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LAW & ADVOCACY
CENTRE FOR WOMEN

Sentencing Advisory Council – Reforming Sentence Deferrals in Victoria

**Submission on behalf of the Law and Advocacy
Centre for Women Ltd**

January 2023

LACW acknowledges that we operate on First Nations land, and that our office is located on the stolen land of the Wurundjeri people of the Kulin Nation. We pay our respects to Elders past, present and emerging. Sovereignty over this land was never ceded and it always was, and always will be, First Nations land.

About the Law and Advocacy Centre for Women

The Law and Advocacy Centre for Women Ltd ('LACW') is a community legal centre operating across the state of Victoria, Australia. It is the only legal service in Victoria whose primary focus is to provide a gender-specific approach to assisting women who are in, or at risk of entering, the criminal justice system. LACW was established in 2016, specifically in response to the rising rates of criminalisation and imprisonment for women. Its mandate is to combat these trends by providing a holistic approach to women in the justice system, providing a wraparound service that combines legal advice and representation with case management to address the underlying causes of women's criminalisation and imprisonment.

The majority of LACW's legal work is in the provision of criminal defence advocacy. Other areas of practice include family violence intervention orders; infringements and fines and victims of crime assistance. In June 2021, in recognition of the significant gap in service provision for women with criminal justice involvement who were also subject to intervention from child protection, LACW created a specialist child protection practice within its service. Since that date, LACW has assisted over 70 women with child protection matters. A majority of these women have concurrent criminal, family violence intervention order and/or VOCAT matters. We have also assisted a smaller cohort of women who are the subject of in-patient treatment orders, who have corresponding child protection matters.

Background

The Sentencing Advisory Council (SAC) is seeking stakeholder and community views on possible changes to 'deferred sentencing' – an order postponing sentence for the offender for up to 12 months. Despite the benefits of deferred sentencing, it is used infrequently by the courts. The SAC seeks to understand which reforms may support increased and better use of this pre-sentence option. There are 14 questions which the SAC has posed to stakeholders. Each of these is answered in turn in this submission.

Overview

LACW views sentencing deferrals as a valuable mechanism through which therapeutic sentencing can be achieved and imprisonment can be avoided. Overall, we support the expansion of their use as we see great need to reduce the rapidly increasing rate of incarceration of women and the continued overrepresentation of First Nations people in prisons. However, we note that there needs to be consideration given to specific gendered issues for our client cohort such as caring responsibilities, trauma histories and family violence. In addition, greater investment in community-based support must supplement any expansion of deferred sentencing, so the service system has the capacity to meaningfully engage people in therapeutic interventions (e.g. residential rehabilitation, during the deferral period). Crucially, investment is needed in secure housing to underpin all other supports. Reform is also needed to the bail regime as current bail laws increase the risk of immediate incarceration for our clients for whom sentence deferral may otherwise be appropriate and beneficial.

Our responses to each of the SAC's consultation questions are outlined in this document including case studies and perspectives developed in the course of assisting women navigating the criminal justice system. We have endorsed the comments and recommendations made by Victoria Legal Aid to this inquiry for some questions.

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

LACW supports the availability of sentence deferrals in the Supreme Court. While most matters in this jurisdiction will result in a sentence of imprisonment given the seriousness of charges, this should not preclude the availability of sentence deferral. In appropriate cases, people facing charges in the Supreme Court should have the opportunity to stabilise their lives and demonstrate to the court their prospects of rehabilitation and reform. LACW has seen a positive change in engagement with women bailed by the Supreme Court and for whom judicial monitoring was imposed. LACW endorses the comments and recommendations made by Victoria Legal Aid on page ten of their submission to this consultation process.

Question 2: What are the current barriers to using sentence deferrals in appropriate cases?

For LACW's clients the key barriers to using sentence referral include:

- The perception of a risk of remand where a person is on bail while sentence is deferred;
- Unavailability of support services;
- Inconsistent judicial consideration of deferred sentencing;
- Limited availability of therapeutic courts

Risk of remand

The 2013 and 2018 legislative amendments to the *Bail Act 1977 (Vic)* introduced a new bail regime that has led to a substantial increase in the numbers of accused persons facing a 'reverse onus' test for bail, where they bear the onus of proving why they should be released from custody, rather than the prosecution having to establish why bail should not be granted. These changes have significantly expanded the circumstances in which an individual can be detained prior to their criminal charges being heard. Our clients who are placed on bail for the period of their sentence deferral, sometimes are not linked with appropriate supports due to unavailability of services. Should they be charged with further offences, including minor charges or breaches of bail, they are at significant risk of being remanded due to the reverse onus and double-uplift provisions of the *Bail Act 1977 (VIC)*. These laws disproportionately affect women¹ and undermine the therapeutic purpose of sentencing deferral. While addressing the stringent nature of bail laws sits outside the remit of this consultation, it is critical nonetheless to raise how these laws impact vulnerable people on deferred sentences.

Bail conditions relating to the completion of rehabilitation programs or abstinence from alcohol and drug use are unhelpful in the context of encouraging rehabilitation. Recovery from addiction is a non-linear journey for most people, so some non-compliance is to be expected. Such conditions also create perverse incentives for those undergoing rehabilitation to be dishonest with treatment providers about substance use. Ultimately, this means that therapeutic approaches to harm reduction and harm minimisation can be undermined by overly restrictive bail conditions, leading to punitive responses that further criminalise the health issue of addiction.

¹ Russell, Emma; Carlton, Bree; Tyson, Danielle; Zhou, Hui; Pearce, Megan and Jill Faulkner, *A Constellation of Circumstances: The Drivers of Women's Increasing Rates of Remand in Victoria* (Report of Fitzroy Legal Service and the La Trobe Centre for Health, Law and Society, 2020).

Unavailability of support services

LACW supports an increase in resourcing for support services. These services are crucial to support greater availability and effectiveness of sentence deferral. Please see our response to Question 10 for more details on this point.

Judicial inconsistency

Decision makers make variable use of sentence deferral resulting in inconsistent application across courts. In our practice experience, some decision makers consider the option of a deferred sentence far less frequently than others. This may be in part due to the resource constraints of the courts, with judicial monitoring commitments further burdening already crowded court lists. Notwithstanding, this inconsistency results in many of our clients missing an opportunity for sentence deferral and the benefits that flow from this. LACW supports more consistent availability of sentence deferral through practice guidance and/or training and education initiatives for judges and magistrates

Koori Court and other therapeutic courts

Koori Courts are an example of a court where sentence deferrals are standard practice. Deferrals are made available to the majority of participants to maximise the court's therapeutic sentencing approach, which involves engagement with First Nations Elders and is supported by the availability of culturally safe support services coordinated through the court. Unfortunately, Koori Court is not an option for many LACW First Nations clients because they reside in areas where Koori Court is not available. LACW supports the expansion of the Koori Court model to all parts of Victoria. LACW also endorses the use of deferral in Koori Court and other therapeutic courts as best practice, as it demonstrates an active interest by the court in the individual's circumstances and rehabilitation prior to sentence.

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

The current criteria under section 83A of the *Sentencing Act* allows sentencing deferrals where it is 'in the interests of the offender' and they agree to the deferral. LACW affirms the current requirement for the individual to agree with the deferral. Without this agreement, the prospects for success on a deferral are low. Section 83A operates broadly in considering what is in the 'best interests of the offender.' The criteria's breadth of application is important to preserve the flexibility provided by sentence deferrals to support people on deferral in the community in a way current sentencing options cannot. LACW does not support a restriction of the criteria.

The view of victims

Victims' perspectives are considered at the bail, sentence indication and sentencing stages of the court process. Currently there is no requirement for a court to consider the impact of sentence deferral on victims. LACW endorses this approach as it allows for victims' perspectives to be considered at relevant points in the court process. Consideration of victims' perspectives above and beyond this does not achieve any purpose and may hinder the expediency of courts.

LACW strongly supports reform to improve victims' experience of the justice system. Many of our clients are also victims of crime themselves and have had to navigate the justice system, leaving them feeling disempowered or further traumatised. Even if perpetrators receive a harsh penalty, victims can be left feeling as if nothing has changed for them or will change in the future. Sentence deferral, like other therapeutic avenues, offer an opportunity for an accused person to rehabilitate, make amends and change their circumstances. Ultimately, for victims, this offers the prospect of longer term, real change in contrast to more limiting punitive outcomes.

Deferrals for offences warranting a prison sentence

LACW supports clarification in legislation that a court may order a sentence deferral even in circumstances where offending is serious enough to warrant a prison sentence. LACW endorses the comments and recommendations made by Victoria Legal Aid on page 14 of their submission to this consultation process.

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?

Women in the criminal justice system

Victoria has been criminalising and incarcerating women at a rate that surpasses men, with this trend being significantly amplified for First Nations women.² While this trend is not new, the rate has accelerated rapidly in recent years, despite a falling crime rate.³

The support needs of criminalised women are interrelated and complex. Women's pathways into and interactions with the criminal justice system are different to men's. Many of the support needs with which criminalised women present are gender specific. There is often a direct relationship between women's trauma and personal relationships and their contact with the justice system; between complex health needs - including mental health and chronic illness – and criminalisation; and between substance abuse, past trauma and victimisation.

Criminal legal processes and gaol serve to exacerbate the trauma experienced by most criminalised women, by re-traumatising them and undermining their prospects for rehabilitation. Likewise, services for victims of violence alienate women who have been involved with the criminal justice system themselves.

The experiences of criminalised women are not universal. First Nations women, and women from culturally and linguistically diverse backgrounds experience over policing and other forms of systemic racism. Women with disability face increased social and economic marginalisation, as well as experiences of victimisation and trauma.⁴ The discrimination faced by trans and gender diverse people in the community is linked to criminalisation,⁵ and

² Australia Bureau of Statistics, Prisoners in Australia, 2021.

³ RMIT University Centre for Innovative Justice, Leaving custody behind: Foundations for safer communities & gender-informed criminal justice systems | Issues Paper July 2021 (2021); Leigh, Andrew. "The second convict age: Explaining the return of mass imprisonment in Australia." *Economic Record* 96.313 (2020): 187-208.

⁴ Winford, Stan, Howard, Anna and Jessica Richter, Recognition, respect and support. Enabling justice for people with an acquired brain injury (Centre for Innovative Justice Report, RMIT University, 2018).

⁵ Lenning, Emily and Carrie Buist, 'Social, psychological, and economic challenges faced by transgender individuals and their significant others: Gaining insight through personal narratives' (2012) 15 (1) *Journal of Culture, Health, and Sexuality*, 45-57.

transphobic stigma, discrimination and assault make carceral settings especially damaging for them.⁶

Sentence deferrals provide an opportunity for decarceration and just sentencing for marginalised populations

Women

Given the unique experiences of women in the justice system and the rising rate of incarceration, sentence deferrals can be used as a tool for decarceration and availability of requisite support. To improve the effectiveness of sentence deferral there is a need for increased awareness of gender-specific considerations for women such as the impact of trauma, family violence and homelessness. These issues should serve as an impetus for deferral to allow women to access the support they need rather than a barrier to accessing deferral. The prevalence of these and other issues among women in the criminal justice system means their lives are likely to have greater levels of instability. If a deferral is granted, the undertaking of deferral engagements may also present unique challenges due to these instabilities, so progress can be slower and non-linear. Increased awareness of the gendered nature of these issues among judicial officers will support more equitable application and use of sentence deferral for women.

First Nations people

Sentence deferrals could become an important tool for reducing First Nations overrepresentation in prison while promoting access to culturally-responsive support services. As noted above, expansion of Koori Court services is essential to this outcome, as is increased resourcing for culturally-safe support services, particularly in regional Victoria where many LACW clients struggle to access appropriate support.

LACW also supports law reform to include specific consideration of a person's First Nations background as part of deferral decision making. See the response to Question 5 below for further submissions about this.

Case example | Impact of sentence deferral for First Nations people

Through our clients, LACW 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

⁶ Ministry of Justice United Kingdom, Review of the care and management of transgender offenders (Report, 2016).

community she was able to satisfy the court of her prospects of rehabilitation and increase the sentencing options available.

Question 5: Should the current legislative purposes of sentence deferral be amended?

Currently sentence deferrals can be made with the purpose to: assess an offender's capacity for or to demonstrate rehabilitation; participate in support programs; participate in programs that address the impact on victims; or any other circumstances the court considers appropriate. These provide the court with discretion to consider a wide range of purposes for deferral and we support these purposes being retained. However, LACW also supports the addition of three further purposes: i) for caring responsibilities; ii) due to pregnancy; and iii) in consideration of the unique background of First Nations persons. Specifying these additional purposes for sentence deferral would prompt decision makers to consider the specific circumstances of women and First Nations people in the context of the criminal justice system.

Caring responsibilities

Women are overwhelmingly the primary carers of children, as well as carers for the sick and elderly in their community. When women are imprisoned, even for short periods, this impacts families and communities and can have long term effects. The Australian Human Rights Commission noted that 'mothers that are prisoners can impact family relationships and can lead to their children suffering from emotional and behavioural problems'.⁷ It is estimated that more than half of women in prison are the primary carers of children,⁸ and 80 per cent of First Nations women in prisons are mothers.⁹

Children whose mothers are in prison are more likely to have 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.¹⁰ For instance, the Australian Institute of Health and Welfare indicates that young people on child protection orders are 27 times more likely to be under a youth justice supervision order in the same year.¹¹

Regardless of whether or not they were classified as "primary carers" of children when entering custody, incarceration clearly disrupts opportunities for incarcerated mothers and carers to maintain contact with children. Concerns about children's wellbeing feature strongly amongst incarcerated women,¹² concerns which are likely to be heightened where children are in the care of the state or a violent partner.¹³

⁷ Australian Human Rights Commission, *Human Rights and Prisoners* (2009).

⁸ Rachel Carbonell 'When mum goes to prison' ABC, 23 June 2017.

⁹ Juanita Sherwood and Sacha Kendall, 'Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison' (2013) 46 *Contemporary Nurse: A Journal for the Australian Nursing Profession* 83, 85.

¹⁰ Juanita Sherwood and Sacha Kendall, 'Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison' (2013) 46 *Contemporary Nurse: A Journal for the Australian Nursing Profession* 83, 85.

¹¹ Australian Institute of Health and Welfare, 'Young People in Child Protection and Under Youth Justice Supervision 2013-14' (Data Linkage Series No 21, 2016) vi.

¹² Goulding, D. (2004) *Severed connections: An exploration of the impact of imprisonment on women's familial and social connectedness*, Centre for Social and Community Research, Murdoch University.

¹³ Centre for Innovative Justice (n 22) 31.

A study by the Victorian Department of Justice and Regulation found that women who had been separated from their children were more likely to return to custody than women whose connection with their children had been supported. Other studies have shown that even short periods of separation can have profoundly devastating impacts on the mother-child bond, with custody functioning as a “double punishment”.¹⁴ When in prison, women who have lost custody of their children are usually at higher risk of self-harm.¹⁵

This brings with it increased risk that the children of incarcerated women will be taken into state care. Given women’s wider caring responsibilities, including First Nations women’s cultural responsibility for the care of non-biological children, the incarceration of women clearly has significant down-stream implications for child welfare and family cohesion.¹⁶

In this context, it is crucial that caring responsibilities are considered a valid purpose for sentence deferral. Giving carers time and opportunity to stabilise their lives and prove to the court that a custodial sentence is not necessary is ultimately better for the community. Deferrals can directly reduce imprisonment as well as the flow-on impact of imprisonment on children and families. Many LACW clients have identified that there is no greater motivation to change than their children.

Pregnancy

LACW supports reform to ensure that sentence deferral is made available to pregnant people. While only a small number of pregnant people are at risk of custody, sentence deferral offers a simple way of affirming a person’s dignity so they can avoid giving birth while imprisoned. See the case study below for an example of a LACW client who ought to have benefitted from a sentence deferral while pregnant to avoid a traumatic birthing process.

Case example | Pregnancy in custody

A client retained LACW to act for her in criminal and child protection matters after she had 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 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.

¹⁴ Moloney, K.P. & Moller, L.F. (2009) ‘Good Practice for Mental Health programming for women in prison: Reframing the Parameters,’ 123(6) *Journal of Public Health* 431-433.

¹⁵ Mitchell, B.K. & Howells, K. (2002) ‘The Psychological Needs of Women Prisoners: Implications for Rehabilitation and Management’ 9(1) *Psychiatry, Psychology and Law* 34-43; Hooper, C.A. (2003) ‘Abuse, interventions and women in prison: A literature review’, *Literature Review*, London: HM Prison Service, Women’s Estate Policy Unit.

¹⁶ Centre for Innovative Justice, *Leaving Custody Behind: Foundations for safer communities & gender-informed criminal justice systems* Issues Paper (July 2021) 27.

Specific consideration of First Nations background

The unacceptable increase in the number of First Nations women in custody in Victoria has its roots in racist and discriminatory colonial practices that serve to criminalise First Nations people, deny self-determination and undermine family structures. Today's legal and policing systems have perpetuated the impacts of these policies.

A critical part of the work of governments around Australia is to end the overrepresentation of First Nations people in the criminal justice system, in line with the National Agreement on Closing the Gap. Sentence deferrals have the potential to be a vehicle for this change. LACW supports law reform to include consideration of a person's First Nations background in deciding the availability of sentence deferral to promote community-based options instead of incarceration. This would operate similarly to the consideration of a person's background in sections 3AAA (surrounding circumstances) and 3A (Aboriginality) of *the Bail Act 1977* (Vic).

Question 6: Should there be any changes to the maximum length of 12 months for sentence deferral?

LACW supports extending the availability of sentence deferrals for periods over 12 months in circumstances where it is reasonable. Longer deferrals may be particularly appropriate 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).

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 described in our response to Question 4 above. As such, a lengthier deferrals period may also be required for supports to meaningfully make a change in these circumstances. Importantly, any consideration of a longer deferral must be balanced with the risk of remand where the deferral is made with stringent bail conditions.

LACW endorses the comments and recommendations made by Victoria Legal Aid on page nine of their submission to this consultation process.

Question 7: Should section 83A of the *Sentencing Act 1991* (Vic) be amended to allow conditions to be attached to deferral orders?

LACW does not support reform which would allow conditions to be attached to deferral orders. Currently sentence deferrals are not made by way of an order, instead Magistrates set out their expectations of what is to be achieved in the deferral period. This approach allows flexibility for courts in managing people over their deferral period, while the imposition of bail conditions allows risk to be managed.

An order attached to a deferral may create an overly prescriptive or punitive approach to administering them, especially if there is a breach of any order conditions and criminal charges are pursued. This would mitigate against the purpose of deferral and would effectively defeat its therapeutic purpose. LACW endorses the comments and recommendations made by Victoria Legal Aid on pages 15 and 16 of their submission to this consultation process.

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

Another area of inconsistency is the frequency of judicial monitoring ordered. Some decision makers prefer judicial monitoring in short intervals (e.g. monthly) over the deferral period. While this may create greater accountability for some individuals on deferral, for others this becomes onerous and can detract from the therapeutic intent of deferred sentencing as it can feel punitive, onerous and traumatising.

LACW supports a flexible approach to judicial monitoring where the need and frequency of this condition is assessed on a case-by-case basis without a fixed structure. However, LACW also supports the development of guidance for decision makers around how this condition should be applied. For example, the frequency of judicial monitoring should be commensurate to the level of offending and risk of reoffending. It is an inefficient use of the court's time to be supervising people in relation to low level offending or those progressing well on their conditions of deferral. In addition, judicial monitoring that is too frequent can be more punitive than therapeutic, especially for people who struggle to attend court due to vulnerabilities such as homelessness, not having a phone, health issues or family violence.

Guidance materials should also make note of the different way people can progress through their deferral conditions. For many of LACW's clients, especially those struggling with drug and alcohol dependency, the path to rehabilitation is winding. Improvements can be incremental and change happens in a non-linear fashion. It often takes time for people to connect with busy support services and for progress to become evident. These considerations ought to be at the forefront during judicial monitoring, particularly for women who tend to have more complex lives and needs.

Question 9: Should justice plans be made available as a condition of sentence deferral?

LACW supports justice plans being made available as a condition of sentence deferral to recognise the unique challenges faced by people with intellectual disability in engaging with and benefitting from support services. Many people with other kinds of disabilities would also benefit from the availability of justice plans. Currently, an intellectual disability is defined in the *Disability Act 2006* as the concurrent existence of significant sub-average general intellectual functioning and deficits in adaptive behaviour which became manifest before the age of 18.¹⁷ Acquired brain injuries and neurological impairment are not included in that definition. People with these diagnoses are currently not eligible for justice plans despite having complex support needs. This would preclude many people from accessing the support they need to advocate successfully for sentence deferral or to engage successfully with deferral activities.

LACW supports the inclusion of acquired brain injuries and neurological impairment in the definition of 'intellectual disability' within the *Disability Act 2006*. Making justice plans more broadly available would align with the approach of the courts in supporting people with disabilities. For example, the Assessment and Referral Court, which is a pre-sentence therapeutic court for accused persons who have a mental illness or cognitive impairment, accepts people with these diagnoses. This court operates by way of deferral of sentence for a majority of cases.

¹⁷ *Disability Act 2006* (VIC) s 3.

For women with additional conditions such as a form of intellectual disability or cognitive impairment, there is an even greater need to make support and treatment in the community available. For these women, the granting of bail can present unique challenges but with appropriate supports, they can succeed.

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?

The objectives of deferred sentencing can only be achieved where people on deferral have access to the support services they require. Currently, many of LACW's clients struggle to access appropriate services and programs during deferrals due to insufficient funding for services that meet the unique needs of women. As outlined in the response to Question 4 of these submissions, women in the criminal justice system are more likely than men to have experienced trauma. They have higher rates of mental ill-health, substance use and homelessness. A majority have been victims of violence and abuse.

LACW supports an increase in funding for services and programs that are responsive to women's needs, including the adoption of gender-specific, trauma-informed and culturally safe practices. These programs should also integrate practice across the service system in recognition of the interrelated nature of women's needs. It is important that support services provided during deferral are sensitive to the relationship between women's criminalisation and their complex trauma, prior victimisation and homelessness. In particular, services and courts should understand the impact these experiences can have on the ability of women in the criminal justice system to engage with supports to avoid setting them up to fail.

In addition to the above, LACW endorses the comments and recommendations made by Victoria Legal Aid on pages seven and eight of their submission to this consultation process.

Question 11: Should offenders receive a written deferral plan?

LACW does not support the introduction of a written deferral plan as this would reduce the flexibility of the order. Written plans would also create a compliance-focused approach where breaches of the plan could lead to punitive action that defeat the therapeutic purpose of deferrals. LACW endorses the comments and recommendations made by Victoria Legal Aid on pages 15 and 16 of their submission to this consultation process.

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?

LACW does not support an express permission or requirement for a courts to tell people placed on deferral the sentence they can expect where sentence deferral is made available. In some circumstances it may be appropriate for decision makers to relay this information, but this should be assessed for each case and remain discretionary. For example, there may be utility in telling a person undertaking a deferral process their future sentence to provide some incentive for compliance with deferral conditions, or to offer them some certainty if this is a concern. However, circumstances for individuals can shift and change over the course of a deferral, especially given the difficult and transformative nature of activities they are undertaking. An individual may exceed expectations or experience major changes in their life over the deferral period, so maintaining flexibility around sentencing is important to accommodate people's realities.

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

Positive engagement with deferral activities has a mitigating effect on a person’s sentence. LACW does not support non-compliance over the deferral period being an aggravating factor in sentencing. The consequence of inadequate engagement should only be loss of any benefit that would have been available had they engaged positively. Non-compliance being used as an aggravating factor in sentencing would be a deterrent to seeking sentence deferral and this punitive approach would defeat the therapeutic purpose of this approach.

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

LACW supports the introduction of an express provision for rehabilitation to become the primary purpose of sentencing following a deferral in line with other sentencing schemes that elevate a particular sentencing purpose. See the case study below for an example of how sentencing deferral lends itself to sentencing with a primary purpose of rehabilitation. LACW endorses the comments and recommendations made by Victoria Legal Aid on page 16 of their submission to this consultation process.

Case example | Sentencing with the primary purpose of rehabilitation

LACW represented a client who was facing serious charges and had a significant criminal history. She had spent a significant amount of time in custody prior to her plea hearing. LACW sought a neuropsychology assessment for our client and this revealed that she suffered from an intellectual disability. The court deferred sentencing and placed our client on bail so she could attend and seek supports in the community.

Our client, who is First Nations, was able to access culturally-safe supports including residential rehabilitation for her long standing use of drug and alcohol. These supports allowed our client to stop using drugs and alcohol as a way of coping with her significant history of trauma. She was also able to stabilise her life enough to have one of her children returned to her care and increase contact with her other child.

Upon seeing her immense progress and in consideration of her intellectual disability, the court ultimately sentenced our client to a Community Corrections Order with the support of a justice plan. She was able to avoid returning to custody and continue to engage with intensive supports in the community. By comparison, the courts sentenced her co-accused to a lengthy custodial term. Our client’s story presents an example of how sentencing deferral provides an opportunity for people to meaningfully change their lives. The purpose of sentencing in these cases should be to bolster the gains achieved during the deferral period.

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With thanks to Riya Kundu for her assistance in preparing these submissions.

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