# Victorian Aboriginal Legal Service Submission to the Sentencing Advisory Council's Consultation on Reforming Sentence Deferrals

January 2023

# Table of Contents

Table of Contents ..... i

Background to the Victorian Aboriginal Legal Service ..... 1

SUMMARY OF RECOMMENDATIONS ..... 3

DETAILED SUBMISSIONS ..... 5

Introduction ..... 5

Address barriers to sentence deferrals ..... 5

Increase access to sentence deferrals for Aboriginal people ..... 7

- Legislative requirement to consider Aboriginality ..... 8
- Deferring sentencing when imprisonment is likely ..... 10
- Aboriginal Community Justice Reports ..... 11
- Koori Court ..... 12
- Other Therapeutic Courts ..... 13

Increase culturally safe/appropriate support during the deferral order ..... 14

- Funding reform to support Aboriginal-led programs and services ..... 15
- Court Integrated Services Program ..... 16
- Justice Plans ..... 16

Expand legislative purposes ..... 17

Increase maximum length ..... 18

Administration of deferrals: conditions and outcomes ..... 19

- Formal deferral conditions ..... 19
- Judicial monitoring ..... 20
- Outcome of the deferral ..... 21

## Background to the Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service (**VALS**) is an Aboriginal Community Controlled Organisation (**ACCO**). VALS was established in 1973 to provide culturally safe legal and community justice services to Aboriginal and/or Torres Strait Islander people across Victoria. VALS' vision is to ensure that Aboriginal people in Victoria are treated equally before the law; our human rights are respected; and we have the choice to live a life of the quality we wish.

## Legal Services

Our legal practice serves Aboriginal people of all ages and genders in the areas of criminal, family and civil law. We have also relaunched a dedicated youth justice service, Balit Ngulu. Our 24-hour criminal law service is backed up by the strong community-based role of our Client Service Officers (**CSO**s). CSOs are the first point of contact when an Aboriginal person is taken into custody, through to the finalisation of legal proceedings.

Our Criminal Law Practice provides legal assistance and representation for Aboriginal people involved in court proceedings. This includes bail applications; representation for legal defence; and assisting clients with pleading to charges and sentencing. We represent clients in matters in the generalist and Koori courts. Most clients have been exposed to family violence, poor mental health, homelessness and poverty. We aim to understand the underlying reasons that have led to the offending behaviour and equip prosecutors, magistrates and legal officers with knowledge of this. We support our clients to access support that can help to address the underlying reasons for offending, and so reduce recidivism.

Our Civil and Human Rights Practice provides advice and casework to Aboriginal people in areas including infringements; tenancy; victims of crime; discrimination and human rights; Personal Safety Intervention Orders (**PSIO**) matters; coronial inquests; consumer law issues; and Working With Children Check suspension or cancellation.

Our Aboriginal Families Practice provides legal advice and representation to clients in family law and child protection matters. We aim to ensure that families can remain together and children are kept safe. We are consistent advocates for compliance with the Aboriginal Child Placement Principle in situations where children are removed from their parents' care.

Our Specialist Legal and Litigation Practice (Wirraway) provides legal advice and representation in civil litigation matters against government authorities. This includes for claims involving excessive force or unlawful detention; police complaints; prisoners' rights issues; and coronial inquests (including deaths in custody).

## Community Justice Programs

VALS operates a Custody Notification System (**CNS**). The *Crimes Act 1958* requires that Victoria Police notify VALS within 1 hour of an Aboriginal person being taken into police custody in Victoria. Once a

notification is received, VALS contacts the relevant police station to conduct a welfare check and facilitate access to legal advice if required.

The Community Justice Team also run the following programs:

- Family Violence Client Support Program[1]
- Community Legal Education
- Victoria Police Electronic Referral System (**V-PeR**)[2]
- Regional Client Service Officers
- Baggarrook Women's Transitional Housing program[3]
- Aboriginal Community Justice Reports[4]

## Policy, Research and Advocacy

VALS informs and drives system change initiatives to improve justice outcomes for Aboriginal people in Victoria. VALS works closely with fellow members of the Aboriginal Justice Caucus and ACCOs in Victoria, as well as other key stakeholders within the justice and human rights sectors.


# Acknowledgements

VALS pays our deepest respect to traditional owners across Victoria, in particular, to all Elders past, present and future. We also acknowledge all Aboriginal and Torres Strait Islander people in Victoria and pay respect to the knowledge, cultures and continued history of all Aboriginal and Torres Strait Islander Nations.

We also acknowledge the following staff members who collaborated to prepare this submission:

- Isabel Robinson, Senior Policy Officer
- Kin Leong, Principal Managing Lawyer, Criminal Law Team
- Grace Donohoe, Managing Lawyer, Criminal Law Team
- Patrick Cook, Head of Policy, Communications and Strategy


[1] VALS has three Family Violence Client Support Officers (FVCSOs) who support clients throughout their family law or civil law matter, providing holistic support to limit re-traumatisation to the client and provide appropriate referrals to access local community support programs and emergency relief monies.

[2] The Victoria Police Electronic Referral (V-PeR) program involves a partnership between VALS and Victoria Police to support Aboriginal people across Victoria to access culturally appropriate services. Individuals are referred to VALS once they are in contact with police, and VALS provides support to that person to access appropriate services, including in relation to drug and alcohol, housing and homelessness, disability support, mental health support.

[3] The Baggarrook Women's Transitional Housing program provides post-release support and culturally safe housing for six Aboriginal women to support their transition back to the community. The program is a partnership between VALS, Aboriginal Housing Victoria and Corrections Victoria.

[4] See https://www.vals.org.au/aboriginal-community-justice-reports/

## SUMMARY OF RECOMMENDATIONS

**Recommendation 1:** Remove barriers that prevent increased use of sentence deferrals, including by:

(a) Addressing time pressures on the judiciary in generalist courts.

(b) Increasing funding to Aboriginal legal services to cover court appearances and associated community justice services throughout the deferral period.

**Recommendation 2.** Urgently amend the *Bail Act 1977* (Vic) to:

(a) Remove the presumption against bail and create a presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted in strictly limited circumstances.[5]

(b) Explicitly require that a person must not be remanded for an offence that is unlikely to result in a sentence of imprisonment.

(c) Remove the offences of committing an indictable offence while on bail (s. 30B), breaching bail conditions (s. 30A) and failure to answer bail (s. 30).

**Recommendation 3.** Increase access to data on sentence deferrals (disaggregated by Aboriginality) in accordance with principles of Aboriginal Data Sovereignty and Governance.

**Recommendation 4:** Increase access to and use of sentence deferrals for Aboriginal people by amending Section 83A of the *Sentencing Act 1991* (Vic) to require courts to:

(a) Take into account the unique systemic and background factors affecting Aboriginal peoples; and

(b) 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.

**Recommendation 5.** Amend Section 83A of the *Sentencing Act 1991* (Vic) to clarify that a sentence can be deferred even if the offence may result in a prison sentence.

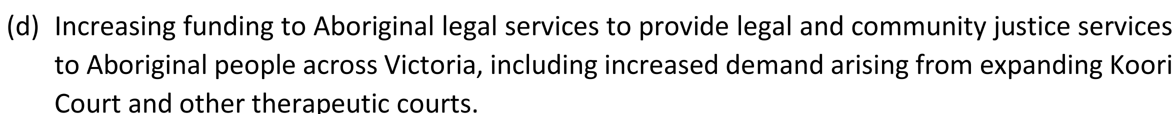
**Recommendation 6.** Increase access to and use of sentence deferrals for Aboriginal people, including by:

(a) Providing long-term funding for Aboriginal Community Justice Reports.

(b) Increasing access to Koori Courts, including by increasing the frequency of sitting days in rural and regional areas, continuing to expand Koori Court locations, and expanding the jurisdiction of Koori Courts to include bail hearings, family violence offences and breaches of Family Violence Intervention Orders.

(c) Expanding the locations of other therapeutic courts, including the Assessment Referral Centre and the Neighbourhood Justice Centre.

[5] The only reasons for not granting bail should be: a specific and immediate risk to the physical safety of another person; a serious risk of interfering with a witness; or the person posing a demonstrable flight risk. See VALS, *Policy Brief: Fixing Victoria's Broken Bail Laws* (2022).



(d) Increasing funding to Aboriginal legal services to provide legal and community justice services to Aboriginal people across Victoria, including increased demand arising from expanding Koori Court and other therapeutic courts.

**Recommendation 7.** Reform funding arrangements to ensure that Aboriginal Community Controlled Organisations have access to adequate, sustainable, and autonomous financial resources in order to develop, implement and evaluate pre-sentence culturally safe services and programs for Aboriginal people.

**Recommendation 8.** Increase access to culturally appropriate support for Aboriginal people on deferral orders, by:

(a) Expanding the Court Integrated Services Program to all Magistrates Court locations, and increasing the number of Koori CIPS case managers.

(b) Increasing access to Justice Plans for all persons with an intellectual disability or cognitive impairments, including Acquired Brain Injuries.

**Recommendation 9.** Amend Section 83A(1A) of the *Sentencing Act 1991* (Vic) to include new legislative purposes for sentence deferrals, which allows the court to defer sentencing in order to:

(a) Take into account the best interests of the person's dependent children.

(b) Support young adults aged 18-25 years to access age-appropriate services.

**Recommendation 10.** Amend the *Sentencing Act* 1991 (Vic) to provide that the maximum length of a sentence deferral may be extended beyond 12 months in appropriate circumstances.

**Recommendation 11.** The *Sentencing Act* 1991 (Vic) should not be amended to provide for formal deferral conditions attached to the deferral order.

**Recommendation 12.** Develop guidance and training for the judiciary to ensure that judicial monitoring is used during a deferral where appropriate, and in a way that maximises the therapeutic benefits of this approach.

**Recommendation 13.** Amend the *Sentencing Act* 1991 (Vic) to provide that:

(a) A person's behaviour whilst on a deferral order can only be considered as a mitigating factor, and never as an aggravating factor.
(b) Following a deferral order, healing and rehabilitation should be the paramount consideration in sentencing.

# DETAILED SUBMISSIONS

## Introduction

VALS welcomes the opportunity to provide a submission to the Sentencing Advisory Council's (**SAC**) Review of Sentence Deferrals. Our feedback is informed by our experience in generalist and Koori Courts across Victoria in the Magistrates, County and Children's Court jurisdictions. It also builds on our observations and recommendations relating to sentence deferrals, as set out in our 2020 *Submission to the Sentencing Act Reform Project*.[6]

Sentence deferrals are an important sentencing tool, which allow courts to prioritise healing and rehabilitation as the primary purpose of sentencing, support individuals to address underlying reasons for offending, and examine all possible avenues to prevent unnecessary escalation up the sentencing hierarchy.

When combined with Aboriginal-led approaches such as Aboriginal Community Justice Reports (**ACJR**s) or culturally safe deferral programs, sentence deferrals also allow the court to consider the unique systemic and background factors affecting Aboriginal people, and adopt a strengths-based approach to Aboriginality, including by incorporating relevant community-based sentencing options.

In our experience, deferrals are more common in therapeutic courts, including Koori Court, the Neighbourhood Justice Centre (**NJC**) and the Assessment Referral Court (**ARC**). We regularly see positive outcomes from deferrals, including sentences being reduced from a likely prison sentence to a non-custodial sentence.

Our submission includes recommendations to support increased use of sentence deferrals for Aboriginal people, including both formal deferrals pursuant to Section 83A of the *Sentencing Act 1991* (Vic), as well as informal deferrals implemented through adjournments.

## Address barriers to sentence deferrals

**Consultation Question 2**: What, if any, are the current barriers to using sentence deferrals in appropriate cases? What changes would you propose to overcome those barriers, and why?

The Consultation Paper identifies several barriers to sentence deferrals that VALS has previously highlighted, including: "time pressure on magistrates, meaning that they may want to clear the list rather than deferring sentencing; and funding restrictions, noting that legal aid grants do not cover

[6] VALS, Submission to Sentencing Act Reform Project (2020).

adjournments, so private lawyers may be reluctant to ask that sentencing is deferred."[7] We continue to see these barriers in practice.[8]

In addition, we agree with some of the other barriers identified by stakeholders, including "the limited availability of many services (such as housing) and programs (such as men's behaviour change programs), and long waiting lists."[9] This is particularly the case for culturally safe deferral programs and services run by Aboriginal organisations, as discussed below.

Finally, the punitive bail system and high number of people on remand in Victoria's prisons, also acts as a barrier to the use of sentence deferrals. In September 2022, 44% of people in Victoria's prisons had not been sentenced, compared to 30% in September 2016.[10] For Aboriginal people, the harsh bail system introduced in 2017/18 has had an even more significant impact: in June 2021, 50% of Aboriginal people in prisons were unsentenced, including 61.4% of all Aboriginal women in prisons.[11]

The current bail system acts as a barrier to increased use of sentence deferrals in several ways. Firstly, if someone is on bail, it is easier to demonstrate the benefit of a sentence deferral, than if the person is on remand. This is because there are more opportunities in the community for the person to be connected to support networks and engaging in programs or services to support healing. Individuals on remand are not able to access the same networks, programs and services that can support a request for sentence deferral.

As highlighted in the Consultation Paper,[12] the punitive bail system can also operate as a barrier to sentence deferrals, due to the risk of charges whilst the person in on a deferral order – either resulting from bail offences or additional offences – which may cumulatively escalate the person into a higher threshold for accessing bail.

Although bail reform is outside the scope of the SAC review, we reiterate recommendations made elsewhere to the Victorian government,[13] to urgently reform the *Bail Act 1977* (Vic) by:

- Removing the presumption against bail and creating a presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted in limited circumstances.
- Explicitly requiring that a person must not be remanded for an offence that is unlikely to result in a sentence of imprisonment.

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[7] Sentencing Advisory Council (SAC), *Reforming Sentence Deferrals in Victoria: Consultation Paper* (hereafter referred to as "Consultation Paper") (2022), p. 15; VALS, *Submission to Sentencing Act Reform Project* (2020), p. 5.
[8] Regarding funding, we understand that appearances for initial applications and appearances at the end of the deferral period are funded, but appearances throughout the deferral period are not funded. Although VALS provides legal representation throughout the deferral period for our clients, this is not the case for other legal practices.
[9] SAC, *Consultation Paper*, p. 14.
[10] Corrections Victoria, Monthly Time series prison and community corrections data.
[11] Department of Justice and Community Safety, *2021-22 Corrections and Justice Services Data Report to the Aboriginal Justice Forum,* pp. 6-7.
[12] SAC, *Consultation Paper,* p. 36.
[13] VALS, *Policy Brief: Fixing Victoria's Broken Bail Laws* (2022); VALS, *Submission to Inquiry into Victoria's Criminal Legal System* (2021) pp. 56-64; VALS, *Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System* (2022) pp. 46-48.

- Repealing the offences of committing an indictable offence while on bail, breaching bail conditions and failure to answer bail.[14]

**Recommendation 1:** Remove barriers that prevent increased use of sentence deferrals, including by:

(a) Addressing time pressures on the judiciary in generalist courts.

(b) Increasing funding to Aboriginal legal services to cover court appearances and associated community justice services throughout the deferral period.

**Recommendation 2.** Urgently amend the *Bail Act 1977* (Vic) to:

(a) Remove the presumption against bail and create a presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted in strictly limited circumstances.[15]

(b) Explicitly require that a person must not be remanded for an offence that is unlikely to result in a sentence of imprisonment.

(c) Remove the offences of committing an indictable offence while on bail (s. 30B), breaching bail conditions (s. 30A) and failure to answer bail (s. 30).

## Increase access to sentence deferrals for Aboriginal people

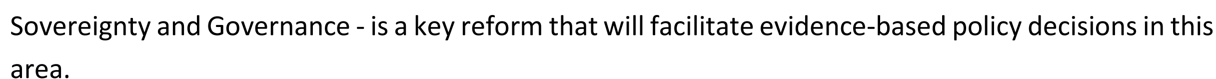
**Question 3:** Are there any issues with the current criteria and considerations courts must take into account before ordering a sentence deferral? In answering this question, you may want to consider: (a) if courts deciding whether to order a deferral should be required to consider the interests or views of any victims, and/or the interests of justice; and (b) whether section 83A should specify that a court may order deferral even if it considers that the seriousness of the offence justifies a prison sentence.

**Question 4:** Are there reforms that could be made to sentence deferrals that could reduce the disproportionate effect of the criminal justice system on marginalised groups? If so, what reforms would you propose, and why?

**Question 5:** Should the current legislative purposes of sentence deferral in section 83A(1A) of the *Sentencing Act 1991* (Vic) be amended? If so, what changes would you recommend, and why?

Data disaggregated by Aboriginality is not currently available in relation to sentence deferrals in the Magistrates or County Courts. Ensuring that disaggregated data on deferrals is collected and controlled by Aboriginal Communities - in accordance with the principles of Aboriginal Data

[14] See sections 30, 30A and 30B, *Bail Act 1977* (Vic).
[15] The only reasons for not granting bail should be: a specific and immediate risk to the physical safety of another person; a serious risk of interfering with a witness; or the person posing a demonstrable flight risk. See VALS, *Policy Brief: Fixing Victoria's Broken Bail Laws* (2022).



Sovereignty and Governance - is a key reform that will facilitate evidence-based policy decisions in this area.

Despite the lack of disaggregated data, our practice experience across the criminal legal system indicates that there are several ways to increase access to sentence deferrals for Aboriginal people, including legislative reform and reforms to increase access to therapeutic and culturally appropriate courts. Across all areas, these proposed reforms must be informed by strengths-based approaches to Aboriginality, which recognise connection to culture, Community, kin and Country as protective factors that can support healing and rehabilitation.

**Recommendation 3.** Increase access to data on sentence deferrals (disaggregated by Aboriginality) in accordance with principles of Aboriginal Data Sovereignty and Governance.

## Legislative requirement to consider Aboriginality

In relation to all decisions relevant to sentence deferrals for Aboriginal people (including whether or not to grant a deferral), courts should be required to: (a) take into account the unique systemic and background factors affecting Aboriginal peoples; and (b) provide reasons and demonstrate the steps taken to discharge this obligation.

This is a recommendation that VALS has made previously, both in relation to broader sentencing reform (e.g. as a sentencing principle applicable to all decisions under the *Sentencing Act 1991*),[16] as well as other areas across the criminal legal system, including cautioning, diversion, bail and parole.[17] It draws on the approach in the Canadian Criminal Code, which requires that: "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."[18]

We are pleased to see that the Parliamentary Inquiry into Victoria's Criminal Justice System recommended that the *Sentencing Act 1991* (Vic) "require, for the purposes of sentencing, courts to take into consideration the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples."[19]

However, Section 3A of the *Bail Act 1977* (Vic)[20] has demonstrated that a legislative requirement to consider an individual's Aboriginality is not enough to create systemic change. For example, evidence

[16] VALS, *Aboriginal Community Justice Reports: Addressing Over-Incarceration* (2017) pp. 16-17; VALS, *Submission to Sentencing Act Reform Project* (2020) pp 9-10; VALS, *Submission to Inquiry into Victoria's Criminal Legal System* (2021) pp. 115-120
[17] VALS, *Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System* (2022) pp.
[18] Criminal Code RSC 1985, c C-46 s 718.2(e).
[19] Parliament of Victoria, Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System: Final Report*, p. 565, Recommendation 71.
[20] Section 3A of the *Bail Act 1977* (Vic) provides that: "In making a determination under this Act in relation to an Aboriginal person, a bail decision maker must take into account (in addition to any other requirements of this Act) any issues that arise due to the person's Aboriginality, including (a) the person's cultural background, including the person's ties to extended family or place; and (b) any other relevant cultural issue or obligation."

adduced during the Coronial Inquest into the passing of Veronica Nelson, proud Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman, indicated that the court was aware that Veronica was Aboriginal, but her Aboriginality was not mentioned once during her bail hearing.[21] As Veronica was self-represented during the hearing, she did not have a lawyer to remind the court of their legal obligation pursuant to Section 3A of the *Bail Act 1977* (Vic).

Although there have been some positive cases in higher courts in relation to Section 3A of the *Bail Act 1977*, there is still significant work to be done to ensure that an individual's Aboriginality is meaningfully and consistently taken into account in relation to bail applications for Aboriginal people. To achieve this, VALS has advocated for:

1. A legislative requirement on bail decision makers to demonstrate how they have complied with Section 3A and to provide reasons if a bail application from an Aboriginal person is refused.
2. Training and guidance for all bail decision makers (including judges, magistrates, bail justices and police) as well as prosecutors and defence counsel, that is developed and delivered by Aboriginal Communities.

Based on our experience with the *Bail Act 1977*, any changes to Section 83A of the *Sentencing Act* 1991 which seek to increase access to sentence deferrals for Aboriginal people, must be robust and must be supported by adequate training and guidance for the judiciary, prosecutors and defence counsel. Additionally, they should be accompanied by Aboriginal-led approaches within the sentencing process, such as ACJRs, discussed further below.

We note that the Consultation Paper contemplates changes to the legislative purposes for sentence deferrals, discussed further below. We strongly believe that any legislative change that seeks to reduce overincarceration of Aboriginal people must be framed as a mandatory legislative requirement, rather than a discretionary legislative purpose. Moreover, it must be accompanied by a legislative requirement to demonstrate how the individual's Aboriginality was taken into account, and provide reasons if an application for a sentence deferral for an Aboriginal person is not granted.

**Recommendation 4:** Increase access to and use of sentence deferrals for Aboriginal people by amending Section 83A of the *Sentencing Act 1991* (Vic) to require courts to:

(a) Take into account the unique systemic and background factors affecting Aboriginal peoples; and
(b) 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.

[21] Transcripts of the hearing are available from the Coroners Court of Victoria upon request.

## Sentence deferral when imprisonment is likely

The Consultation Paper contemplates whether the *Sentencing Act 1991* should "clarify whether, and to what extent, the likely sentence to be imposed is a relevant consideration in the use of deferral."[22] We believe that the Act should specify that a deferral can be ordered even if the offence may result in a prison sentence.

Research and VALS' practice experience indicates that prisons are harmful, inflict further trauma and do not support healing or rehabilitation for Aboriginal people. This is in part due to disconnection from culture, Country, community and kin; but also due to violent practices in prisons including solitary confinement, strip searching, excessive use of force and corruption. In addition, Aboriginal people experience high rates of self-harm, injury and death in custody.[23]

Evidence provided by witnesses at the Yoorook Justice Commission in December 2022 confirms the harm inflicted by practices such as strip searching. According to Aunty Vickie Roach, proud Yuin woman, who gave evidence before the Commission:

> *"When you realise that, like, around 90 per cent of women in prison have been abused, you know, physically, sexually throughout their lives, as a child or as an adult, strip searching is a particularly demeaning, terrifying, horrifying experience to have to endure. The fact is that it's not necessary. You know, it's not necessary to demean women in this way.*
>
> *…*
>
> *It's like being raped. You have got no choice. You know, you can't say, "No, I don't want to take my clothes off." You know, it's - you understand that it's not your body anymore, it's theirs. Like, if I said no during a strip search, they'd just grab me and throw me down and tear my clothes off."*[24]

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."[25] 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.[26]

Given that one of the most important outcomes of a sentence deferral is the opportunity to address underlying reasons for offending and access services that can support healing, we strongly support

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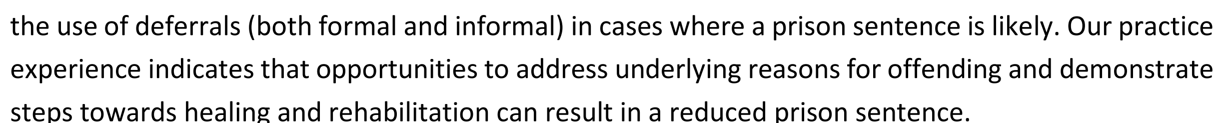
[22] SAC, Consultation Paper, p. 20.
[23] In 2021-22, 22% of all deaths in custody across Australia were Aboriginal people. See Australian Institute of Criminology (AIC), *Deaths in custody in Australia 2021-22* (2022), pp. 7-15.
[24] Yoorrook Justice Commission, Transcript of Day 8 – Wurrek Tyerrang, p. 462.
[25] Royal Commission into Aboriginal Deaths in Custody (RCIADIC), *National Report: Volume 5*, Recommendation 92.
[26] For example, Wulgunggo Ngalu Learning Place is a Corrections Victoria facility for Aboriginal men on Community Corrections Orders (CCOs). The facility was co-developed with the Aboriginal Community and is run by Aboriginal staff. They report high rates of successful completion of CCOs. See Clear Horizon Consulting, Department of Justice, *Wulgunggo Nglu Learning Place: Final Evaluation Report* (2013), 3-4. See also, RCIADIC, *National Report: Volume 5*, Recommendations 11 and 116; Australian Law Reform Commission (ALRC), *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, pp. 262-264, Recommendation 7-3.



the use of deferrals (both formal and informal) in cases where a prison sentence is likely. Our practice experience indicates that opportunities to address underlying reasons for offending and demonstrate steps towards healing and rehabilitation can result in a reduced prison sentence.

**Recommendation 5.** Amend Section 83A of the *Sentencing Act 1991* (Vic) to clarify that a sentence can be deferred even if the offence may result in a prison sentence.

## Aboriginal Community Justice Reports

Since 2017, VALS has been advocating for ACJRs, as a mechanism to support Aboriginal people to tell their life stories on their own terms during the sentencing process. Aboriginal led mechanisms such as ACJRs, can also support courts to understand and comply with legislative requirements to consider an individual's Aboriginality.

According to Anthony et al., "Aboriginal storying in sentencing promotes the principles of truth-telling by placing power in the hands of the Aboriginal person and their community to tell their story. Through this, non-custodial pathways can be identified, drawing on the person's strengths and community avenues for healing." [27] ACJRs "endeavour to amplify the aspirations, interests, strengths, connections, culture, and supports of the individual, as well as the adverse impact of colonial and carceral systems on their life."[28]

ACJRs are currently being piloted by VALS as part of a joint project with the University of Technology, the Australasian Institute of Judicial Administration and Griffith University. The reports are modelled off Gladue Reports, which evolved in Canada in 2001 in response to the landmark case of *R v. Gladue*[29] and the establishment of Gladue Courts.[30]

The ACJR pilot includes both Aboriginal men and women with matters in the Koori County Court. The reports are prepared by Aboriginal report writers who work with the defendant, their family and support people. Report writers conduct research on the person's community and culture, and identify relevant services and supports. The report can only be requested by the defendant and their lawyer (it cannot be ordered by the court); and the defendant's lawyer does not have control over the report, which is submitted to the court, prosecution and defence simultaneously.

ACJRs can take approximately 3 months to prepare, as they involve multiple meetings with the client as well as other family members and/or friends. Generally they are completed prior to a plea being entered, but they may also support a request for a sentence deferral.

The AJCR pilot has completed several reports to date, which have been well-received by the court. For example, in *DPP v Tirris*, the court noted that the report "provides a much more detailed and in-depth

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[27] T. Anthony, A. Lachsz and N. Waight, "The role of 're-storying' in addressing over-incarceration of Aboriginal and Torres Strait Islander Peoples," (17 August 2021).
[28] Ibid.
[29] *R v Gladue* [1999] 1 SCR 688.
[30] As noted in *R. v. Ipeelee*, "A Gladue report is an indispensable sentencing tool to be provided at a sentencing hearing for an Aboriginal offender." See *R. v. Ipeelee* 2012 SCC 13, [2012] 1 S.C.R. 433 [60].

level of information about your circumstances, your family and community, than is usually provided to a Court. The report also provides a greater opportunity for you and your loved ones to tell your story yourselves - rather than having it told by others."[31] In *DPP v Rotumah*, the court noted that "the prosecution acknowledges the contents of the ACJR and accepts that structural and systemic racism and colonisation influenced … personal circumstances and outcomes in life."[32] Additionally, preliminary findings from the ACJR project have indicated that the ACJR process itself can have significant healing and therapeutic value for the client.

Indigenous Experience Reports are also evolving in other jurisdictions and were recommended by the Australian Law Reform Commission in its 2017 *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*.[33]

As noted above, Section 3A of the *Bail Act 1977* has demonstrated that a legislative requirement to consider Aboriginality is not sufficient. It must be supported by training and guidance, as well as Aboriginal led approaches which allow decision makers to access relevant information regarding the person's community, culture, strengths and culturally safe support, services or sentencing alternatives.

Accordingly, we strongly recommend that any legislative provisions relating to Aboriginality in the *Sentencing Act 1991,* must be supported by adequately funded Aboriginal-led approaches such as ACJRs.

## Koori Court

As noted in our submission to the Sentencing Act Reform Project, VALS' experience is that sentence deferral is more common and more accessible in Koori Courts. This may include both formal deferral pursuant to Section 83A, as well as informal deferral through adjournments or other mechanisms.

VALS provides legal representation in relation to approximately 188 matters in Koori Courts each year[34] and it is common practice for VALS lawyers to request that sentencing is deferred to allow time for the offender to engage in culturally appropriate programs to support healing. Our experience is that Koori Courts are more flexible to the needs of Aboriginal people, more willing to prevent unnecessary escalation of an Aboriginal person up the sentencing hierarchy, and more committed to sentencing outcomes that seek to support healing over punishment.

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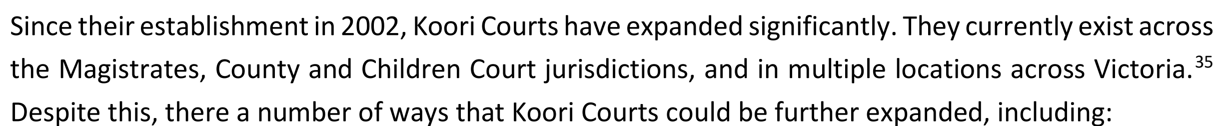
[31] *DPP v Tirris* [2022] VCC 1575 (16 Sep 2022).
[32] *DPP v Rotumah* [2022] VCC 1532 (7 Sep 2022)
[33] ALRC, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2017), p. 214.
[34] In 2017-2018, VALS criminal lawyers made 330 appearances in relation to 195 matters in Koori Courts; and in 2018-2019, VALS criminal lawyers made 300 appearances in relation to 182 matters.



Since their establishment in 2002, Koori Courts have expanded significantly. They currently exist across the Magistrates, County and Children Court jurisdictions, and in multiple locations across Victoria.[35] Despite this, there a number of ways that Koori Courts could be further expanded, including:

- **Increase frequency of sitting days:** in rural and regional locations, the frequency of Koori Court sitting days is limited (in some locations, every 6 weeks), meaning that someone may choose to have their matter heard in generalist court rather than waiting for the next Koori Court sitting day.
- **Expand the jurisdiction of Koori Courts to include family violence offences and offences that involve a breach of a Family Violence Intervention Order (FVIO):** Currently, the Magistrates Koori Court cannot hear family violence offences, or offences involving a breach of an FVIO. This is the same for the County Koori Court, expect for Mildura, which has recently expanded its jurisdiction to hear these offences, following a successful pilot.
- **Expand jurisdiction of Koori Court to include bail hearings:** the decision to remand or bail a person is one of the most critical decisions in a criminal matter, with significant implications for sentencing outcomes. As above, being on remand rather than in the community can impact access to sentence deferral. Currently, Koori Courts do not have jurisdiction to hear bail applications. Despite Section 3A of the *Bail Act 1977*, there is a critical need to increase access to culturally appropriate bail hearings by expanding the jurisdiction of Koori Courts.

In March 2021, the Inquiry into Victoria's Criminal Justice System found that "since their establishment, Victoria's Koori Courts have provided culturally safe and accessible criminal justice processes for Aboriginal Victorians. However, geographic and jurisdictional limitations restrict them from further supporting Aboriginal self-determination within the Victorian criminal justice system."[36] The Inquiry recommended expanding Koori Court locations and considering the extension of the Court's jurisdiction to hear additional types of criminal matters.[37]

Given the funding implications of expanding Koori Court, any expansion would need to be accompanied by adequate funding for Aboriginal legal services to provide increased representation and community justice services to Koori Court clients across Victoria.

## Other Therapeutic Courts

In addition to Koori Court, other therapeutic courts such as the NJC and ARC are more likely to use sentence deferrals, due to the focus in these courts on supporting the individual to address underlying reasons for offending behaviour.

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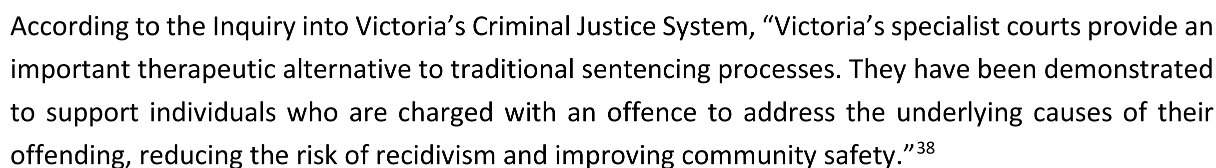
[35] The Magistrates Koori Court sits in: Bairnsdale, Broadmeadows, Dandenong, Geelong, Hamilton, Heidelberg, Latrobe Valley, Melbourne, Mildura, Portland, Shepparton, Swan Hill, Wangaratta, Warrnambool and Wodonga. The Children's Koori Court sits in: Melbourne, Heidelberg, Dandenong, Mildura, Latrobe Valley (Morwell), Bairnsdale, Warrnambool, Portland, Hamilton, Geelong, Swan Hill, Shepparton. Under AJA4, the Children's Koori Court is due to be expanded to Over Bendigo, Echuca and Wodonga. The County Koori Court sits in: Melbourne, Geelong, the Latrobe Valley, Mildura, Shepparton, Warrnambool and Wodonga.

[36] Parliament of Victoria, Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System: Final Report*, Finding 47, p. 523.

[37] Ibid., Recommendation 65, p. 524.



According to the Inquiry into Victoria's Criminal Justice System, "Victoria's specialist courts provide an important therapeutic alternative to traditional sentencing processes. They have been demonstrated to support individuals who are charged with an offence to address the underlying causes of their offending, reducing the risk of recidivism and improving community safety."[38]

At ARC, the defendant develops a support plan jointly with a team of case managers, and receives support to complete the plan. Sentencing takes places once the support plan has been completed. Currently, ARC is available at 5 out of 50 locations of the MMC,[39] however, pursuant to Recommendation 37(1) of the Royal Commission into Victoria's Mental Health System, ARC will be expanded to each of the 12 headquarter Magistrates Courts.[40]

At NJC, legal and social services are co-located with the court, and clients are supported to address underlying reasons for offending behaviour through an enhanced range of sentencing and diversion alternatives, problem solving approaches and judicial monitoring.[41]

**Recommendation 6.** Increase access to and use of sentence deferrals for Aboriginal people, including by:

(a) Providing long-term funding for Aboriginal Community Justice Reports.

(b) Increasing access to Koori Courts, including by increasing the frequency of sitting days in rural and regional areas, continuing to expand Koori Court locations, and expanding the jurisdiction of Koori Courts to include bail hearings, family violence offences and breaches of Family Violence Intervention Orders.

(c) Expanding the locations of other therapeutic courts, including the Assessment Referral Centre and the Neighbourhood Justice Centre.

(d) Increasing funding to Aboriginal legal services to provide legal and community justice services to Aboriginal people across Victoria, including increased demand arising from expanding Koori Court and other therapeutic courts.

## Increase culturally safe/appropriate support during the deferral order

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

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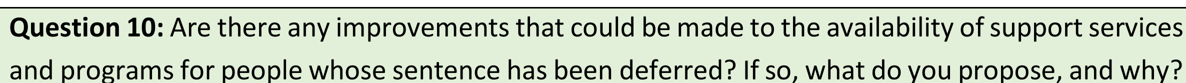
[38] Parliament of Victoria, Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System: Final Report*, Finding 45, p. 515.

[39] The Court is available at Magistrates' Court locations in Frankston, Latrobe Valley, Korumburra, Melbourne and Moorabbin. Magistrates' Court of Victoria, 'Assessment and Referral Court (ARC)', https://www.mcv.vic.gov.au/about-us/assessment-and-referral-court-arc.

[40] Royal Commission into Victoria's Mental Health System, *Final Report*, Recommendation 37(1).

[41] Stuart Ross, 'Evaluating neighbourhood justice: Measuring and attributing outcomes for a community justice program', *Australian Institute of Criminology: Trends & issues in crime and criminal justice*, no. 499, 2015. See also, Neighbourhood Justice Centre: What We Do (website).



**Question 10:** Are there any improvements that could be made to the availability of support services and programs for people whose sentence has been deferred? If so, what do you propose, and why?

As highlighted by Victoria Legal Aid (**VLA**), "for deferrals to be effective, there must be ready access to appropriate support services and programs."[42] This is currently not the case in Victoria, including in relation to services and programs run by ACCOs, as well as the Court Integrated Services Program (**CISP**) and Justice Plans.

In this regard, there is a critical need to:

- Reform funding arrangements so that ACCOs and other Aboriginal organisations have access to adequate, sustainable, and autonomous financial resources and are able to develop, implement and evaluate culturally safe services and programs.[43]
- Increase access to the CISP, including through additional Koori CISP case managers.
- Increase access to Justice Plans, including for people on a deferral order.

## Funding reform to support Aboriginal-led programs and services

As noted previously, "Aboriginal specific rehabilitative programs, including drug and alcohol or behaviour change programs, regularly have limited capacity and long waiting times for admission."[44] This is the case in relation to cautioning and diversion programs, as well as services available for individuals prior to sentencing and community-based sentencing options. In this regard, we echo VLA's experience[45] that limited access to services in regional and rural areas means that sentence deferral is either less accessible, or the conditions placed on the deferral cannot be complied with.

There is a critical need to increase access to culturally safe support services and programs. However, more importantly, there is a critical need for funding reform so that ACCOs have access to adequate, sustainable, and autonomous financial resources in order to develop, implement and evaluate culturally safe services and programs.[46]

**Recommendation 7.** Reform funding arrangements to ensure that Aboriginal Community Controlled Organisations have access to adequate, sustainable, and autonomous financial resources in order to develop, implement and evaluate pre-sentence culturally safe services and programs for Aboriginal people.

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[42] VLA, *Encouraging the Use of Deferrals: a flexible and people-centred approach to sentencing*, (2022), p. 7.
[43] VALS, *Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System* (2022), Recommendation 13, p. 30.
[44] VALS, *Submission to the Sentencing Consultation on Adjourned Undertakings Reform* (2022) p. 12. See also, VALS, *Submission to Inquiry into Victoria's Criminal Legal System* (2021); VALS, Submission to the Commission for Children and Young People Inquiry: Our Youth, Our Way (2019); VALS, *Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System* (2022).
[45] VLA, *Encouraging the Use of Deferrals: a flexible and people-centred approach to sentencing*, (2022), p. 7.
[46] VALS, *Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System* (2022), Recommendation 13, p. 30.

## Court Integrated Services Program

VALS has previously highlighted the need to increase access to the CISP, including through expanding the locations where CISP is available and increasing the number of Koori CISP case managers.[47]

CISP is currently available in 20 out of 50 locations of the Magistrates Court of Victoria, with approximately 70 CISP case managers, however it is also being expanded to the County Court as part of a pilot.[48] According to the Final Report of the *Parliamentary Inquiry into Victoria's Criminal Justice Commission*, the government should expand CISP to additional court locations including in rural and regional Victoria and increase funding to enable the program to meet increases in demand.[49]

The Victorian Government and Court Services Victoria (**CSV**) have committed to increase the number of Koori CISP case managers,[50] however, the Magistrates Court of Victoria have experienced challenges with recruitment and retention of Aboriginal employees in this program.[51] To address some of these challenges, the Melbourne Magistrates Court is currently recruiting a Koori Support Officer role at Melbourne Magistrates Court (**MMC**) with a focus on custodies and cultural support for Aboriginal people on CISP.

Finally, we support the proposal at paragraph 2.24 of the Consultation Paper to extend "the availability of CISP in deferral cases to ensure that services are available throughout the deferral period are not limited to four months."[52]

## Justice Plans

Justice Plans are currently available to individuals who are on a Community Corrections Order (**CCO**) and have an intellectual disability[53] (as defined under the *Disability Act 2006*). Justice Plans are prepared by the Department of Families, Fairness and Housing, and identify treatment services and specialised support to help them comply with the conditions of the Order.[54]

In VALS' experience, Justice Plans provide significant support for our clients. However, due to the narrow definition of intellectual disability under the *Disability Act*,[55] many of VALS' clients who are in need of additional support are not eligible for a Justice Plan. This includes clients with an Acquired

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[47] VALS, *Submission to the Royal Commission into Victoria's Mental Health System* (2019), Recommendation 25, p. 40; VALS, *Submission to Inquiry into Victoria's Criminal Legal System* (2021), Recommendation 22, p. 64.
[48] Parliament of Victoria, Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System: Final Report*, p. 493.
[49] Ibid., Recommendation 61, p. 495.
[50] *Burra Lotjpa Dunguludja: Aboriginal Justice Agreement Phase 4*, Outcome 2.3.3, p. 43.
[51] AJA4 in Action, update on commitment to provide greater support for Aboriginal accused on bail through the employment of an additional five Koori Court Integrated Support Program Workers.
[52] SAC, Consultation Paper, p. 15.
[53] *Sentencing Act 1991* (Vic), section 80.
[54] Sentencing Advisory Council, 'Community Correction Order'
[55] Intellectual disability in relation to a person over the age of 5 years, means the concurrent existence of: (a) significant sub-average general intellectual functioning; and (b) significant deficits in adaptive behaviour, each of which became manifest before the age of 18 years. See Section 3, *Disability Act 2006* (Vic).

Brain Injury (**ABI**), as well as clients who have an intellectual disability that was not diagnosed before the age of 18 years.

VALS supports increased use of Justice Plans as part of a sentence deferral, but this should be optional and not a requirement. Regardless of whether the person is on a CCO or a deferral order, Justice Plans should be available to all persons with an intellectual disability or cognitive impairment, including individuals with ABIs.

**Recommendation 8.** Increase access to culturally appropriate support for Aboriginal people on deferral orders, by:

(a) Expanding the Court Integrated Services Program to all Magistrates Court locations, and increasing the number of Koori CIPS case managers.

(b) Increasing access to Justice Plans for all persons with an intellectual disability or cognitive impairments, including Acquired Brain Injuries.

## Expand legislative purposes

**Question 5:** Should the current legislative purposes of sentence deferral in section 83A(1A) of the Sentencing Act 1991 (Vic) be amended? If so, what changes would you recommend, and why?

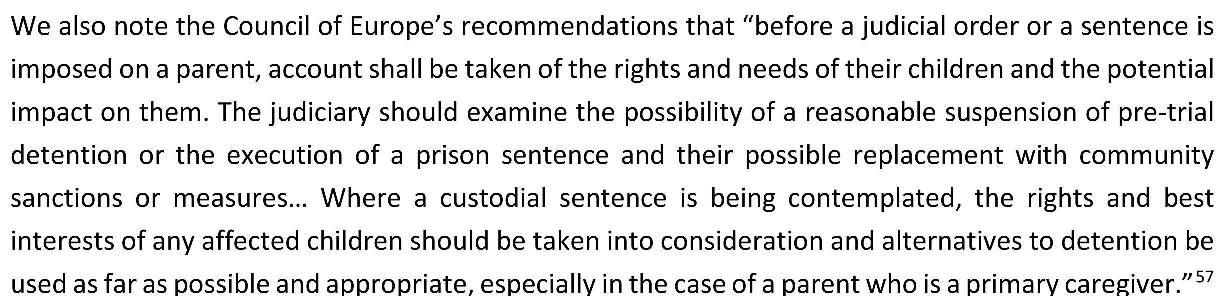
Currently, the *Sentencing Act* 1991 (Vic) provides that a court may defer sentencing for the following purposes:

- the offender's capacity and prospects for rehabilitation to be assessed;
- the offender to demonstrate that rehabilitation has taken place;
- the offender to participate in a program addressing underlying causes of the offending;
- the offender to participate in a program addressing the impact of the offending on the victim;
- any other purpose that the court considers appropriate in the circumstances.[56]

As noted above, Section 83A of the *Sentencing Act* should be amended to require courts to consider the unique systemic and background factors affecting Aboriginal peoples in relation to sentence deferrals. However, this should be framed as a mandatory legislative requirement rather than a legislative purpose.

In relation to legislative purposes, we strongly support the recommendations from the Prison Reform Trust in the UK, that when women are the sole or primary carer, there should generally be a presumption in favour of deferral regardless of the likely sentence. Data is not currently available regarding the number of children who become involved in Child Protection due to their primary carer being incarcerated. However, Aboriginal women are the fastest growing cohort in Victoria's prisons, and we remain concerned about incarceration as a driver for the high rates of Aboriginal child removal.

[56] *Sentencing Act 1991* (Vic), section 83A(1A).



We also note the Council of Europe's recommendations 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."[57]

Finally, we recommend that an additional legislative purpose be added to underline the importance of sentence deferrals for young adults aged 18-25 years. Whilst opportunities for healing are important for all defendants, they are particularly important for young offenders where all avenues for diversion away from the criminal legal system must be prioritised.

**Recommendation 9.** Amend Section 83A(1A) of the *Sentencing Act 1991* (Vic) to include new legislative purposes for sentence deferrals, which allows the court to defer sentencing in order to:

(a) Take into account the best interests of the person's dependent children.

(b) Support young adults aged 18-25 years to access age-appropriate services.

## Increase maximum length

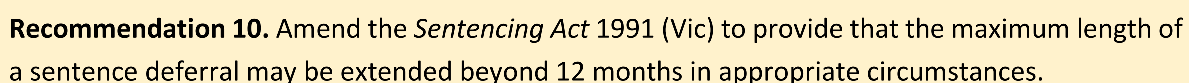
**Consultation question 6:** Should there be any changes to the maximum length of 12 months for sentence deferral in the Magistrates' Court and/or in the County Court? If so, what changes would you propose, and why?

We support VLA's submissions in relation to the length of the deferral period,[58] noting that there may be situations where an exception to the 12-month deferral period is required.

One reason for an extension of the time period is that services and programs may not be available due to long waiting lists, particularly in regional and rural areas. Whilst an extension of the deferral may be appropriate in some limited cases, the underlying reasons for a lack of appropriate support services must also be addressed. As discussed above, there is a critical need for funding reform to increase the capacity of Aboriginal organisations to develop, implement and evaluate culturally safe deferral programs.

The Consultation Paper also raises the issue of exposing individuals to "an unduly long period of potential exposure to the reverse onus bail laws."[59] As noted above, this is a critical issue which must be urgently addressed through reforms to the *Bail Act 1977.*

[57] Council of Europe, Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents, para 10.
[58] VLA, *Encouraging the Use of Deferrals: a flexible and people-centred approach to sentencing*, (2022), pp. 9-10.
[59] SAC, *Consultation Paper*, p. 36.



**Recommendation 10.** Amend the *Sentencing Act* 1991 (Vic) to provide that the maximum length of a sentence deferral may be extended beyond 12 months in appropriate circumstances.

## Administration of deferrals: conditions and outcomes

**Question 7:** Should section 83A of the *Sentencing Act 1991* (Vic) be amended to allow conditions to be attached to deferral orders? If so, why? If not, why not? In answering this question, you may wish to consider whether compliance with deferral conditions should be prohibited from being made a condition of bail?

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

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

**Question 12:** Should courts be expressly permitted or required to tell the offender the sentence that they can expect if they successfully engage with the deferral? If so, why? If not, why not?

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

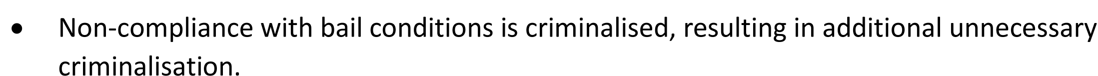
**Question 14:** If an offender has engaged positively with the conditions of their deferral, should rehabilitation become the primary purpose of sentencing?

### Formal deferral conditions

Deferrals currently operate as a flexible sentencing tool, which, if used effectively, can significantly reduce the sentencing outcome. Currently, conditions are not attached to a deferral, but they may be imposed informally, or through an undertaking or as a bail condition.

From our practice experience, we regularly see that conditions attached to bail and CCOs set clients up to fail and have a significant detrimental impact. This is because:

- Conditions are often culturally inappropriate, for example, non-association conditions that do not take into account an individual's family or community obligations (which may mean that it is not possible to stay away from someone);
- Conditions may be otherwise inappropriate, for example, requiring individuals with drug and alcohol addictions to abstain from substance use, or reporting conditions that do not take into account challenges associated with lack of transport options;
- Supervision of compliance with conditions is often punitive and rigid, for example, seeking to cancel a CCO after the person misses one appointment, but then reengages soon afterwards;



- Non-compliance with bail conditions is criminalised, resulting in additional unnecessary criminalisation.

Accordingly, we support concerns raised by VLA, that the introduction of formal conditions or other forms of administering sentence deferrals (written deferral plans or sentencing indications) "would reduce the flexibility of the order and place an emphasis on compliance and as a result, the impact of potential breaches."[60] In particular, we recommend against the creation of formal deferral conditions.

Similarly, while a sentencing indication may be useful in some cases, it should not be a requirement and should remain within the discretion of the judiciary.

**Recommendation 11.** The *Sentencing Act* 1991 (Vic) should not be amended to provide for formal deferral conditions attached to the deferral order.

## Judicial monitoring

When used effectively, VALS encourages judicial monitoring to support better outcomes for our clients throughout the deferral period. We see this regularly through Koori Court, NJC and ARC, where clients have contact with the court every month, or as a frequently as requested by the magistrate/judge. Even if a client has not met the expectations of the deferral order, increased interaction with the magistrate/judge during the deferral can lead to a better sentencing outcome for the client.

However, our experience in therapeutic courts is that judicial monitoring is used carefully in a way that supports and does not overburden our clients. For example, the court is unlikely to schedule a mention when the individual is participating in a rehabilitation program. Similarly, if the client is residing at a location which would make it challenging for them to attend court frequently, this will be taken into account when determining the frequency of mentions.

In this regard, we support submissions from VLA that "judicial monitoring should be applied cautiously to ensure contact with the criminal justice system is reduced."[61] Further, we support VLA's recommendation that guidance and training should be developed for the judiciary "to ensure that judicial monitoring has its intended therapeutic benefits."[62]

Increased judicial monitoring requires additional resources, both for courts, defendants and their legal representatives. As noted above in relation to expanding therapeutic courts, this would require increased funding to Aboriginal legal services to provide legal and community justice supports to our clients.

**Recommendation 12.** Develop guidance and training for the judiciary to ensure that judicial monitoring is used during a deferral where appropriate, and in a way that maximises the therapeutic benefits of this approach.

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[60] VLA, *Encouraging the Use of Deferrals: a flexible and people-centred approach to sentencing*, (2022), p. 15-16.
[61] VLA, *Encouraging the Use of Deferrals: a flexible and people-centred approach to sentencing*, (2022), p. 15.
[62] Ibid.

## Outcome of the deferral

The Consultation Paper raises several questions regarding whether the individual's behaviour during the deferral order should impact the sentencing decision.

It is our firm view that an individual's behaviour whilst on a deferral order must only ever be considered as a mitigating factor, and never as an aggravating factor. If an individual is not meeting the expectations of the deferral order, they should not be penalised or criminalised, and this should not be an aggravating factor in sentencing. Either the requirements of the deferral order should be amended, or the deferral order should be cancelled, and the court should proceed directly to sentencing.

Regarding sentencing considerations, VALS' firm view is that healing and rehabilitation should always be the paramount consideration in sentencing. Approaches to sentencing that prioritise deterrence or punishment overlook the stark reality that many individuals in the criminal legal system are victims of crime themselves. Moreover, they are regularly based on the false premise that imprisonment increases community safety. In contrast, evidence shows that prisons are harmful and do not support community safety, they only serve to create or exacerbate existing trauma.

Evidence provided by Aunty Vickie Roach at the Yoorook Justice Commission in December highlights this point:

> *"I have questioned this point of deterrence in the sentencing formula before, and it simply does not exist. A magistrate told me once that it was not so much to deter me from offending again as to deter the public from offending in the way I had. I thought, well, that's just ridiculous, like I have been pinched for shoplifting or something like that, and who's going to hear about my paltry $50 fine for shoplifting, you know, that's not deterring anybody. It certainly wasn't deterring me because whatever I was doing I needed to do because I had to provide for myself."*

Whilst we maintain that healing should always be the paramount sentencing consideration, this is particularly the case if an individual has been able to demonstrate steps towards healing during a deferral order. In this regard, we support the introduction of an express legislative provision providing that healing and rehabilitation should be the primary purpose of sentencing following a deferral order.

**Recommendation 13.** Amend the *Sentencing Act* 1991 (Vic) to provide that:

(a) A person's behaviour whilst on a deferral order can only be considered as a mitigating factor, and never as an aggravating factor.
(b) Following a deferral order, healing and rehabilitation should be the paramount consideration in sentencing.