencing Advisory Council (26 June 2023).

3.6 While the Supreme Court can informally defer sentencing via the general adjournment power, stakeholders (especially the Law Institute of Victoria) described several shortcomings with this approach, which would be addressed by extending the power in section 83A to the Supreme Court. For example:

- the current approach creates uncertainty about the ability or appropriateness of informal deferrals in the Supreme Court under section 333 of the *Criminal Procedure Act*, as 'practitioners and Judges may not consider them to be an available option, even in circumstances where they would be appropriate'.[192] An express power would 'clearly signal that sentence deferrals are available and can be made in that jurisdiction', which may address the current uncertainty 'if coupled with adequate education and training';[193]
- uncertainty creates an associated risk that informal deferral will be inconsistently used and not made available in all cases where it might be appropriate. An express power would increase consistency of use of deferral in the Supreme Court by addressing the current lack of certainty;[194]
- there is no guidance in the Supreme Court about the appropriate reasons to adjourn, how long to adjourn for, and any review processes. An express deferral power would regularise the use of deferral 'by creating rules about when [deferrals] are appropriate and what conditions must be satisfied for [deferral] to be ordered', which would provide 'clarity about when a sentence deferral is suitable and certainty about the process';[195] and
- the Supreme Court should have available to it 'whatever sentencing or pre-sentencing option is most appropriate to the case before them',[196] which will 'allow for consistency in sentencing across jurisdictions and equitable access to the benefits of a deferred sentence'.[197]

192. Submission 10 (Law Institute of Victoria).
193. Submission 10 (Law Institute of Victoria).
194. Submission 10 (Law Institute of Victoria).
195. Submission 10 (Law Institute of Victoria).
196. Submission 10 (Law Institute of Victoria).
197. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice.

3.7 No to Violence's submission was the only one to oppose extending sentence deferrals to the Supreme Court. No to Violence said that offending heard in the Supreme Court is too serious for sentence deferral to be considered.[198] Other stakeholders noted, however, that while most cases heard in the Supreme Court are very serious, less serious cases are also heard in that jurisdiction.[199] Our finding in our consultation paper supports this view: 17% of people sentenced in the Supreme Court do not receive a prison sentence.[200] The Supreme Court explained that:

> [m]aking this option available would be consistent with the range of matters that come before the Court.
>
> While the primary focus of the Court's criminal jurisdiction is on very serious cases, it does deal with lower level offending in particular instances. This will often be in the context of more serious offending by another offender. The Court also deals with cases where non-custodial sentences are warranted, some without conviction.
>
> Again while not common, the *Criminal Procedure Act 2009* enables certain summary offences to be dealt with by the Court. As a result some matters before the Court are not necessarily more serious than matters dealt with in the County Court, or even in some instances the Magistrates' Court.[201]

3.8 Similarly, Victoria Legal Aid noted that changes in the cases heard in the Supreme Court have increased the relevance of sentence deferral in that jurisdiction. Victoria Legal Aid observed that 'the biggest barrier to using sentence deferrals in the Supreme Court is the severity of charges and lengthy periods of imprisonment' but 'an inevitable sentence of imprisonment should not always be a barrier to … a sentence deferral'.[202]

3.9 Stakeholders also acknowledged that the serious nature of most offending heard in the Supreme Court increases the risk that sentence deferral will cause trauma to victims. However, as in other courts, the potential effect of delay would be relevant to the Supreme Court's decision whether to defer sentencing,

198. Submission 6 (No to Violence).
199. Email from Supreme Court of Victoria to Sentencing Advisory Council (26 June 2023); Submission 5 (Victoria Legal Aid).
200. *Consultation Paper* 10.
201. Email from Supreme Court of Victoria to Sentencing Advisory Council (26 June 2023).
202. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice.

along with other considerations. The Supreme Court said that '[t]he Court is conscious of the impact of delay on victims and weighs this with other relevant factors including community benefits'.[203]

The Council's view

3.10 We are persuaded that there is merit in extending sentence deferral to the Supreme Court. Making formal sentence deferral available would provide transparency and consistency to the process, rather than requiring the Supreme Court to fall back on its general adjournment powers. There was strong stakeholder support for extending deferred sentencing to the Supreme Court, with only one submission raising concerns about its use in serious cases. However, as described throughout this report, there are a multitude of circumstances where sentence deferral would be appropriate, even if a prison sentence is inevitable. And the Supreme Court does not only hear serious cases that demand a prison sentence.

3.11 Ultimately, if sentence deferral is extended to the Supreme Court, the discretion to defer sentencing would rest with the sentencing judge, who would determine whether it was in the interests of justice (if Recommendation 7 is implemented), weighing up all the circumstances of the case including the purpose of the proposed deferral, the effect of delay on the victim, the seriousness of the offence, the likelihood of a prison sentence, the risk posed by the offender and the interests of the community.

Recommendation 6

That the Government amend section 83A of the *Sentencing Act 1991* (Vic) to allow sentence deferral in the Supreme Court.

203. Email from Supreme Court of Victoria to Sentencing Advisory Council (26 June 2023), providing the following examples in the context of the adjournment power: 'In *McGrath v The Queen* [2018] VSCA 134 the Court of Appeal in considering the appropriateness of refusing an application for an adjournment noted there was a legitimate public interest in seeking to expedite the finalisation of the plea hearing in order to reduce the stress and distress which it could be expected to cause to the family of the deceased victim. In *R v Furlan* [2014] VSC 361 the Court adjourned sentencing as a result of the death of the offender's father on the day listed for sentence, but noted the interest of the deceased victim's family in having the matter proceed had been considered'.

The interests of justice

3.12 Section 83A of the *Sentencing Act* currently requires courts to consider the 'interests of the offender' in deciding whether to defer sentencing. The offender's consent to the sentence deferral is also required.

3.13 During our preliminary consultations and again in submissions, stakeholders raised the issue of the priority given to the offender's interests as a requirement for deferring sentence. In our consultation paper, we asked for feedback on this requirement, exploring issues such as whether the interests of the victim and/or the interests of justice should be considered instead of, or as well as, the interests of the offender, or whether a different approach would be preferable (such as removing this requirement altogether).

Stakeholder views

3.14 The Law Institute of Victoria noted that the current requirement for a court to consider the interests of the offender stemmed from the origins of sentence deferral, when it was an option exclusively available for children, and then for young adult offenders, reflecting the prominence of rehabilitation in sentencing young people.[204] However, the requirement did not change when sentence deferral was extended to older offenders, despite other sentencing purposes – such as just punishment and community protection – often carrying more weight when sentencing that cohort.

3.15 Stakeholders who addressed this question were divided, as were roundtable participants. The County Court was of the view 'that the current criteria and considerations … are sufficient'.[205] Other stakeholders, including roundtable participants, thought that change was necessary but differed in their approach to what change should occur. The main alternatives suggested were to:

1. remove the 'interests of the offender' consideration (with applications instead simply focusing on the purpose for which the deferral was sought);
2. retain the 'interests of the offender' consideration but add more considerations; or
3. replace the 'interests of the offender' consideration with a more balanced 'interests of justice' consideration.

204. Submission 10 (Law Institute of Victoria).
205. Submission 2 (County Court of Victoria).

Option 1: Removing the 'interests of the offender' consideration

3.16 This option proposed simply removing the requirement to consider the interests of the offender, with applications instead focusing on the purpose(s) of the sentence deferral. When we canvassed this option at our roundtable and in subsequent consultation, there was neither strong support nor opposition to it, but there was generally a preference for the other two options.[206] One roundtable participant said that the 'interests of the offender' should be retained to highlight that the offender's needs and circumstances are central to a deferral decision. Another observed that because the purposes of deferral already extend beyond an offender's interests, there is a 'potential conflict' between some of the existing and proposed purposes of deferral and the legislative requirement to only consider the interests of the offender. For example, a restorative justice process should not proceed unless it is in the interests of the victim and the victim consents.[207]

Option 2: Adding further considerations in addition to the 'interests of the offender'

3.17 Several stakeholders proposed amending section 83A to include additional mandatory requirements that must be satisfied before a court defers sentencing. But the Law Institute of Victoria cautioned 'that any such list not be so prescriptive that it would unduly restrict judicial officers from exercising their discretion to defer a sentence … in appropriate cases'.[208] There was also no consensus about which considerations should be added or prioritised. The suggested factors included:

- the impact of the criminal justice system on marginalised groups, especially Aboriginal and Torres Strait Islander people, and the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples;[209]
- any risks an offender may pose during a deferral period, especially in family violence cases;[210]
- the views or interests of, or possible effects on, the victim;[211]

206. Stakeholder Roundtable (10 August 2023).
207. Stakeholder Roundtable (10 August 2023).
208. Submission 10 (Law Institute of Victoria).
209. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)); Submission 10 (Law Institute of Victoria); Submission 12 (Victorian Aboriginal Legal Service).
210. Submission 6 (No to Violence).
211. Email from Victims of Crime Commissioner to Sentencing Advisory Council (4 August 2023).

- whether the offender is a woman, is pregnant or breastfeeding, or is a primary caregiver;[212] and
- the importance of treatment and harm reduction relating to alcohol and drug dependence.[213]

3.18 Factors relating to Aboriginal and Torres Strait Islander people and the effect of sentence deferral on victims received the most support from stakeholders, although they had mixed views for[214] and against[215] the inclusion of the effect on the victim as a consideration.

3.19 No to Violence said that '[v]ictim survivors might be consulted and their views considered, should the Courts grant a deferred sentence'.[216] Highlighting the importance of considering the impact of deferral on the victim, the Supreme Court noted that in adjourning sentencing currently, the Court is 'conscious of the impact of delay on victims and [weighs] this with other relevant factors including community benefits'.[217]

> "To effectively address this overrepresentation, it is important to acknowledge that the overrepresentation of First Nations people in the criminal justice systems is partly caused by systemic racism and unconscious bias in the application of the law. To be effective, reforms need to target those issues. The LIV submits that systemic racism and unconscious bias could be targeted by requiring the court to consider whether an offender is an Aboriginal and/or Torres Strait Islander person in forming its opinion as to whether a deferral is appropriate.
>
> **Submission 10**
> **(Law Institute of Victoria)**

3.20 Other stakeholders expressed concern about a new legislative consideration relating to the interests of, or effects on, the victim.[218] Some viewed a new consideration as unnecessary as there is already consideration of the victim's views or victim impact at other stages, such as bail, sentence indication and sentencing.[219]

212. Submission 10 (Law Institute of Victoria).
213. Submission 1 (Victorian Alcohol and Drug Association).
214. Email from Victims of Crime Commissioner to Sentencing Advisory Council (4 August 2023); Submission 6 (No to Violence).
215. Submission 7 (Professor Felicity Gerry KC); Submission 11 (Fitzroy Legal Service); Submission 13 (Law and Advocacy Centre for Women).
216. Submission 6 (No to Violence).
217. Email from Supreme Court of Victoria to Sentencing Advisory Council (26 June 2023), providing two cases as examples in the context of the adjournment power: see above n 203.
218. Submission 7 (Professor Felicity Gerry KC); Submission 11 (Fitzroy Legal Service); Submission 13 (Law and Advocacy Centre for Women).
219. Submission 13 (Law and Advocacy Centre for Women).

In addition, one reason for introducing statutory purposes of deferral was as a protection to 'help to ensure that deferral is not used by defendants as a means of unnecessarily prolonging proceedings'.[220] Victoria Legal Aid suggested that 'any changes to how the interests of victims are considered when determining whether to defer sentence' should be examined in the context of the system-wide response to victims of crime, rather than isolated to a specific process.[221]

3.21 Another concern was the potential for further delay if courts were required to seek direct victim input, particularly in the Magistrates' Court.[222] Given existing concerns around the potential for sentence deferral to add trauma to victims by delaying finalisation of matters, it may be counter-productive to compound delay by postponing a deferral decision in order to contact the victim and seek their views. However, in response to such concerns, the Victims of Crime Commissioner commented:

> I support legislative reform that would require the court to consider the needs of victims when considering a sentence deferral. While the high-volume nature of the summary jurisdiction (where deferrals often occur) is often raised as a key reason not to enhance consideration of victims' interests and entitlements, I believe the operation of the justice system must continue to evolve to enhance victim participation.[223]

3.22 The Victims of Crime Commissioner suggested that 'prosecutors should have a role in facilitating victim participation and informing the court of victims' views or the possible effects of deferral on any victims', adding that '[v]ictims' concerns may relate to impacts of delay and safety concerns if the sentence is deferred'.[224]

3.23 Another concern related to the expectations of victims. Victim Services, Support and Reform noted that involving victims in the deferral decision risks further traumatising them if they expect their views to influence the ultimate decision (as opposed to their views being one of several considerations).[225] Victim Services, Support and Reform instead supported requiring courts to consider the 'interests of justice' as a more balanced approach:

> Requiring the court to consider the interests of justice (which includes consideration of the victim(s)' interests as well as risks to the community), rather than just the offender's

220. Sentencing Advisory Council (2008), above n 3, 274.
221. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)).
222. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)); Submission 11 (Fitzroy Legal Service); Submission 12 (Victorian Aboriginal Legal Service); Submission 13 (Law and Advocacy Centre for Women).
223. Email from Victims of Crime Commissioner to Sentencing Advisory Council (4 August 2023).
224. Email from Victims of Crime Commissioner to Sentencing Advisory Council (4 August 2023).
225. Email from Victim Services, Support and Reform to Sentencing Advisory Council (19 December 2022).

> interests, is a more balanced way of determining the appropriateness of sentence deferral in individual matters than is currently the case. Considering 'the interests of justice' is therefore potentially another effective way of ensuring victims are considered without requiring specific input from individual victims.[226]

Option 3: Replacing the 'interests of the offender' with the 'interests of justice'

3.24 Stakeholders, including some roundtable participants, gave the most support to the option of replacing the 'interests of the offender' with the 'interests of justice'.[227] An argument for this option is that it would introduce more balance to the court's decision-making, by balancing the interests of the offender with a range of other considerations which could be developed in case law.[228] The views or potential effects on the victim would be relevant, as would the interests of the broader community and, for example, the interests of any of the offender's dependent children. The County Court, for instance, said that it:

> is generally supportive of the availability of deferrals being based on whether it is in the interests of justice to do so. This would appropriately apply to the wide cohort that may be captured by the scheme, even where offences are inherently serious.[229]

3.25 Emeritus Professor Arie Frieberg AM commented that an obligation to consider the 'interests of justice' would require a judge to 'balance the risks to the community, the interests of the victim, and what's good for the defendant in terms of their rehabilitation, and their likelihood of reoffending'.[230] In cases where an offender is pregnant or has dependent children, deferral may be in the interests of justice in the long term by reducing:

> the risk of intergenerational trauma or offending by providing for a child to be brought up in circumstances outside of prison. So there are longer term societal benefits beyond having the baby with the mother, which is an important benefit as well.[231]

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226. Email from Victim Services, Support and Reform to Sentencing Advisory Council (19 December 2022).
227. Submission 10 (Law Institute of Victoria); Email from Victim Services, Support and Reform to Sentencing Advisory Council (19 December 2022); Email from County Court of Victoria to Sentencing Advisory Council (26 October 2023); Meeting with Emeritus Professor Arie Frieberg AM (28 August 2023); Stakeholder Roundtable (10 August 2023).
228. Stakeholder Roundtable (10 August 2023).
229. Email from County Court of Victoria to Sentencing Advisory Council (26 October 2023).
230. Meeting with Emeritus Professor Arie Frieberg (28 August 2023).
231. Meeting with Emeritus Professor Arie Frieberg (28 August 2023).

3.26 The Law Institute of Victoria initially supported a list of statutory factors to help guide the court's decision as to whether deferral was in the interests of justice.[232] However, they ultimately favoured a simple requirement for courts to consider 'the interests of justice', especially if the purposes of sentence deferral were given more prominence in ('moved to the front of') section 83A.[233] They commented that it could become 'quite convoluted' to introduce a long list of factors to assist courts in considering what might be relevant in determining whether sentence deferral would be in the interests of justice.[234]

The Council's view

3.27 We have reached the view that section 83A should be amended to better balance the various potential interests affected by a court's decision to defer sentencing, so that the decision does not exclusively focus on the interests of the offender. As the Law Institute of Victoria noted, the current requirement to consider the interests of the offender reflects the origins of deferral as a therapeutic option designed for children and young adult offenders, for which rehabilitation is generally the dominant purpose of sentencing. With deferral now an option for all adult offenders, we take the view that the requirement to consider the 'interests of the offender' in section 83A should be replaced with a requirement to consider the 'interests of justice'. We intend the 'interests of justice' requirement to be interpreted broadly on a case-by-case basis to account for matters including:

- the interests of the offender;
- the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples;
- the interests of the victim and the potentially adverse effect on them if sentencing is deferred (particularly in family violence cases, such as cases involving coercive control, including 'legal system abuse'[235]);
- the seriousness of the offence;
- the risk posed by the offender to the victim and the community (particularly in family violence cases and/or cases where sentence deferral will delay imprisonment or supervision by Corrections Victoria);

232. Submission 10 (Law Institute of Victoria).
233. Meeting with Law Institute of Victoria (4 September 2023).
234. Meeting with Law Institute of Victoria (4 September 2023).
235. See, for example, Heather Douglas, 'Legal Systems Abuse and Coercive Control' (2017) *Criminology and Criminal Justice* 18(1). The article explores the nexus between family violence victims' experience of the legal system and their experience of coercive control.

- the interests of the community, including reducing the offender's risk of reoffending;
- the best interests of an offender's unborn, newborn or dependent child; and
- the need for finality of criminal proceedings.

3.28 We note that sentencing cannot be deferred without the offender's consent. Therefore, there is little risk that replacing 'the interests of the offender' with 'the interests of justice' in section 83A will result in a person's sentence being deferred against their wishes.

3.29 We were not persuaded that section 83A should be amended to specify a list of considerations that courts should have regard to in deciding whether to defer sentencing. There was no consensus among stakeholders on whether section 83A should be amended to include such a list, and there was no consensus among supporters of this approach on what the considerations should be. And some of the suggested considerations would be more appropriately elevated to apply to all decisions under the *Sentencing Act*, not just those related to sentence deferral (for example, the unique, systemic and background factors affecting Aboriginal and Torres Strait Islander peoples).[236]

3.30 Our aim is to better *enable* sentence deferral in appropriate cases. We harbour concerns that mandating courts to consider a list of legislative factors may inadvertently create another barrier to the use of deferral. For those reasons, we simply recommend replacing the 'interests of the offender' with the 'interests of justice' and allowing courts, in their discretion, to apply that well-known requirement on a case-by-case basis. In addition, we recommend that the purposes of deferral be moved into section 83A(1) to highlight their prominence in decision-making.

Recommendation 7

That the Government amend section 83A of the *Sentencing Act 1991* (Vic) to replace 'the interests of the offender' with 'the interests of justice', and to move the purposes of deferral into section 83A(1).

236. Victorian Aboriginal Legal Service (2022), above n 136, 55 (Recommendation 22).

Allow sentence deferral in appropriate cases even if a prison sentence is likely or inevitable

3.31 Currently, courts in Victoria may defer sentencing even in cases where a prison sentence is likely or inevitable. This is true in most Australian jurisdictions.[237] Legislation in the Australian Capital Territory even specifies 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'.[238] However, although it is technically possible, courts in Victoria and elsewhere have demonstrated an understandable reluctance to defer sentencing where prison is inevitable. For example:

> "I consider in this case that a sentence of imprisonment is inevitable, and I refuse to defer sentencing you.
>
> ***DPP v Swift* [2015] VCC 1588 [29]**

> 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.
>
> **Unpublished sentencing remarks provided to the Council**

> 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.
>
> ***R v Wymond & Anor* [2013] SASCFC 12 [33]**

> [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.
>
> ***DPP v Evangelistis* [2015] VCC 1192 [33][239]**

237. See, for example, *Sentencing Act 1995* (WA) s 33A(3); *Crimes (Sentencing) Act 2005* (ACT) s 116(2); *R v Wymond & Anor* [2013] SASCFC 12 [33]; *R v Rayment* [2010] NSWCCA 85 [22], [160]; *R v Brown* [2009] NSWCCA 6 [22]; *R v Trindall* [2002] NSWCCA 364 [62], [64].
238. *Crimes (Sentencing) Act 2005* (ACT) s 116(2).
239. See also *DPP v Schembri* [2019] VCC 1774 [58]; *DPP v Villis* [2021] VCC 684 [29].

3.32 In a 2006 report, the Australian Law Reform Commission (ALRC) discussed the 'judicial debate regarding the circumstances in which it is appropriate to defer the sentencing of an offender',[240] noting the uncertainty about the use of deferral where a prison sentence is inevitable. The ALRC commented that the New South Wales Court of Criminal Appeal refused to endorse the argument 'that it is not appropriate to order the deferral of a sentence in circumstances where it is inevitable that the offender will be sentenced to a period of full-time imprisonment'.[241]

3.33 In our consultation paper, we asked whether section 83A should be amended to clarify that a court may defer an offender's sentence even if a prison sentence is inevitable.[242]

Stakeholder views

3.34 The Law Institute of Victoria said that a current barrier to the use of deferral 'is an apparent reluctance among some judicial officers to use them', which may reflect 'concerns regarding a risk of harm to victims and/or that a deferred sentence would be futile as a custodial sentence will be required in any event'.[243] And the County Court said that clarity about 'the perceived barrier of inevitable custodial sentences' would be 'helpful to the profession broadly'.[244]

3.35 Stakeholders gave examples of circumstances where sentence deferral might be appropriate despite the likelihood of a prison sentence, suggesting that the Victorian legislation should incorporate an approach similar to the Australian Capital Territory to clarify that deferral may be appropriate in such cases.[245] Examples included:

- deferral for a restorative justice process, which 'should not be limited to cases where a community-based disposition is the expected outcome';[246]

240. Australian Law Reform Commission (2006), above n 4, 228.
241. Ibid (citation omitted).
242. *Consultation Paper* 23–24.
243. Submission 10 (Law Institute of Victoria).
244. Email from County Court of Victoria to Sentencing Advisory Council (26 October 2023).
245. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 8 (RMIT Centre for Innovative Justice); Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)); Submission 10 (Law Institute of Victoria); Submission 11 (Fitzroy Legal Service); Submission 12 (Victorian Aboriginal Legal Service); Submission 13 (Law and Advocacy Centre for Women); Stakeholder Roundtable (10 August 2023).
246. Submission 8 (RMIT Centre for Innovative Justice).

- deferral to connect a person 'with services and programs that promote rehabilitation at the earliest opportunity',[247] even if the person will ultimately be sentenced to prison. 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';[248]
- the potential for an offender's efforts during the deferral period to lead to a shorter sentence or shorter non-parole period, even if a prison sentence is unavoidable; and
- deferral for the new purposes outlined in Chapter 2, such as for medically necessary treatment or surgery, or to give birth in the community rather than in custody.[249]

> "If restorative justice programs are designed in response to victims' needs, questions of whether an offender is likely to receive a sentence of imprisonment or not should not determine whether a victim has the opportunity to engage. … [R]estorative justice can offer significant benefits for victims, including reducing the traumatic effects of crime. From a victim-centred perspective, it makes sense to make restorative justice broadly available to all victims, regardless of the degree of seriousness of the offence or the likely sentence that the offender will receive.
>
> **Submission 8 (RMIT Centre for Innovative Justice)**

3.36 However, Victoria Legal Aid noted that if section 83A is amended to clarify that deferral can be used if prison is inevitable, judicial officers should be provided with training that highlights 'the importance of informed consent being obtained from clients before proceeding in this manner'.[250] Similarly, most roundtable participants also supported this reform, provided that courts made it clear to the offender that prison is inevitable.[251]

247. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice.
248. Submission 11 (Fitzroy Legal Service). Similarly, a roundtable participant said that sentence deferral can enable medically supported withdrawal from drug dependency prior to entering custody, which is likely to be less traumatic and more effective than 'withdrawing in the cells': Stakeholder Roundtable (10 August 2023).
249. Stakeholder Roundtable (10 August 2023).
250. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice.
251. Stakeholder Roundtable (10 August 2023).

3.37 There was some opposition to this proposed amendment, however. Victim Services, Support and Reform did not support the suggested reform because if offending is serious enough to warrant a prison sentence, it would not be appropriate to allow the offender to remain in the community.[252] Similarly, No to Violence emphasised the need for courts to consider 'any risk posed by an offender reoffending while on a deferred sentence, notably for family violence offences' and to 'ensure the safety of the offender's partner and/or former partner is upheld'.[253]

3.38 While supporting the reform, other stakeholders had concerns about unintended consequences. Both the Law Institute of Victoria and a roundtable participant were concerned that a legislative provision specifying that a court may defer sentence even if the offence seriousness justifies a prison sentence may inadvertently 'make it too easy to send an offender to prison after deferral'.[254]

The Council's view

3.39 We were persuaded that section 83A of the *Sentencing Act* should be amended to clarify that sentence deferral is permitted even if a prison sentence is likely or inevitable. This is particularly important given our earlier recommendations for new purposes of deferral that envisage its use in situations where the offender is facing a prison sentence (for example, to allow a person to give birth in the community). Further, courts will retain full discretion to determine whether a sentence deferral is appropriate in a particular case, including (if Recommendation 7 is implemented) whether it is in the interests of justice. This recommendation is intended to augment the court's discretion.

3.40 The suggested amendment will not make sentence deferral available as a matter of course. On the contrary, an offender will still need to show the court the intended purpose of the deferral and (if Recommendation 7 is implemented) why deferral is in the interests of justice in the circumstances of the case. It is likely that courts will continue to exercise a degree of caution in deciding whether to defer sentencing in cases where a prison sentence is likely or inevitable. Further, the considerations where a court is contemplating a punitive sentence may be different from the considerations where the court is contemplating a therapeutic sentence.

252. Email from Victim Services, Support and Reform to Sentencing Advisory Council (19 December 2022).
253. Submission 6 (No to Violence).
254. Email from Law Institute of Victoria to Sentencing Advisory Council (15 September 2023); Stakeholder Roundtable (10 August 2023). See further [2.34]–[2.35].

The public interest in rehabilitating an offender (and thereby protecting the community) must also be balanced with 'the public interest in having convicted persons serve their sentence as soon as is practicable'.[255]

3.41 If a court defers sentencing even though a prison sentence is inevitable, it is important not to give the offender false hope that their behaviour during the deferral period might allow them to avoid a prison sentence.[256] Before the offender consents to the deferral, it may be appropriate to warn them that a prison sentence is likely or inevitable.[257]

3.42 Finally, the suggested amendment is not intended to imply that a court should more readily imprison an offender after a sentence deferral. The principle of parsimony dictates that imprisonment is a sentence of last resort that must not be imposed unless a court is satisfied that the purposes of sentencing cannot be served by a less severe disposition. This principle is enshrined in the *Sentencing Act*[258] and is a logical corollary of the right not to be deprived of liberty if there is 'any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve'.[259]

Recommendation 8

That the Government amend section 83A of the *Sentencing Act 1991* (Vic) to specify that a court may defer sentencing even if it considers the seriousness of the offence justifies a sentence of imprisonment.

255. *United Mexican States v Cabal* [2001] HCA 60 [39].
256. *R v Palu* [2002] NSWCCA 381 [29]–[30]. See also *R v Thompson* [2012] SASCFC 149 [34].
257. Freiberg (2014), above n 87, 198. See also Australian Law Reform Commission (2006), above n 4, 228 (citations omitted): 'a court should clearly inform an offender if he or she will be ordered to serve a period of full-time imprisonment when sentenced'.
258. *Sentencing Act 1991* (Vic) ss 5(4)–(7).
259. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2)(e).

The availability of legal aid funding for deferral

3.43 Our consultation revealed that another barrier to the use of sentence deferral was limited or unclear access to funding for legal representation at deferral hearings.[260]

Stakeholder views

3.44 The Victorian Aboriginal Legal Service (VALS) has previously written that 'legal aid grants do not cover adjournments, so private lawyers may be reluctant to ask that sentencing is deferred'.[261] During our preliminary consultations, we encountered uncertainty among stakeholders about what aspects of deferral were funded by Victoria Legal Aid, for example, whether review hearings were covered. Stakeholders also identified 'inadequate legal aid funding for adjournments' as a barrier to the use of deferral.[262]

3.45 The Law Institute of Victoria noted that 'the practical effect of inadequate funding' is that if private lawyers aren't willing to appear for free at subsequent deferral hearings, deferral may not be an option for their clients and therefore 'legal aid funding rates must be increased to ensure lawyers can perform this vital work for legal aid clients'.[263] The RMIT Centre for Innovative Justice also advocated for legal service providers to 'be adequately resourced to enable them to offer holistic services to their clients', including funding for 'multiple court appearances, [which] is resource intensive' and to help clients connect to therapeutic, rehabilitative and restorative justice services as well as with the legal appearance itself.[264]

3.46 Victoria Legal Aid's submission set out its current fee structure, noting that it funds appearances at initial applications for sentence deferral and at the sentencing hearing at the end of the deferral (claimable as an appearance on sentence or adjournment as per Table A of the *VLA Handbook*).[265] Victoria Legal Aid also pays

260. *Consultation Paper* 14–15. Note that Sentencing Advisory Council Director Dan Nicholson, who is also Executive Director of Criminal Law at Victoria Legal Aid, declared a potential conflict of interest in relation to Victoria Legal Aid funding of deferral hearings and recused himself from the discussion and decision-making process in relation to Recommendation 9.
261. Victorian Aboriginal Legal Service (2020), above n 27, 9.
262. See, for example, Submission 10 (Law Institute of Victoria); Submission 8 (RMIT Centre for Innovative Justice).
263. Submission 10 (Law Institute of Victoria). The Law Institute of Victoria added that legal fees can also be a barrier for privately funded clients who may resist paying a subsequent day fee for a deferral hearing.
264. Submission 8 (RMIT Centre for Innovative Justice).
265. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice. Victoria Legal Aid's fees for summary proceedings are set out in Table A of the *VLA Handbook for Lawyers*: Victoria Legal Aid, 'Table A – Fees for Summary Criminal Proceedings', *VLA Handbook for Lawyers* (2023).

a lump sum preparation fee.[266] It discussed the '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', commenting that while it could explore '[a]dditional fees or different fee structures … to encourage increased applications for sentence deferrals in appropriate cases', this 'would require additional funding to support changes to existing fee arrangements'.[267] Similarly, roundtable participants commented that if Victoria Legal Aid is expected to provide additional funding for deferral hearings, there should be a commensurate increase in the funding provided to Victoria Legal Aid, so that the funding of deferral hearings does not occur at the expense of other legally aided services.[268]

The Council's view

3.47 We were persuaded by the uncertainty expressed by multiple stakeholders that there is a need for Victoria Legal Aid to clarify its existing fee structure in relation to the funding of deferral hearings, regardless of whether Victoria Legal Aid increases the funding available for deferral hearings.

3.48 More importantly, however, we recommend that Victoria Legal Aid consider whether there are opportunities to change the fee structure to ensure that adequate funding is available to support sentence deferrals in appropriate cases. We note, however, that without additional funding, Victoria Legal Aid may not be able to accommodate extra funding for deferral hearings.

Recommendation 9

That Victoria Legal Aid:

- clarify in its existing fee structure the extent to which sentence deferral applications and review hearings are funded; and
- consider whether there are opportunities for changes to the fee structure relating to sentence deferral applications and review hearings.

266. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice.
267. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice.
268. Stakeholder Roundtable (10 August 2023).

Other issues affecting the availability and use of deferral

> [T]the first barrier to the use of sentence deferrals is lack of awareness that they exist. LIV members report that some judicial officers and practitioners appear unaware that sentence deferral is an option.
>
> **Submission 10 (Law Institute of Victoria)**

3.49 Stakeholders identified several other barriers to the availability and use of sentence deferral, some of which are outside the scope of this review.

3.50 First, there is insufficient awareness and understanding of sentence deferral among members of the legal profession. The Law Institute of Victoria said that this 'lack of awareness' results in 'a failure to identify instances when a deferral might be suitable, and in practitioners' submissions being geared towards the finalisation of matters'.[269] Victoria Legal Aid also identified a 'lack of understanding and awareness of deferrals as a sentencing option' noting that this was 'a major driver of the low use of sentence deferrals', and that this issue 'cuts across the criminal justice workforce and includes both practitioners and the judiciary'.[270] Victoria Legal Aid said that this lack of awareness results in 'wide variation' in the use of sentence deferrals, for example, in some cases they are 'used to promote therapeutic options and support the assessment of prospects of rehabilitation' while 'in other similar circumstances, deferrals do not appear to be considered as a potential option'.[271] The Law Institute of Victoria suggested that this 'awareness gap … could be addressed by targeted education and training'.[272]

3.51 Second, there is a perception that judicial officers are under time pressure 'to clear the list rather than deferring sentencing'.[273] 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 to be barriers to using judicial monitoring under standard workloads.[274]

269. Submission 10 (Law Institute of Victoria).
270. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice.
271. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice.
272. Submission 10 (Law Institute of Victoria). See also Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice); Submission 12 (Victorian Aboriginal Legal Service); Submission 13 (Law and Advocacy Centre for Women).
273. Victorian Aboriginal Legal Service (2020), above n 27, 9; Email from Youthlaw to Sentencing Advisory Council (15 August 2023).
274. Michael Trood et al., 'Magistrates' Experiences of Judicial Supervision in Mainstream Courts' (2022) 31(3) *Journal of Judicial Administration* 115.

3.52 Third, the availability and effectiveness of sentence deferral hinge on offenders having access to suitable programs and services. One of the strongest themes to emerge in submissions and consultation was the need for better availability (for example, shorter waiting lists)[275] of appropriate (for example, culturally safe)[276] rehabilitation programs and services (including residential rehabilitation), particularly in regional Victoria.[277] Several stakeholders identified the need to provide targeted programs and services for marginalised cohorts. The Australian Multicultural Foundation advocated for appropriate treatment and programs for newly arrived migrants and refugees.[278] The Law Institute of Victoria advocated for programs and services specifically for young people and for women.[279] And many stakeholders emphasised the critical importance of investing in programs and services that are culturally safe and appropriate for Aboriginal and Torres Strait Islander people. In our concurrent project on adjourned undertakings, VALS told us that 'Aboriginal specific rehabilitative programs, including drug and alcohol or behaviour change programs, regularly have limited capacity and long waiting times for admission'.[280] VALS also recommended that long-term funding be provided for community justice reports to 'increase access to and use of sentence deferrals for Aboriginal people'.[281]

3.53 The Australian Community Support Organisation also highlighted the benefit of case management or coordination-type support, noting that the effectiveness of sentence deferrals is 'vastly diminished' if recipients 'are unable to navigate, access and engage effectively with supports in the community'.[282] To help address deficits in program availability, stakeholders proposed expanding the availability of the Court Integrated Services Program (CISP)[283] so that it is available for the

275. Submission 1 (Victorian Alcohol and Drug Association); Submission 4 (ACSO COATS); Submission 6 (No to Violence); Submission 12 (Victorian Aboriginal Legal Service).
276. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 12 (Victorian Aboriginal Legal Service).
277. Submission 2 (County Court of Victoria); Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 10 (Law Institute of Victoria); Submission 12 (Victorian Aboriginal Legal Service); Submission 13 (Law and Advocacy Centre for Women).
278. Meeting with Australian Multicultural Foundation (5 September 2022).
279. Submission 10 (Law Institute of Victoria).
280. Victorian Aboriginal Legal Service (2022), above n 136, 12. See also Submission 12 (Victorian Aboriginal Legal Service); Victorian Aboriginal Legal Service (2019), above n 136; Victorian Aboriginal Legal Service (2021), above n 136; Victorian Aboriginal Legal Service (2022), above n 136; Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 10 (Law Institute of Victoria); Submission 13 (Law and Advocacy Centre for Women).
281. Submission 12 (Victorian Aboriginal Legal Service). See further [2.49].
282. Submission 4 (Australian Community Support Organisation).
283. CISP aims to reduce the likelihood of reoffending by addressing offenders' health and/or social needs and assisting them to access support services.

full potential period of sentence deferral (12 months);[284] it is available in regional County Court cases;[285] and it is available in all Magistrates' Court locations.[286]

3.54 The success of sentence deferral as a therapeutic option depends on the availability and accessibility of effective, culturally safe and appropriate programs and services, particularly in regional Victoria. More broadly, such programs and services are critical to the meaningfulness of rehabilitation as a purpose of sentencing. Without such programs, offenders with complex needs will continue to churn through the criminal justice system. We support any efforts to improve access to programs and services, particularly for marginalised and over-represented groups in the criminal justice system and in regional Victoria.

> "[D]eferred 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. For example, our clients' experience in rural and remote areas [is] 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.
>
> **Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice**

284. Submission 2 (County Court of Victoria); Submission 3 (Jesuit Social Services).
285. Submission 2 (County Court of Victoria).
286. Submission 3 (Jesuit Social Services).

4. Maximum length of sentence deferral

4.1 This chapter looks at the current maximum length of sentence deferral and whether it might be appropriate to extend that length in certain circumstances.

Should the maximum deferral period increase?

4.2 When sentence deferral was first introduced in the adult jurisdiction, the maximum deferral period was six months. The government increased it to 12 months in 2010, based on our recommendation.[287] Consultation at the time revealed mixed feelings about extending the maximum deferral period, with stakeholders mindful of the need to balance timely finalisation of criminal proceedings with timeframes that allow the purposes of deferral to be achieved.[288]

4.3 The current 12-month maximum in Victoria is the same as the maximum deferral period in New South Wales, South Australia and the Australian Capital Territory,[289] though in South Australia a deferral can exceed the 12-month maximum if that timeframe would prevent the offender from participating in a relevant intervention program.[290] In 2006, the Australian Law Reform Commission also recommended a 12-month deferral period in federal cases.[291] In contrast, the maximum deferral period 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').[292]

287. *Sentencing Amendment Act 2010* (Vic) s 21, amending *Sentencing Act 1991* (Vic) s 83A(1); Sentencing Advisory Council (2008), above n 3, 275 (Recommendation 13–1). These same recommendations had been made six years earlier: Arie Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) 184 (Recommendation 46).
288. Sentencing Advisory Council (2008), above n 3, 269–273.
289. *Crimes (Sentencing) Act 2005* (ACT) s 122(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11(2); *Sentencing Act 2017* (SA) s 29(2).
290. *Sentencing Act 2017* (SA) s 29(3). See further [4.12].
291. The Australian Law Reform Commission commented that a maximum deferral period of 12 months 'strikes an appropriate balance between the need for flexibility to enable a court to achieve individualised justice and the need to avoid excessive delay in the resolution of criminal proceedings': Australian Law Reform Commission (2006), above n 4, 229.
292. *Sentencing Act 2020* (UK) s 5(2); *Sentencing Act 1997* (Tas) s 7A(1); *Criminal Procedure (Scotland) Act 1995* s 202(1).

4.4 There is no reliable data about the typical lengths of sentence deferrals in practice. When asked about the typical deferral period, participants in our online survey of practitioners and the judiciary most frequently responded six months (eight participants), though answers ranged from one month (one participant) to 12 months (three participants).[293]

4.5 In our consultation paper, we asked whether there should be any changes to the 12-month maximum length of sentence deferral.[294]

Stakeholder views

4.6 Stakeholders generally supported increasing the maximum length of sentence deferral,[295] telling us that the 12-month limit can cause difficulties in cases where programs have long waitlists and subsequently an offender has a limited opportunity to demonstrate their rehabilitative potential before the deferral period has expired.

4.7 Although most stakeholders agreed that the maximum length should increase, they differed as to how that should be achieved, or how long the maximum length should be. Two main options emerged from submissions:

1. increase the maximum deferral period either for all courts or in the higher courts (allowing a sentence to be deferred for the longer period from the outset);[296] or
2. permit an extension in appropriate circumstances by allowing an application for more time at the end of the initial 12-month deferral period, functionally mandating a review hearing before an extension can occur.[297]

293. Online Survey (February 2022).
294. *Consultation Paper* 38.
295. Submission 2 (County Court of Victoria); Submission 4 (Australian Community Support Organisation); Submission 7 (Professor Felicity Gerry KC); Submission 13 (Law and Advocacy Centre for Women); Stakeholder Roundtable (10 August 2023).
296. Submission 2 (County Court of Victoria); Submission 4 (Australian Community Support Organisation); Submission 13 (Law and Advocacy Centre for Women).
297. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)); Submission 10 (Law Institute of Victoria); Submission 11 (Fitzroy Legal Service); Submission 12 (Victorian Aboriginal Legal Service).

Option 1: Increase the maximum length of sentence deferral at the start

4.8 The County Court, the Australian Community Support Organisation (ACSO) and the Law and Advocacy Centre for Women (LACW) supported a simple increase in the maximum length of sentence deferral. LACW suggested that deferral periods over 12 months should be available 'where it is reasonable', particularly for 'people who have trouble accessing services because they live rurally or require services that are in short supply (e.g. residential rehabilitation facilities that accommodate children)'.[298] The County Court suggested 'an extension of the deferral period, eg, to 18 months, particularly to ensure that offenders with special needs are adequately provided for'.[299] The County Court suggested that a longer maximum length of sentence deferral was preferable to an extension power as 'allowing applications for extensions while retaining the 12-month maximum term may … cause uncertainty and unexpected delays in finalising proceedings'.[300] ACSO suggested a 2-year maximum deferral period to:

> allow sufficient time for an effective worker-client relationship to be established, for the participant to gain access to relevant services and achieve a level of stabilisation (including in housing and relationships), and for the court to genuinely assess a participant's level of engagement and prospects of rehabilitation.[301]

> "Women in the justice system commonly face significant instability and adversity due to the complexity of gender-specific issues such as trauma, homelessness and family violence … As such, a lengthier deferrals period may also be required for supports to meaningfully make a change in these circumstances.
>
> **Submission 13 (Law and Advocacy Centre for Women)**

298. Submission 13 (Law and Advocacy Centre for Women).
299. Submission 2 (County Court of Victoria).
300. Submission 2 (County Court of Victoria).
301. Submission 4 (Australian Community Support Organisation).

Option 2: Retain the current maximum length of sentence deferral but add an extension power

4.9 The Victorian Aboriginal Legal Service (VALS), the Law Institute of Victoria, Fitzroy Legal Service and Victoria Legal Aid (endorsed by Youthlaw and WEstjustice) supported an extension power. They referred to the need to balance meaningful participation in a rehabilitation program with finality of proceedings.

4.10 VALS mentioned the frequent lack of program and service availability, particularly in regional and rural areas. While acknowledging that 'an extension of the deferral may be appropriate in some limited cases', VALS commented that 'the underlying reasons for a lack of appropriate support services must also be addressed'. In particular, VALS called for funding 'to increase the capacity of Aboriginal organisations to develop, implement and evaluate culturally safe deferral programs'.[302]

> "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. …[P]articularly 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 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.
>
> **Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice**

302. Submission 12 (Victorian Aboriginal Legal Service).

4.11 The Law Institute of Victoria advocated for a power to extend a deferral to 18 months 'in exceptional circumstances to allow those who may need more time to engage with rehabilitative services to do so'. Noting that some cases required additional time due to the offender's complex needs, the Law Institute of Victoria also emphasised the need to ensure 'that people are kept in the justice system for no longer than is strictly necessary … to minimise the criminogenic impact [of] interaction with the criminal justice system'.[303]

4.12 Fitzroy Legal Service advocated for an exception to the 12-month maximum for offenders entering residential rehabilitation. A precedent for this is the equivalent provision in South Australia, which permits a court to defer sentencing for longer than the 12-month maximum if the offender is, or will be, participating in an intervention program and the court is satisfied that the offender's participation (or agreement to participate) demonstrates 'a commitment to addressing the problems out of which their offending arose' and 'if the longer deferral period wasn't granted, the offender would be prevented from completing, or participating in, the intervention program; and their rehabilitation would be prejudiced'.[304]

4.13 Based on our consultation and research, we developed a draft recommendation for a new power for a court to extend a deferral for six months at a review at the end of the 12-month deferral period. The County Court, the Law Institute of Victoria and Emeritus Professor Arie Freiberg all supported this recommendation,[305] as did most roundtable participants, although some participants had concerns about the mandatory review. One participant said that, in their experience, sentence deferrals usually involve judicial monitoring, so they did not think a mandatory review after 12 months was necessary. Another participant raised concerns that a review may 'lead to a punitive response … [if] the offender is still using', because there remains 'an expectation of abstinence that is a deep systemic misunderstanding of treatment – the greater the engagement with a person the better the outcomes'.[306]

303. Submission 10 (Law Institute of Victoria).
304. *Sentencing Act 2017* (SA) s 29(3).
305. Meeting with Law Institute of Victoria (4 September 2023); Email from Law Institute of Victoria to Sentencing Advisory Council (15 September 2023); Meeting with Emeritus Professor Arie Frieberg (28 August 2023); Email from County Court of Victoria to Sentencing Advisory Council (26 October 2023).
306. Stakeholder Roundtable (10 August 2023).

> The Court sees merit in the extension mechanism after a 12-month period. Sentence deferrals in the County Court generally contain a 'built-in' monitoring system that allows a judge to observe progress. This extension power would be helpful in circumstances where there are waiting periods for services, for example.
>
> In the Court's experience, anything around a 12-month period (particularly whilst on CISP), is on the long side, but still considers 18 months maximum as an appropriate length of time for a deferral should the case require it. The Court notes that it is also important … that finality in proceedings is important for all involved.
>
> **Email from County Court of Victoria to Sentencing Advisory Council (26 October 2023)**

Relationship between deferral and adjournment powers

4.14 In addition to their power to defer sentencing, courts have a general power to adjourn criminal proceedings as they see fit.[307] This can be (and has been) used as a mechanism to achieve an 'informal deferral'. We heard, however, that there is sometimes uncertainty, or at least discomfort, about using an adjournment after a formal sentence deferral, for example, where an offender has only a few weeks of treatment left but the deferral is about to expire.

4.15 We therefore considered whether section 83A should be amended to clarify that it does not limit a court's general power to adjourn proceedings. The equivalent provision in South Australia includes such a clarification.[308]

4.16 Roundtable participants generally supported (and did not oppose) this suggestion. Similarly, the Law Institute of Victoria, Emeritus Professor Arie Frieberg and the County Court supported this proposal,[309] with the County Court noting that clarification 'is important and would enable judges to utilise that power where appropriate, depending on the circumstances of the matter at hand'.[310]

307. *Criminal Procedure Act 2009* (Vic) ss 331(1)–(2). See also [1.5], [3.4].
308. *Sentencing Act 2017* (SA) s 29(7).
309. Meeting with Law Institute of Victoria (4 September 2023); Email from Law Institute of Victoria to Sentencing Advisory Council (15 September 2023); Meeting with Emeritus Professor Arie Frieberg (28 August 2023); Email from County Court of Victoria to Sentencing Advisory Council (26 October 2023).
310. Email from County Court of Victoria to Sentencing Advisory Council (26 October 2023).

The Council's view

4.17 We see merit in enabling sentencing to be deferred for a period longer than 12 months in appropriate cases. In some cases, 12 months may be insufficient due to long waiting lists for programs and services, which may delay an offender's access to treatment or support through no fault of their own. Even with immediate access, a program may go beyond 12 months (for example, a residential drug and alcohol rehabilitation program).[311]

4.18 We do, however, share the concerns raised by some stakeholders about balancing the need for finality with the potential value of a longer deferral period. The community may benefit in the long term from the offender being provided with more time for their rehabilitation, but this is not the only consideration. The impact of any additional delay on the victim and the need for finality of proceedings must also be considered. We agree that the appropriate policy solution is to enable a six-month extension of deferral in appropriate circumstances, which would require a hearing where the court could check in on the offender's progress as well as the extent of their access of the intended programs and services.

4.19 During our consultation on our proposed recommendations, several stakeholders asked whether the extension power would allow *multiple* six-month extensions of a deferral.[312] We have reached the view that a maximum six-month extension period is the most appropriate means of balancing the various competing interests. We agree with the County Court that a maximum deferral period of 18 months (12 months with a six-month extension) is 'an appropriate length of time for a deferral should the case require it' and that 'finality in proceedings is [also] important for all involved'.[313]

4.20 Turning finally to the relationship between sentence deferral and a court's general adjournment power, we see merit in clarifying that the power to defer sentencing does not limit the power to adjourn matters. There are various reasons why it may be necessary and appropriate to adjourn a matter after the deferral period (even if it was the *maximum* deferral period). A court should not be constrained from adjourning a matter in appropriate circumstances simply because the offender's sentence has previously been deferred.

311. See, for example, *DPP v Wharton* [2014] VCC 1844, in which the offender was sentenced at the end of a 16-month residential rehabilitation program, for which sentencing was deferred.
312. Meeting with Law Institute of Victoria (4 September 2023); Stakeholder Roundtable (10 August 2023).
313. Email from County Court of Victoria to Sentencing Advisory Council (26 October 2023).

Recommendation 10

That the Government amend section 83A of the *Sentencing Act* to:

- permit the court (on its own motion or on an application) to extend a sentence deferral for an additional period of up to six months in appropriate circumstances; and
- clarify that section 83A does not limit any power that a court has to adjourn proceedings.

5. The recommendations we didn't make

5.1 Some of the issues that we discussed in our consultation paper have not resulted in recommendations. We consider it important to explain our reasoning in relation to these issues, both because stakeholders took the time to provide us with their insights, and because it is as important for bodies such as ours to highlight the recommendations we don't make as much as the recommendations we do.

5.2 In our view, good policy recommendations should:

- be evidence-based;
- avoid trying to 'fix what isn't broken' or making changes for the sake of change;
- be capable of practical implementation (including being supported by the stakeholders whose buy-in would be critical to implementation); and
- focus on the topic at hand, rather than drifting into broader areas.

Should sentence deferral orders have conditions?

5.3 Section 83A of the *Sentencing Act* does not currently allow courts to impose conditions on offenders whose sentence has been deferred. Instead, the offender is released either on bail or on their own undertaking to attend court when required.[314] The expectations of an offender during the deferral period are typically communicated verbally in court. However, as the Law Institute of Victoria highlighted in their submission, deferral commitments are sometimes ordered as conditions of bail.[315] In contrast, the equivalent provision in the Australian Capital Territory permits courts to add 'any condition the court considers appropriate' on a sentence deferral order, taking into account the purposes of the deferral.[316]

314. *Sentencing Act 1991* (Vic) s 83A(2)(b).
315. Submission 10 (Law Institute of Victoria).
316. *Crimes (Sentencing) Act 2005* (ACT) s 27(5).

5.4 In our 2008 report, we recommended against formal deferral conditions, saying that we did 'not support courts being permitted to impose formal obligations on the offender as a condition of deferral'.[317] Instead, we concluded that '[i]f the court is of the view that conditions are required to ensure an offender's compliance with the order, then in our view it should proceed straight to sentencing'.[318]

5.5 We revisited this issue in our consultation paper, in large part because we were told that if courts want to formalise deferral requirements, in some cases they have to resort to imposing the requirements as bail conditions.[319] There is a degree of tension between the purposes of bail conditions (which focus on reducing the risk to the community)[320] and the purposes of deferral (which mainly focus on rehabilitation).[321] We were also told that imposing deferral requirements as bail conditions puts people at risk of being in a 'reverse onus bail position' (i.e. the offender would need to convince the court to release them) for any indictable offence allegedly committed during the period of deferral, which could further entrench them in the criminal justice system.[322] In this context, formal deferral conditions were suggested as a pathway away from incorporating deferral requirements in bail orders, thereby limiting the potential consequences of imperfect compliance.

Stakeholder views

5.6 Stakeholders were divided as to whether formal conditions of sentence deferral should be introduced. Most stakeholders who addressed this question opposed the introduction of formal deferral conditions.[323] Victoria Legal Aid, for example, preferred the current approach as 'sufficient in balancing the competing priorities of monitoring compliance, managing risk and maintaining flexibility', in part because formal deferral conditions may over-emphasise compliance over progress, which 'can be detrimental as people's trajectory through rehabilitation is not linear and may involve setbacks'.[324]

317. Sentencing Advisory Council (2008), above n 3, 274.
318. Ibid.
319. *Consultation Paper* 39–40.
320. *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.
321. *Sentencing Act 1991* (Vic) s 83A(1A).
322. Submission 3 (Jesuit Social Services). Since we published our consultation paper, significant bail reforms have been introduced that go some way to mitigating these concerns: *Bail Amendment Act 2023* (Vic) ss 39–41.
323. Submission 4 (Australian Community Support Organisation); Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw); Submission 11 (Fitzroy Legal Service); Submission 12 (Victorian Aboriginal Legal Service).
324. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice.

5.7 The Law Institute of Victoria originally supported deferral conditions due to concerns that:

- there is tension in the current practice of making deferral commitments conditions of bail 'because the rehabilitative purpose underlying sentence deferrals sits uneasily with the consequences of violating bail conditions, which are punitive';
- 'using bail conditions … to impose deferral conditions [may] undermine prospects of long-term rehabilitation as setbacks can be punished harshly'; and
- relying on verbal communication in court about the court's expectations of the offender 'may be confusing for offenders' as court hearings 'can be intimidating and overwhelming, and anything less than a clearly formulated, recorded set of conditions creates the potential for misapprehensions or miscommunications'.[325]

5.8 The Law Institute of Victoria supported the introduction of formal deferral conditions on the proviso that 'compliance with deferral conditions is prohibited from being a condition of bail'.[326] Professor Felicity Gerry KC supported the introduction of deferral conditions on the same proviso. However, the Law Institute of Victoria ultimately supported our decision to not recommend the introduction of formal deferral conditions given strong stakeholder opposition and recent bail reform measures.[327] Emeritus Professor Arie Freiberg and the County Court also supported this decision.[328]

The Council's view

5.9 We were originally of the view, like the Law Institute of Victoria and Professor Felicity Gerry KC, that it would be useful to introduce formal deferral conditions, providing it was clear that the intent was to stop the unnecessary incorporation of deferral commitments into bail orders, thus limiting the potential consequences of imperfect compliance. However, given opposition from numerous key stakeholders, recent bail reforms, and concerns that formal conditions would change the nature of deferral to be more like a sentencing order, we were not persuaded that there is a sufficiently strong case for change.

325. Submission 10 (Law Institute of Victoria).
326. Submission 10 (Law Institute of Victoria).
327. Meeting with Law Institute of Victoria (4 September 2023); Email from Law Institute of Victoria to Sentencing Advisory Council (15 September 2023).
328. Meeting with Emeritus Professor Arie Frieberg (28 August 2023); Email from County Court of Victoria to Sentencing Advisory Council (26 October 2023).

Should people on deferral have access to justice plans?

5.10 In our consultation paper, we explored the issue of whether justice plans should be available for people during sentence deferrals.[329] Justice plans are specialised plans of support services for people with an intellectual disability (as defined in legislation).

5.11 There was considerable stakeholder support for extending the availability of justice plans to offenders on sentence deferrals.[330] However, there was a degree of tension between this support and the lack of support for formal deferral conditions (see [5.3]–[5.9]), as conditions are the mechanism by which justice plans would be attached to sentence deferrals.

5.12 We agree that there would be benefits to allowing offenders on sentence deferrals to commence their justice plan *during* the deferral period. However, we are mindful of the strong stakeholder feedback that it is inappropriate for a pre-sentence order to have formal conditions. 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 sentence deferral.[331] Blurring the lines between pre-sentence options and sentencing orders risks subjecting people to disproportionately more onerous conditions than might have been appropriate had those same people simply been sentenced. We have therefore not recommended introducing justice plans as a condition of sentence deferrals. We do, though, also note that one of the reasons to defer sentencing is to enable a person's rehabilitation to be assessed, so deferring sentence to allow a suitability assessment for a justice plan is already possible under the current version of section 83A.

329. *Consultation paper* 44–45.

330. Submission 2 (County Court of Victoria); Submission 4 (Australian Community Support Organisation); Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)); Submission 12 (Victorian Aboriginal Legal Service); Submission 13 (Law and Advocacy Centre for Women). The Australian Law Reform Commission has also recommended that justice plans be available during deferral periods: Australian Law Reform Commission (2006), above n 4, 62.

331. Arie Freiberg and Neil Morgan, 'Between Bail and Sentence: The Conflation of Dispositional Options' (2004) 15(3) *Current Issues in Criminal Justice* 220, 230.

Should written deferral plans be introduced?

5.13 In our consultation paper, we also asked whether it might be useful to introduce some form of written deferral plan, that is, a documented agreement of what the person has said they plan to achieve during the deferral period.[332] Currently in Victoria, there is a verbal communication between the court and the offender about expectations, but these expectations are not provided to the offender in a written document. In comparison, courts in both the Australian Capital Territory and in England and Wales must give a copy of the deferral order to the offender.[333]

Stakeholder views

5.14 Stakeholders were strongly divided on this question.

5.15 Some saw merit in providing offenders with a written deferral plan in appropriate cases.[334] Their primary argument was that it would allow an offender to understand and remember their commitments, and ensure that the offender and court have a shared understanding of the purposes of the deferral.[335] Jesuit Social Services, for instance, emphasised the especial importance of this shared understanding 'for people appearing before the courts who may have an Acquired Brain Injury, a neurodisability, a developmental language disorder (DLD) and those who have English as a second language'.[336] One roundtable participant also said that 'in the absence of a written document, [a person] may be confused or not truly [be] aware of what's been agreed to'.[337] A number of stakeholders added that a formal deferral plan would better ensure 'systems and individual accountability',[338] particularly if there is judicial monitoring along the way.[339]

5.16 Fitzroy Legal Service broadly supported written deferral plans, but also said:

> 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.[340]

332. *Consultation Paper* 48.
333. *Crimes (Sentencing) Act 2005* (ACT) s 121; *Sentencing Act 2020* (UK) s 5(3).
334. Submission 2 (County Court of Victoria); Submission 3 (Jesuit Social Services); Submission 6 (No to Violence); Submission 7 (Professor Felicity Gerry KC); Submission 11 (Fitzroy Legal Service); Stakeholder Roundtable (10 August 2023).
335. Submission 2 (County Court of Victoria); Submission 3 (Jesuit Social Services).
336. Submission 3 (Jesuit Social Services).
337. Stakeholder Roundtable (10 August 2023).
338. Submission 6 (No to Violence).
339. Submission 2 (County Court of Victoria); Submission 7 (Professor Felicity Gerry KC).
340. Submission 11 (Fitzroy Legal Service).

5.17 Other stakeholders, however, held strong concerns about the risks of introducing written deferral plans.[341] Their primary concern was that written deferral plans would organically function like quasi-court orders, replacing the therapeutic intent of sentence deferral with a compliance mindset. Several roundtable participants were concerned that, despite the best of intentions, an offender may fail to successfully engage with the programs or services and this could inadvertently become an aggravating factor at sentencing (for example, because it demonstrates reduced rehabilitative prospects).[342] Victoria Legal Aid were concerned that formal deferral plans 'would reduce the flexibility of the order and place an emphasis on compliance and as a result, the impact of potential breaches'. Victoria Legal Aid explained that this could be harmful, especially as offenders can experience setbacks during their rehabilitation.[343]

5.18 The Law Institute of Victoria initially supported the introduction of deferral plans to assist offenders to 'understand what is expected of them'. However, they also cautioned that including details in the plan about the potential consequences of non-compliance may 'translate into a threat of punishment if an offender is not compliant, which may undermine the rehabilitative purpose of sentence deferrals'.[344] When we met with representatives of the Law Institute of Victoria to outline our draft recommendations, they supported our decision to not recommend the introduction of written deferral plans, especially in light of other stakeholders' feedback.[345]

The Council's view

5.19 Overall, we did not feel there was sufficient support to introduce mandatory written deferral plans. We note, however, that there is no legislative barrier to practitioners and courts developing a written deferral plan in appropriate cases. Victoria Legal Aid has a useful precedent letter that is sent to clients when sentencing has been deferred. This could easily be adapted into a deferral plan that practitioners could provide to the court when applying for deferral and amended as necessary if the court agrees to defer sentencing, with a copy provided to the offender.

341. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)); Submission 12 (Victorian Aboriginal Legal Service); Submission 13 (Law and Advocacy Centre for Women).
342. Stakeholder Roundtable (10 August 2023).
343. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice.
344. Submission 10 (Law Institute of Victoria).
345. Meeting with Law Institute of Victoria (4 September 2023).

Should the approach to judicial monitoring change?

5.20 In deferring sentence, courts may set a date (before the deferral end date) for the offender to reappear for review of the order.[346] This is a form of judicial monitoring, which 'involves a judicial officer monitoring an offender's … treatment or compliance via specially listed "review" hearings'.[347] At a review hearing, the court may:

- take no further action (allowing the sentence deferral to continue); or
- cancel the sentence deferral and sentence the offender.[348]

5.21 In our consultation paper, we asked whether there might be scope to improve or increase the use of judicial monitoring during sentence deferral.[349]

5.22 While there was general support for the use of judicial monitoring in appropriate cases, stakeholders largely suggested educative efforts over any law reform, as well as appropriate resourcing of courts and legal service providers to enable judicial monitoring to occur.[350] The County Court, for example, described judicial monitoring as 'an important part of the deferred sentence scheme' but also said it is already possible under section 83A(1B).[351] We witnessed ourselves the benefits of judicial monitoring during sentence deferrals when the Magistrates' Court allowed us to observe a half day of review hearings.[352]

5.23 Ultimately, we reached the view that there is no need for legislative reform. We have already witnessed an increase in the use of judicial monitoring over time.[353] In addition, the concept of judicial monitoring applies far more broadly than just sentence deferrals (for example, for people on adjourned undertakings or community correction orders) and any measures to increase or improve the use of judicial monitoring would be better considered in its broader context. We have therefore not made any recommendations about the use of judicial monitoring for sentence deferral. We simply reiterate the vital importance of judicial monitoring as a sentencing tool and note that its continued expansion requires an increase in resources for affected agencies.

346. *Sentencing Act 1991* (Vic) ss 83A(1B)–(1C).
347. Trood et al. (2022), above n 274.
348. *Sentencing Act 1991* (Vic) s 83A(1D).
349. *Consultation Paper* 42–43.
350. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)); Submission 10 (Law Institute of Victoria); Submission 12 (Victorian Aboriginal Legal Service); Submission 13 (Law and Advocacy Centre for Women).
351. Submission 2 (County Court of Victoria).
352. See further Sentencing Advisory Council, *Reforming Adjourned Undertakings in Victoria: Consultation Paper* (2023) 38.
353. See, for example, ibid 36–39; Sentencing Advisory Council, *Sentencing Breaches of Family Violence Intervention Orders and Safety Notices* (2022) 70–71; Sentencing Advisory Council, *Sentencing Breaches of Personal Safety Intervention Orders in Victoria* (2022) 58–59; Sentencing Advisory Council, *Sentencing Stalking in Victoria* (2022) 48–49.

Should an offender be told the likely sentence after deferral?

5.24 Unlike in the Australian Capital Territory,[354] in Victoria there is no express requirement for a court to state the penalty it might impose if the offender does well during their sentence deferral. There is also no prohibition on courts doing so.[355] In our consultation paper, we asked whether courts should be expressly permitted or required to tell the offender the sentence that they can expect if they successfully engage with the deferral.[356] Stakeholder views were strongly divided.

5.25 Jesuit Social Services, No to Violence and Fitzroy Legal Service all supported a requirement for courts to specify the sentence that the offender could expect if they did (or did not) engage well with their deferral.[357] Jesuit Social Services and Fitzroy Legal Service emphasised the impact of uncertainty on offenders with a background of complex trauma. Fitzroy Legal Service noted that 'the impact of having an unknown sentence hanging over a person's head should not be underestimated' and that 'even clients who are not at risk of imprisonment are usually highly anxious about this possibility until their case finalises'.[358]

5.26 In contrast, the County Court, Victoria Legal Aid, the Law Institute of Victoria, the Victorian Aboriginal Legal Service and the Law and Advocacy Centre for Women held concerns about a requirement for courts to specify the sentence that the offender could expect if they engage with their deferral.[359] These organisations observed that an offender's circumstances can change drastically during a deferral. Offenders may be charged with other offences that pre-date the deferral; although such offences don't constitute non-engagement they can complicate the sentencing exercise. Or offenders may only partially engage with deferral but have reasons for their lacklustre engagement.

354. *Crimes (Sentencing) Act 2005* (ACT) s 118.
355. See, for example, *Consultation Paper* 53, citing *DPP v Mayoum* [2017] VCC 442 [163]; *DPP v Mawien* [2018] VCC 565 [21], [30].
356. *Consultation Paper* 53–54.
357. Submission 3 (Jesuit Social Services); Submission 6 (No to Violence); Submission 11 (Fitzroy Legal Service).
358. Submission 11 (Fitzroy Legal Service).
359. Submission 2 (County Court of Victoria); Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)); Submission 10 (Law Institute of Victoria); Submission 12 (Victorian Aboriginal Legal Service); Submission 13 (Law and Advocacy Centre for Women).

> Court and contact with the criminal justice process is highly stressful. Often, the added layer of not knowing what may happen at court heightens the significant stress and burden of contact with the justice system that for many people is compounded by trauma, adverse life experiences and unstable living circumstances …
>
> By clearly communicating what a person can expect as a sentencing outcome following successful completion of a deferral plan, this allows individuals to plan their future, and also may encourage motivation to address deferral plan conditions.
>
> **Submission 3 (Jesuit Social Services)**

> 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.
>
> 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.
>
> **Submission 2 (County Court of Victoria)**

5.27 Given the lack of consensus on this issue, including some strong opposition, we were not persuaded that there was a sufficiently compelling case to amend the *Sentencing Act* to require courts to specify the sentence that the offender could expect if they engage well during the deferral period. That said, we see no legislative barrier to courts specifying the likely sentence in appropriate cases, even in the absence of legislative reform.

Sentencing after deferral

5.28 In sentencing an offender after a sentence deferral, the court must have regard to, among other things, the offender's behaviour during the deferral period.[360] In our consultation paper, we asked about the extent to which the principle of proportionality should come into play, both at the time of deferral ('will these requirements be more onerous than the sentence I might otherwise impose?') and at the time of sentencing ('have the requirements been so onerous that they should be reflected in the sentence imposed?').[361]

5.29 Stakeholders were keen to emphasise that in having regard to the offender's behaviour, courts should ensure that the final sentence reflects the sum of the offender's obligations during the deferral to ensure that the sentence is proportionate in all the circumstances, while also ensuring that offenders are not penalised for mis-steps. The County Court said that while 'positive progress' on deferral 'could be taken into account … it may be counter-intuitive to have a negative impact on an offender if they do not take up the opportunity'.[362] The County Court and Victoria Legal Aid emphasised that, rather than being viewed as an aggravating factor in the final sentence, any non-compliance 'could be more appropriately regarded as an absence of mitigation'.[363] Similarly, the Law Institute of Victoria took the view that the extent of an offender's compliance with their deferral should be 'reflected in mitigation in sentencing' because '[c]ompliance with rehabilitative conditions, some of which may be quite onerous, is suggestive of genuine remorse and/or an intention to address problematic behaviour, and this should be recognised'.[364] In cases where an offender's engagement with their deferral fell short, Jesuit Social Services emphasised the need to understand the barriers to engagement 'holistically in the context of each person's living circumstances and needs', noting that barriers to engagement 'could include limited access to services, lengthy waitlists, and experiences of homelessness, mental health concerns and serious health issues'.[365] For people experiencing drug and alcohol dependency, the Victorian Alcohol and Drug Association also emphasised the need to understand that it 'is a chronic relapsing condition' and '[p]eople should not be penalised for not succeeding in a therapeutic [alcohol and other drug] related program'.[366]

360. *Sentencing Act 1991* (Vic) s 83A(3).
361. *Consultation Paper* 55. See further Roberts (2022), above n 4, 217.
362. Submission 2 (County Court of Victoria).
363. Submission 2 (County Court of Victoria). See also Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice.
364. Submission 10 (Law Institute of Victoria).
365. Submission 3 (Jesuit Social Services).
366. Submission 1 (Victorian Alcohol and Drug Association).

5.30 We agree that an offender's behaviour on deferral should be capable of having a mitigating effect on any sentence imposed. But in order to not punish someone for trying to take an opportunity to rehabilitate, a failure to adequately engage with deferral requirements should not be treated as an aggravating factor.[367] As this approach is consistent with section 83A(3) of the *Sentencing Act,* we see no need for reform.

5.31 In our consultation paper, we also asked whether section 83A should be amended to provide that where an offender had engaged positively with their deferral, rehabilitation should become the predominant purpose of sentencing.[368] This approach was suggested during our preliminary consultation and would be consistent with other sentencing schemes that elevate particular sentencing purposes in particular circumstances. This approach also would be consistent with the rehabilitative objectives of deferral and would acknowledge the requirements on the offender during the deferral period.

5.32 Several submissions favoured this approach.[369] For example, the Victorian Alcohol and Drug Association commented that sentencing 'should seek to prioritise rehabilitation and in doing so, ensure that people have access to the supports necessary to have the best chance to achieve that goal' and in that context sentence deferrals 'accompanied by accessible services, would assist many people and reduce community risk going forward'.[370] Similarly, Victoria Legal Aid said that 'one of the key purposes of a deferral is to allow the offender to demonstrate rehabilitation' but that in their practice experience, sufficient weight was not always given to rehabilitation, 'particularly where there are onerous bail conditions, and a lengthy period of deferral has been completed'. On this basis, Victoria Legal Aid supported a legislative provision that where a person has engaged with their deferral, 'rehabilitation becomes the primary purpose of the sentence', noting that '[t]his prioritisation already exists for children and young people and drug treatment orders'.[371]

5.33 There was, though, also strong opposition. There were significant concerns that a legislative provision would be inconsistent with the principles of totality and proportionality and fetter judicial discretion. The County Court considered that:

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367. This is the approach taken in England and Wales: Roberts (2022), above n 4, 222.
368. *Consultation Paper* 56–57.
369. Submission 1 (Victorian Alcohol and Drug Association); Submission 3 (Jesuit Social Services); Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice; Submission 7 (Professor Felicity Gerry KC); Submission 9 (Youthlaw) (endorsing Submission 5 (Victoria Legal Aid)); Submission 11 (Fitzroy Legal Service); Submission 12 (Victorian Aboriginal Legal Service); Submission 13 (Law and Advocacy Centre for Women).
370. Submission 1 (Victorian Alcohol and Drug Association).
371. Submission 5 (Victoria Legal Aid), endorsed by Youthlaw and WEstjustice.

> 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.[372]

5.34 Similarly, the Law Institute of Victoria said that:

> rehabilitation should not become the primary purpose of sentencing in instances where an offender has engaged positively with the conditions of their deferred sentence.
>
> The LIV considers that doing so would be inappropriate and counterproductive to established sentencing principles. Facts of individual cases vary widely, and there should not be a one size fits all approach to sentencing. Judicial officers are best placed to consider all relevant matters under the instinctive sentencing synthesis in order to determine a suitable sentence in light of whatever sentencing purpose is most relevant, be that just punishment, denunciation, deterrence, or rehabilitation. The LIV further notes that positive compliance is already a factor that the Court will take into account and to which it will attribute weight under existing sentencing principles.[373]

5.35 We agree with the County Court and the Law Institute of Victoria that amending section 83A to prioritise rehabilitation simply because sentencing has been deferred would unnecessarily fetter judicial discretion. There is no evidence to suggest that courts are not giving due weight to an offender's rehabilitative potential after sentence deferral; indeed, in the vast majority of cases, the reason that the court has deferred sentencing is to better understand the offender's rehabilitative potential. Moreover, a significant proportion of cases involving sentence deferral in the Magistrates' Court were family violence cases (see [1.11]). In many of these cases, it would be inappropriate to elevate rehabilitation above other sentencing purposes such as deterrence and denunciation. Similarly, it would be inappropriate to legislatively prioritise rehabilitation as a sentencing purpose due to the increasing use of sentence deferral in the County Court and our recommendation to extend sentence deferral to the Supreme Court. For these reasons, we see no cause to interfere with the ability of courts to appropriately apply their discretion to balance the competing purposes of sentencing in section 5 of the *Sentencing Act*, taking into account all the circumstances of the case.

372. Submission 2 (County Court of Victoria).
373. Submission 10 (Law Institute of Victoria).

Appendix: Consultation and submissions

Meetings

The Council consulted the following organisations throughout the project, often on multiple occasions:

- Australian Community Support Organisation (ACSO)
- Australian Multicultural Foundation
- County Court of Victoria
- Criminal Bar Association
- Department of Justice and Community Safety (DJCS)
- Department of Fairness, Families and Housing (DFFH)
- Federation of Community Legal Centres
- Fitzroy Legal Service
- Forensicare
- Jesuit Social Services
- Judicial College of Victoria
- Law and Advocacy Centre for Women Inc
- Law Institute of Victoria
- Magistrates' Court of Victoria
- No to Violence
- Safe and Equal
- Supreme Court of Victoria
- Vacro
- Representatives of the Victims of Crime Commissioner
- Victoria Police
- Victoria Legal Aid
- Victorian Aboriginal Legal Service
- Victorian Bar
- Youthlaw

We are grateful to them for so generously sharing their time and expertise.

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
2 May 2022	Meeting with Magistrates' Court
2 September 2022	Meeting with No to Violence
2 September 2022	Meeting with Safe and Equal
5 September 2022	Meeting with Jesuit Social Services
5 September 2022	Meeting with Australian Multicultural Foundation
9 September 2022	Meeting with Magistrates' Court
13 September 2022	Meeting with Australian Community Support Organisation
13 September 2022	Meeting with Victim Services, Support and Reform (a business unit within the Department of Justice and Community Safety)
13 September 2022	Meeting with Vacro
26 September 2022	Meeting with Fitzroy Legal Service
6 December 2022	Meeting with Magistrates' Court
21 February 2023	Meeting with Department of Families, Fairness and Housing
28 February 2023	Meeting with Law Institute of Victoria
5 June 2023	Meeting with Supreme Court

Date	Meeting
4 August 2023	Meeting with Victorian Aboriginal Legal Service
10 August 2023	Stakeholder Roundtable: attended by representatives of the Australian Community Support Organisation (ACSO); RMIT Centre for Innovative Justice; Criminal Bar Association; Jesuit Social Services; Law and Advocacy Centre for Women Ltd; Victorian Alcohol and Drug Association (VAADA); Victoria Police; Victorian Aboriginal Legal Service; Victoria Legal Aid, Youthlaw and Professor Felicity Gerry KC.
22 August 2023	Meeting with representative of the Victims of Crime Commissioner
28 August 2023	Meeting with Emeritus Professor Arie Freiberg
4 September 2023	Meeting with Law Institute of Victoria
10 October 2023	Meeting with representatives of the County Court

Submissions

The Council received the following public submissions, which we published on our website.

Submission number	Organisation
1	Victorian Alcohol and Drug Association
2	County Court of Victoria
3	Jesuit Social Services
4	Australian Community Support Organisation
5	Victoria Legal Aid
6	No to Violence
7	Felicity Gerry KC
8	RMIT Centre for Innovative Justice
9	Youthlaw
10	Law Institute of Victoria
11	Fitzroy Legal Service
12	Victorian Aboriginal Legal Service
13	Law and Advocacy Centre for Women

The Council also received written comments on selective issues from the Supreme Court of Victoria and the Victims of Crime Commissioner.

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Sentencing Advisory Council
Level 3
333 Queen Street
Melbourne VIC 3000

Telephone 1300 363 196
contact@sentencingcouncil.vic.gov.au

www.sentencingcouncil.vic.gov.au
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