

# Delivering a Smarter Approach: Deferred Sentencing

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## Commitment in the White Paper

Page 52 of 'A Smarter Approach to Sentencing' states:

*“Where the court has the capacity, we want to encourage them to use existing legislation on deferred sentences, and existing services available to them such as Liaison and Diversion or community advice and support services, to divert vulnerable offenders into services and away from further involvement in the criminal justice system, especially vulnerable women who are likely to benefit from referral to a women’s centre... The greater use of deferred sentencing will also provide opportunities for restorative justice practices to be deployed...”*

## Background and purpose of this paper

As the Government’s recent White Paper states, “failures in sentencing lead to never-ending cycles of criminality, with low-level offenders stuck in a revolving door of crime...in many cases their offending is fuelled or exacerbated by poor mental health or substance misuse. Yet our system of sentencing is not properly equipped to support them to address these and other causes of their offending. This means they have little hope of rehabilitation and we as a society have little hope of cutting the crime they commit in the longer term.”

Taking inspiration from a number of different jurisdictions, we outline ways that deferred sentences can be used in England and Wales as part of structured and targeted approaches to address these issues. In suggesting these innovative approaches, we see deferred sentence schemes of these types as *part* of a vital spectrum of responses to the otherwise endless cycle of offending that some people are caught in. Starting with diversion at the arrest stage for low-level and first time offenders, through to problem-solving substance misuse courts providing an alternative to longer periods of custody, we see innovation in deferred sentencing as playing a crucial role in ensuring we have a justice system that is “agile enough to give offenders a fair start on their road to rehabilitation.”

## Innovative use of deferred sentences

### *Evidence-informed deferred sentences*

Deferred sentences offer courts the opportunity to place offenders in a meaningful community programme while retaining the option of an alternative disposal based on the offenders’ engagement and compliance with that programme. In doing so, they follow a number of evidence-based principles in working with offenders.

Firstly, they may encourage compliance with rehabilitative support through legal leverage. Extensive research into the factors which drive the effectiveness of court based interventions in the US has demonstrated that legal leverage – usually the prospect of a more severe sentence being imposed if the offender does not comply – is an important factor in motivating compliance with court orders and reducing reoffending.<sup>1</sup>

Secondly, deferred sentences have an important role to play in improving procedural fairness. There is strong evidence<sup>2</sup> to suggest that when people feel they have been treated fairly, they are more likely to comply with the criminal justice system in future, and potentially less likely to reoffend. The use of deferred sentencing aligns with the procedural fairness components of “transparency” and “respect” (which incorporates decision making which has regard for the individual’s well-being)<sup>3</sup> by being upfront about what the individual needs to do and what the consequences are of non-compliance.

Thirdly, the use of deferred sentences as a potential alternative to short-term custody has the potential to reduce reoffending rates, because it seeks to de-escalate contact with the criminal justice system. An individual who complies with the conditions of the deferred sentence should receive a lesser criminal justice disposal than they would have otherwise received, avoiding the negative consequences of custodial sentences on reoffending.<sup>4</sup>

### **Current use of deferred sentences**

Our criminal courts are empowered to defer passing sentence for up to six months (Powers of Criminal Courts (Sentencing) Act (“PCCSA”) 2000, s.1). The purpose of deferment is “to enable the court to have regard to the offender’s conduct after conviction or any change in his or her circumstances, including the extent to which the offender has complied with any requirements imposed by the court.”

However, currently this power is seldom used. Anecdotal evidence suggests that deferring sentences is actively discouraged as it lengthens the time within which a case is concluded and therefore impacts on the HMCTS court timeliness targets. Moreover, without a structured approach to deferred sentencing, it is unclear to judges what the impact ought to be of an offender’s compliance on the final sentence.

In addition, while in some places the services do exist which could provide purposeful and rehabilitative options, the processes and practices are not in place for the court to regularly use them.

### **Providing better routes into services**

There is extensive evidence that many of the individuals who come into police stations and our criminal courts have complex needs, including substance misuse, mental health illnesses and learning disabilities.<sup>5</sup> There has been a great deal of work done to find better ways of referring these individuals into services. For example, liaison and diversion schemes have been created to ensure that some of these people can access services promptly. Yet, for all this effort, an evaluation of liaison and diversion schemes in 2016 was unable to detect whether they had led to reduced use of remand or custodial sentences nor whether they had made a material difference to longer term re-offending rates.<sup>6</sup>

In part, this is because schemes like liaison and diversion have no clear mechanism to change the decisions of the court. The information gathered by these services may be conveyed to the court but there is no clarity about the circumstances in which that information can or should alter a court’s sentencing decision. This means individuals can be referred to services, can engage in those services and yet, because of the absence of a clear court mechanism, can still receive exactly the same sentence they would have received had they not engaged at all. Providing better access to treatment, without a parallel commitment from the courts to change an individual’s path ahead within the criminal justice system, is a missed opportunity.

Yet, when we look at other jurisdictions, we can see a different way of doing things (see case study 1).

### **CASE STUDY 1: The Assessment and Referral Court, Victoria, Australia**

The Assessment and Referral Court aims to help people address underlying factors that contribute to their offending behaviours. The Assessment and Referral Court works with individuals due to go to court on bail who have been diagnosed with a range of mental health illnesses or other vulnerabilities.

The accused person must be assessed for eligibility by an ARC case manager. The Magistrates' Court will organise the assessment and submit a report to the ARC magistrate who will make a decision regarding eligibility. The accused person must benefit from receiving coordinated services in accordance with an individual support plan, which may include psychological services, welfare services, health services and other services that aim to reduce the risk of offending or re-offending.

Sentencing is deferred while the accused participates in an individual support plan, while also meeting regularly with their case manager and being brought back monthly before the same judge, to check on their progress. In the ARC List, the magistrate, the prosecution, support staff, the accused person and their family sit at the same table. The participants individual support plan will be reviewed, and their progress explained to them in plain English.

If the individual's progress is to the satisfaction of the Court, the Court may discharge the accused without any finding of guilt.

The findings for the Assessment and Referral Court are positive: 82% of participants successfully completed the program and 43% of participants did not re-offend in the two years' post-completion.<sup>7</sup>

As this case study shows, deferring sentence can provide just the window of opportunity services, individuals and the court needs to give low risk, but high need individuals the opportunity to change their lives around, and, if they do so, to materially change their criminal justice pathway.

The ARC model incentivises compliance by communicating clearly to the accused that engagement will change the sentencing outcome they will eventually receive. Crucial to this model is the clear expectation that when individuals successfully access and engage with services, their compliance will materially change the court's decision. Evidence from the wider use of Structured Deferred Sentences in Scotland (in which Sheriffs, if satisfied with compliance, can discharge individuals from the court case altogether) indicates that the prospect of a better sentence may act as an incentive to compliance.

### **Opening up routes for victim-focused reparation**

In a similar way, the greater use of deferred sentencing could also provide space to encourage the greater use of restorative justice, where victims and offenders consent to it, for low level offending. In New Zealand, although restorative justice processes can operate in a variety of ways at different stages in the criminal justice system, deferring sentence at the District Court and referring cases into restorative justice conferencing is common (see case study 2).

## **CASE STUDY 1: New Zealand pre-sentencing restorative justice conferencing**

Following a guilty plea, the court can defer sentence for restorative justice to be considered. Once a case has been adjourned, a local coordinator will explore whether the victim and the offender are willing to participate and assign a facilitator to the case. Facilitators are community-based and trained (they can be volunteers or employees of the local service provider). Facilitators are tasked with arranging separate pre-conference meetings with both the victim and the offender, along with any other supporters.

At the conference, participants discuss the harm and impacts of the offence and attempt to produce a restorative outcome plan. After the conference, facilitators report the conference proceedings to the court. These RJ conferencing results are then considered by judges once the case returns to court for sentencing.

The latest data (which covers both police and court referred cases) shows that the reoffending rate for offenders who participated in restorative justice was 15% lower over the following 12-month period than comparable offenders and 7.5% lower over three years. Offenders who participated in restorative justice committed 26% fewer offences per offender within the following 12-month period than comparable offenders (20% fewer offences within three years).<sup>8</sup>

An amendment to the Sentencing Act in 2014 provided further support to the use of restorative justice in the criminal justice system. It requires all cases that meet certain criteria to be adjourned for consideration of whether restorative justice is appropriate prior to sentencing. According to New Zealand's Ministry of Justice, this change resulted in the number of cases referred for a restorative justice assessment jumping from around 4000 in 2014 to just over 12,000 in 2015.<sup>9</sup>

There have been previous attempts in England and Wales to trial this type of approach, yet attempts to use these powers have often been undermined by poor implementation. An evaluation of a trial of pre-sentence restorative justice in the Crown Courts found a number of challenges were encountered in the implementation of the pathfinder, including “the local sites’ limited access to data (particularly, victim contact details).”<sup>10</sup> It was also not clear how “participation in pre-sentence RJ could affect an offender’s sentence...Varying expectations or perceptions of impact on sentence among victims, offenders and indeed practitioners sometimes provoked disappointment or frustration.”<sup>11</sup>

Yet, despite these challenges, and the attrition these challenges caused, the wider evidence on restorative justice conferencing suggests it could be a useful disposal, especially where victims want to access restorative justice—a large-scale, multi-scheme evaluation in the UK found high levels of satisfaction among victims who participated in the restorative process. In addition, Ministry of Justice summaries of the evidence on re-offending suggest that “research to date has identified good results with people who have committed property or violent offences where there is a clear identifiable victim. Offenders with a medium or high risk of reconviction appear to respond well.”<sup>12</sup>

### ***A problem-solving approach***

The other area where deferred sentencing can be used is within problem-solving courts, another commitment in the White Paper. Some courts we have come across have used the deferred sentence as a kind of initial trial for change, assessing whether the offender is likely to stick to the programme, before sentencing them to the various components of a community

sentence.

In others, such as in Aberdeen's problem-solving approach or the Belfast substance misuse court (see case study 3), the deferred sentence is the principal means of disposal: conditions are attached to the deferment, the proposed sentence hangs over the offender, and, when an offender succeeds, their case is dismissed, and when they fail, the proposed sentence is passed.

### **CASE STUDY 3: The use of deferred sentences in problem-solving courts in Aberdeen and Belfast**

In the Aberdeen problem-solving approach, originally piloted with female offenders at risk of short custodial sentences, potential participants are screened by Criminal Justice Social Work (CJSW) and those admitted into the PSA have their sentence deferred while they engage with service providers for a specified period of time. Those admitted to the PSA have a Structured Deferred Sentence (SDS) imposed, usually for six months initially. At each review, every 4 weeks, the sheriff takes into consideration a participant's compliance with the PSA plan and any evidence of offending and decides to: continue the SDS; end the SDS and admonish the participant; or impose an alternative sentence (usually custodial).

The importance of the SDS in generating favourable compliance rates is unclear but an evaluation has suggested that the prospect of admonition upon completion of the SDS may act as an incentive, while for some, the primary consideration was a desire to avoid a remand in custody or a custodial sentence.

In the Belfast substance misuse court, which has been running at Belfast Magistrates Court since April 2018, eligible offenders have their sentence deferred until completion of the treatment programme. Upon being admitted, probation officers, psychologists, and Addiction NI counsellors, work together to formulate a comprehensive and tailored treatment and supervision plan, which includes access to social support, therapeutic intervention for substance misuse, and random drug/ alcohol testing. While completing the programme, the offender is subject to court bail conditions and must attend review hearings with the Judge to monitor progress. If the Judge feels that progress is not being made, she can terminate the programme and sentence the offender. Upon successful completion of the programme, the judge will preside over a final review where she passes sentence. The sentence takes into account the offender's engagement with the programme and any other evidence before the court. In March 2020 an initial evaluation of phase 1 was published, with positive, initial results reported. By the end of phase 1, 28 out of 50 clients had completed or were nearing completion of the programme. 26 of these clients showed a significant reduction in problem scores for both drug and alcohol misuse over the duration of the programme, a significant reduction in risk of re-offending, and significant increases in self-efficacy, locus of control and well-being.

## **Delivering Deferred Sentences**

We have set out three areas in which deferred sentence could be used creatively to widen the ways in which our justice system responds to offending. From our reading of the evidence and understanding of practice, there are a number of crucial issues to bear in mind:

- **There is no need for legislation but there is a need for clear policy:** The legal framework exists for courts to deploy structured deferred sentence. However, what is needed is clear policy and guidance about when deferred sentences should be used, with further detail about what types of case the Ministry wants to be in scope and how deferred sentences can be excluded from or at least appropriately catered from within court timelines targets.
- **Provide individuals with an incentive to comply:** A clear feature of the design of new structured deferred sentences schemes is clarity about what engagement with services means in terms of the final sentence. While it is obviously for the court to decide what the eventual sentence is, it is clear that other jurisdictions give offenders a clear indication of what that sentence will be if they comply. This is clearly a motivating incentive to comply. For lower-level offending, for example, in magistrates' courts, the dismissal of the case of sentencing or an absolute discharge may be the sort of incentive that can encourage offenders to comply with an engagement in services for the period of the deferment.
- **Develop deferred sentencing schemes in areas with existing services:** Instead of feeling like it has to have specific funding in order to deliver this White Paper commitment, the Ministry can work with already existing and funded liaison and diversion services and community advice services at court to develop alternatives for individuals with complex needs, including substance misuse, mental health illnesses and learning disabilities. Similarly, there is much the Ministry can do to create new schemes to encourage the use of restorative justice conferencing. This could be an area where the Ministry and Home Office could work with PCCs to ensure restorative justice services are resourced to accept more referrals from court via deferred sentences, while the overall envelope of funding for victims as commissioned by PCCs remains the same.
- **Implementation requires effort and leadership:** It is clear, for example, in previous attempts to pilot restorative justice conferencing via deferred sentences, that insufficient statutory support and leadership, and poor planning led to poor implementation.

## Endnotes

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## About the Centre for Justice Innovation

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