

# **The Use of Deferred Sentencing in England and Wales**

*A Review of Law, Guidance and Research*

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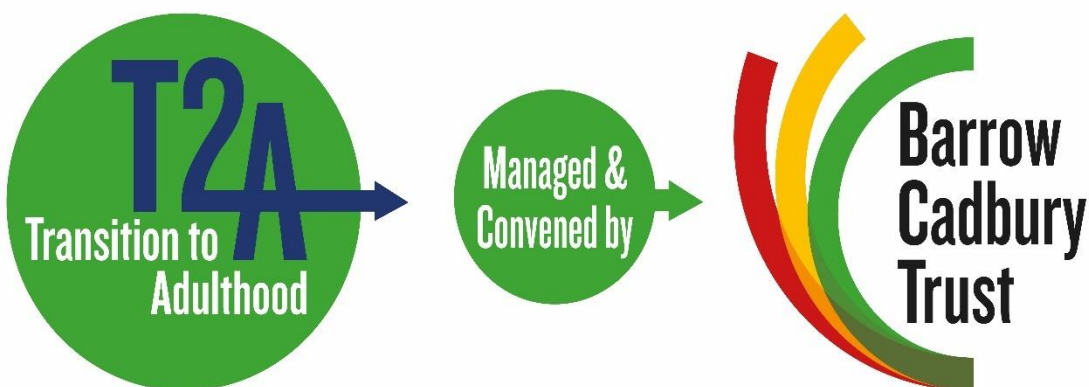
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## Acknowledgements

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## Executive Summary

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This report provides an introduction to the concept of *deferred sentencing*. Courts in England and Wales have long had the power to defer sentencing for up to six months. The Government's 2020 White Paper, *A Smarter Approach to Sentencing*, expressed an intention to encourage greater use of deferred sentencing.

To date, very little research has explored this little-known element of sentencing law. The only peer-review publications exploring the subject appeared approximately 40 years ago. This report summarises the limited research on this topic and reports recent trends in the use of deferred sentencing in England and Wales.

The power to defer sentence was conceived to respond to those individuals whose personal and professional circumstances are most likely to be in transition and evolving in ways that have consequences for the sentencing decision. For this reason, deferred sentencing may be particularly appropriate for young adults whose personal and professional lives are changing rapidly. The idea behind the deferred sentence is that the offender has a limited time (up to six months) to address the problems which gave rise to the offending for which he or she is being sentenced.

When a court defers sentencing, the offender is required to comply with a number of requirements during the period of deferral. If the offender complies successfully with these requirements, there is a strong presumption that a non-custodial sanction will ultimately be imposed. This may mean imposing a suspended sentence order or community order in a case which would normally have resulted in a short immediate prison sentence. The deferred sentence therefore should serve as a powerful incentive for the offender to take steps towards desistance and away from offending. The deferral order commonly involves completing or undertaking a drug or alcohol treatment programme.

The deferred sentencing provision was introduced in 1973 to provide an opportunity for the offender to demonstrate a change in personal circumstances during the period of deferral. Compliance with requirements designed to promote desistance normally resulted in the imposition of an alternative to immediate imprisonment. Deferred sentencing thus targeted offenders convicted of an offence serious enough to justify the imposition of a custodial sentence.

The limited statistics available from the early period showed that almost all cases deferred ultimately attracted a non-custodial sentence. The volume of deferred sentences has declined considerably from a high of almost 10,000 cases a year in the mid-1970s although it is unclear why courts have moved away from exercising the power to defer sentence.

Most deferrals (approximately half of all cases) over the more recent period covered by the statistics we have been provided with by the Ministry of Justice in response to requests under the Freedom of Information Act (2005-2020) involved theft or minor fraud. Crimes involving violence or sexual offences accounted for 3% or less of all cases.

No data are currently available on the requirements imposed as part of a deferred sentence, the outcome of the deferment, or the sentence ultimately imposed.

## *The Use of Deferred Sentencing in England and Wales*

Young adults represented a high percentage of cases deferred in the early years. In 1981, two-thirds of all deferments involved offenders under 21 years of age. Although deferred sentencing is most appropriate in cases involving younger offenders whose circumstances are often in transition, recent trends suggest that courts' use of deferral has declined for this profile of offender.

Males accounted for 72% of cases in the Ministry of Justice's data for 2005-2020. Female offenders were more likely to have sentencing deferred for summary non-motoring offences while male offenders were more likely to be deferred for drug offences.

Guidance for courts regarding the use of deferral is provided by the Court of Appeal, the Sentencing Council, and the Crown Court Compendium. The Sentencing Council guidance advises that deferred sentences will be appropriate in only very limited circumstances. Some academics have questioned this restrictive view of the power to defer sentence. In addition, a number of groups have called for deferred sentencing to be used more frequently, and in particular for young adults, female offenders, pregnant offenders as well as individuals commencing or undertaking treatment.

There are many gaps in our knowledge of how deferred sentencing currently operates. We know almost nothing about this little-known provision beyond the limited research summarised in this report.

The report concludes by calling for better statistics relating to deferred sentencing and noting a number of key issues and research priorities.

## **Chapter 1: Defining and Conceptualising Deferred Sentencing**

*This chapter provides a summary of the deferred sentencing regime. It distinguishes a deferred sentence from an adjournment and the principal options available to a sentencing court in England and Wales.*

### **Introduction**

For almost 50 years now, courts in England and Wales have had the power to defer sentence. How useful is this power? What benefits or problems may arise if sentencing is postponed for several months? Very little is known about this element of English sentencing law. It has attracted almost no research, and none that is recent.

This report takes a step towards understanding the role of deferral in current sentencing practice. In light of our limited resources, it was not possible to undertake original empirical research. Instead, the report reviews the relevant socio-legal literature, analyses some secondary data, and provides the context for a more systematic research programme. The goal is to provide a framework for research by clearly identifying the key issues and gaps in our knowledge.

The tradition in common law jurisdictions is for a court to proceed to sentencing expeditiously following conviction. For example, section 720 (1) of the Criminal Code of Canada states that: 'A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed'. In England and Wales, Rule 1.1 (2)(f) of the Criminal Procedure Rules includes 'dealing with the case efficiently and expeditiously' as one of the attributes of 'dealing with a case justly'. There are several reasons for this approach. Postponing sentencing requires a separate court date which may inconvenience all parties involved in the case. Offenders usually wish to move on with their lives and to begin serving their sentence. Yet there may also be sound reasons for deferring sentence. In fact, many countries allow courts to defer sentencing for a specific purpose.

The most common justification is to allow the offender time to complete a treatment or rehabilitation programme, or otherwise demonstrate progress towards desistance and rehabilitation. Again, in Canada, a recent statutory provision (section 720 (2)) states that: 'The court may, with the consent of the Attorney General and the offender and after considering the interests of justice and of any victim of the offence, delay sentencing to enable the offender to attend a treatment program approved by the province under the supervision of the court such as an addiction treatment program or a domestic violence program'. Sentence deferral is also an option in the Australian state of Victoria. Originally aimed at young (17- to 25-year-old) offenders, it now is available to defendants of any age (see Freiberg, 2014).

Sentence deferral is likely to be particularly useful for responding to the specific needs and particular circumstances of young offenders and young adults – those individuals whose personal and professional circumstances are most likely to be in transition and evolving in ways that have consequences for the sentencing decision.

## **Contents of Report**

This chapter summarises the current deferral regime, distinguishing deferral from an adjournment or a suspended sentence order. This chapter also locates deferred sentencing within the panoply of current sentencing options, identifying the claims and the criticisms which have arisen with respect to deferral. Chapter 2 summarises the limited empirical research, which is almost 40 years old now, and notes the changing volume of deferred sentences in recent years. Chapter 3 draws some lessons about deferred sentencing from the accumulated case law and reviews the current guidance available from the Sentencing Council. Chapter 4 considers the use of deferred sentencing in relation to young adults and, finally, Chapter 5 explores critical aspects of deferred sentencing and proposes a research agenda.

## **Origins and Purpose of Deferred Sentencing**

The statutory power to defer sentencing came into force in 1973 as a result of section 1 of the Powers of Criminal Courts Act 1973. The provisions are modelled on the power exercised by Scottish courts.<sup>1</sup> The English regime was proposed by the 1970 Advisory Council on the Penal System<sup>2</sup> (hereafter 'Advisory Council'). This panel reviewed the experience with deferred sentencing in Scotland and concluded:

'We are firmly of the opinion that there is a definite place in the penal code for the deferment of sentence to provide the offender with an opportunity to show good behaviour, to repay money which he has acquired dishonestly, to pay compensation for damage which he has caused maliciously, or to perform some other act which would indicate ability to stay out of trouble.' (Advisory Council, 1970, p. 28)

In the words of the Advisory Council, deferment involved 'postponing sentence for a period to see if the offender carried out some stipulated action' (Advisory Council, 1970, p. 22). The Advisory Council conceived of deferred sentencing as a means '(a) to ensure future good conduct or to enable the court to await the happening of an event (e.g., employment or the return of the offender to his family home; and (b) to await the outcome of the offender's undertaking to make reparation to his victim' (Advisory Council, 1970, p. 25). Deferral offers the offender a final opportunity to avoid immediate imprisonment. More recently, in recognition of the need to support restorative justice initiatives, the deferred sentencing provision has acquired a wider remit. Schedule 23 to the Criminal Justice Act (CJA) 2003 expanded the objectives of deferred sentencing by adding reparative activities to the list of requirements. The CJA 2003 also broadened the conduct of the offender to include consideration of the extent of compliance with requirements, and 'greatly improved the effectiveness of deferment of sentence as a tool for testing an offender's will and capacity to reform' (Baker, 2014, p. 54).

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<sup>1</sup> See Scottish Advisory Council on the Treatment of Offenders (1960). Scotland created the power to defer sentence a decade earlier in section 47 of the Criminal Justice (Scotland) Act 1963. Courts in Northern Ireland also have the power to defer sentencing. The regimes vary, with the Scottish courts having widest powers. For example, the deferral period in Scotland is unlimited.

<sup>2</sup> The 18-member panel included some of the most important legal and socio-legal scholars including Baroness Wooton; Louis-Blom Cooper, Q.C; Professor Sir Leon Radzinowicz; and Dr. Nigel Walker.

## **Distinguishing Deferred Sentencing from Adjourment**

Deferred sentencing differs from a simple adjourment in several respects. First, adjourment is normally only for a few weeks, whereas a sentence may be deferred up to six months. Second, in the vast majority of cases a court adjourns in order to secure additional information, usually in the form of a Pre-Sentence Report (PSR). In contrast, deferment may be ordered for a wide range of reasons which go far beyond collecting professional reports or gathering further information. Third, adjourment has no direct consequences for the offender, beyond obliging him or her to return to court at a later date for sentencing. In contrast, when a court defers sentence, the offender is obliged to comply with any requirements during a longer period (up to six months). Upon return to court, they will be expected to demonstrate positive changes to their life circumstances. In this sense, deferred sentencing actively engages the offender in the sentencing process. This engagement does not arise in the context of a simple adjourment.

## **Deferred Sentences and a Suspended Sentence Order**

Some scholars have suggested that the imposition of a suspended sentence order (SSO) can serve the same purposes as deferral – without the need for a delay and a second hearing.<sup>3</sup> Yet deferred sentences are distinguishable from SSOs. A court imposing an SSO is definitively marking the seriousness of the offence with a custodial sentence, albeit one which is suspended for a specified period of time. As the Sentencing Council's Imposition guideline makes clear, before imposing an SSO, a court must be satisfied that the custody threshold has been met. Only if this is the case will a court proceed to determine if the sentence may be served as an SSO. The decision for a court prior to imposing an SSO is whether there are reasons why the term of immediate imprisonment may be suspended (Sentencing Council, 2017a).

A wide range of circumstances may affect the offender in a way that will become relevant for the purposes of sentencing. The offender may be engaged in a professional, academic or therapeutic course, the outcome of which is currently unknown. They may be in the midst of paying compensation to the victim, or they may be beginning or continuing to participate in a restorative justice programme. The personal circumstances of the offender's dependents might be changing in significant ways that a court may wish to consider at sentencing. One distinction, therefore, between individuals being sentenced immediately or shortly after conviction and deferred sentence offenders is the dynamic nature of their life circumstances. If a court has all necessary information relevant to the sentencing decision, no adjourment is necessary; if the offender's life circumstances (including his or her possible participation in a restorative justice initiative) are static and stable, deferral is equally unnecessary. Finally, the offender must consent to deferral of sentence. In *R v Fairhead*,<sup>4</sup> an early judgment relating to deferred sentences, the Court of Appeal noted that it was of the greatest importance that the accused should be personally asked whether he consented to the deferment (see Bennun, 1976). This requirement does not apply to either sentencing adjournments or sentencing options, such as the imposition of an SSO.

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<sup>3</sup> See Roberts (2022) for a summary of scholarly commentary regarding deferred sentencing.

<sup>4</sup> [1975] 2 All E.R. 737.



## **Chapter 2: Research Findings, 1973-2020**

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*This chapter summarises research findings in England and Wales from the inception of deferred sentencing to the present. The research record is very sparse. Only two peer-review publications have appeared, almost forty years ago now. In addition, the Home Office published several small-scale analyses in the 1970s. The official statistical record is equally meagre; although the annual 'Criminal Statistics' publication initially included some limited data on the number of sentences deferred, this practice ceased in the mid-1980s. Since then, the statistics have appeared in different publications and in a far more restricted way. We begin our review by noting some key findings from the early research, before reporting findings from our own limited research documenting the volume of sentences deferred in more recent years.*

### **Previous Research on Deferred Sentencing**

Over the years, the deferred sentencing provision has attracted very little attention from academics or government departments. The findings from the early research are purely descriptive, revealing little more than the kinds of cases deferred and the sentencing outcomes following deferral. One of the early analyses published by the Home Office concluded that, in practice, 'The object of deferred sentencing seems to have been either to put the defendant to the test, or to provide the offender with an opportunity or to postpone sentence because the situation was complex' (Home Office, 1975a, p. 10). Another Home Office report, published the same year, noted that the 'new power has been used in a wide variety of circumstances by different courts' (Home Office, 1975b, p. 28). In three-quarters of the cases, the initiative to defer came from the bench rather than the offender's advocate; this may suggest limited practitioner awareness of the power.

The quality and coverage of published statistics has deteriorated over the years. Deferred sentences first appear in the 1975 edition of the Criminal Statistics which recorded 8,244 cases. The number of deferred cases varied little over the next decade but then began to decline (Jones, 1983). In 1984, Stanley and Baginsky noted that 'deferred sentences are used frequently by the courts' (1984, p. 82). Thereafter, deferred sentences disappear from the Criminal Statistics, only to re-appear for a few years in the Offender Management Statistics (until 2009), after which the Ministry of Justice ceased publishing comprehensive statistics relating to deferred sentencing. Finally, although the early statistics provide the offender's age and gender as well as the sentence imposed after deferral, this level of detail appears to have been discontinued in the mid-1980s.

### **Young Adults and the Deferred Sentence**

As noted in the previous chapter, young adults whose lives are often in transition are a key clientele for deferral. This focus is confirmed by these early studies. Young persons and young adults accounted for a high percentage of cases in the first few years: over half the deferred sentence offenders were aged between 17 and 25 years of age. Corden and Nott (1980, Table 2) provide some limited data from the West Yorkshire courts. They report that of the 392 cases deferred in 1977, approximately two-thirds were under 21 (the age of offenders over 21 is not broken down any further). Government statistics a few years later confirmed this trend. Data from

1981 reveal that in 7,251 cases of deferred sentences approximately two-thirds (65%) of offenders were under 21 (Criminal Statistics, 1981, Table 7.22).

The proportion of offenders under 21 was higher in the magistrates' courts than the Crown Court. Jones (1983) summarises data from several Home Office studies, the first of which was carried out in 1973. Again, there was a clear over-representation of offenders in younger age groups: more than two-thirds were under 21 years of age.

### **Gender of Deferred Sentence Offenders**

With respect to gender, the profile of deferrals was little different from the general offender population. Jones reported in 1983 that the male to female ratio was 7 to 1 for deferred sentence cases, and 7.5 to 1 for sentencing in general.

### **Sentencing Outcomes Following Deferral**

The early research sheds little light on offenders' progress during deferment. The only relevant statistic comes from Corden and Nott (1980) who reported that almost two-thirds of the offenders in their sample completed the deferment period without any further court appearances.

A key issue, and one for which courts may benefit from some guidance (see later chapters of this report), concerns the effect of a successful deferral on the sentence ultimately imposed. To what extent should a court modify sentence if the offender has made significant progress during the period of deferment? As with other research questions, the data on outcomes following deferral are very sketchy. One problem is that the final sentence is seldom recorded by the official statistics, and there is no indication of the sanction that the court may have imposed in the event that sentencing had proceeded immediately after conviction. But if we assume that an immediate prison sentence was likely at the time of deferral, the statistics suggest that courts made a significant change in sanction severity.

According to the Criminal Statistics, in 1979, of approximately 7,000 deferred sentences, only 192 ultimately resulted in immediate imprisonment of the offender following deferment. Two years later, 3,886 cases were deferred in the magistrates' courts. Of these, 112 (3%) subsequently received an immediate prison sentence. An additional 230 (6%) received a suspended sentence. In the Crown Court, 11% of the 1,195 deferrals ultimately resulted in an immediate prison sentence, and an additional 19% attracted a suspended sentence. The smaller-scale regional studies show equally low imprisonment rates after deferral. Corden and Nott, for example, found only 8% of deferred offenders received a term of immediate imprisonment and these authors concluded that 'the offender who agrees to deferment can usually expect to avoid a custodial sentence' (1980, p. 366). After that study was published, the empirical research record dried up.

### **Offences Resulting in a Deferred Sentence**

Table 1 provides a breakdown of the deferred sentence cases in terms of the offences and offence categories in 1981. As can be seen, theft/handling and burglary together account for approximately four-fifths of all cases. Young adults account for a high proportion of convictions for these offences. Another interpretation of the high volume of these offences is that they involve repeat offenders with drug or alcohol addictions. The court may have decided to defer for a period

to determine whether the offender could make some progress towards abstinence and desistance, thereby justifying the subsequent imposition of a non-custodial sentence. This table also shows that deferred sentencing was primarily employed for offenders convicted of less serious or non-violent offences (which would result in short prison sentences). This conclusion is confirmed by the very limited data on the length of prison terms imposed after deferral. Corden and Nott report that of those few cases receiving a custodial sentence, the majority were under 12 months in duration (1980, Table 5).

**Table 1: Deferred sentences by offence category, 1981**

	Number of cases deferred	Percentage of all deferred sentences
<b>Theft and handling</b>	3,113	46%
<b>Burglary</b>	2,408	36%
<b>Violence</b>	419	6%
<b>Fraud and Forgery</b>	282	4%
<b>Criminal damage and arson</b>	153	2%
<b>Motoring offences</b>	126	2%
<b>Sexual offences</b>	38	<1%
<b>Other</b>	172	3%
<b>Total</b>	<b>6,711</b>	<b>100%</b>

Source: Criminal Statistics (1981); percentages rounded.

Table 2 provides the latest breakdown of offences (from 2020) from the data we have been provided with by the Ministry of Justice in response to a Freedom of Information (FOI) Act request, and comparing the two tables reveals a similar pattern, with theft offences accounting for almost half of all deferred sentences. (A more detailed breakdown of recent trends is provided later in this chapter.)

**Table 2: Deferred sentences by offence category, 2020**

	Number of cases deferred	Percentage of all deferred sentences
<b>Theft and handling</b>	239	43%
<b>Drug offences</b>	31	6%
<b>Violence</b>	62	11%
<b>Fraud and Forgery</b>	15	3%
<b>Criminal damage and arson</b>	10	2%
<b>Motoring offences</b>	11	2%
<b>Other</b>	188	34%
<b>Total</b>	556	100%

Note: data exclude deferrals in the Crown Court; percentages rounded.

### **Summary of Early Research Findings**

The early research is now very dated but does contain lessons for the current use of the deferred sentence. First, we have uncovered no evidence that deferral of up to 10,000 cases caused any obvious difficulties for defendants, other stakeholders or the court system. Second, deferral was clearly seen to be particularly applicable to young offenders and young adults whose lives are most likely to be in transition, and for whom immediate imprisonment is likely to have most severe consequences. Courts appear to have been aware that offenders in these age categories were experiencing life changes which should be taken into account at sentencing. Third, the offences for which sentence was being deferred were non-violent crimes of relatively low seriousness. It is likely, therefore, that the custody threshold had been passed as a result of the offender's record more than the seriousness of the offence. Approximately half the offenders deferred were being sentenced for theft, one of the offence categories with the highest re-offending rates.

### **New Data: Deferred Sentences, 2005-2020**

The paucity of published data on deferred sentencing, and the difficulties in accessing even the limited statistics, has led researchers to seek information by means of an FOI Act request. One such FOI, submitted by Professor Gwen Robinson in 2018, generated a spreadsheet of statistics which we used to prepare a portrait of deferred sentences over the period 2005-2017, the years covered by the request.<sup>5</sup> To these data we have added additional statistics supplied in response to a Sentencing Academy FOI request in 2021.<sup>6</sup> One important limitation is that no data were

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<sup>5</sup> Ministry of Justice FOI Ref: 181004021.

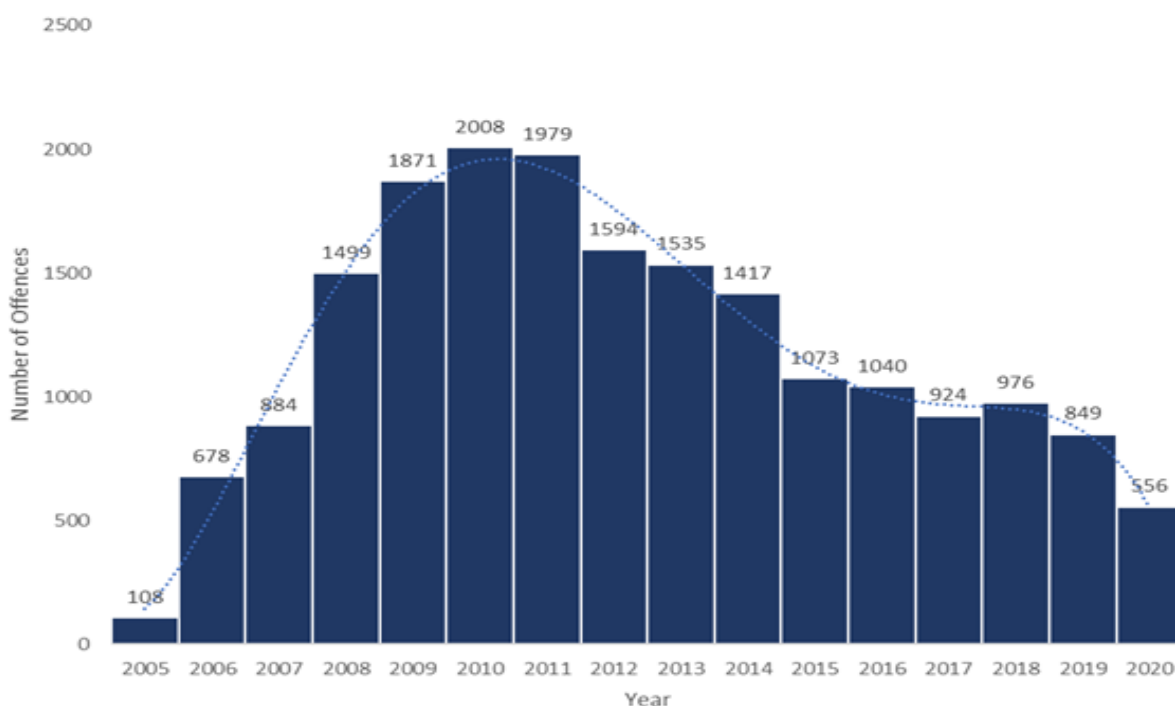
<sup>6</sup> Ministry of Justice FOI Ref: 211214009.

available from the Crown Court after 2010 and therefore we can make no claims about the completeness of the available data.

## Volume of Cases

Between 2005 and 2020, 18,991 deferred sentencing cases were recorded in the data provided to us. The vast majority occurred in the magistrates' courts but, as noted, these statistics do not include the Crown Court after 2010.<sup>7</sup> Figure 1 shows the pattern of deferrals over the period 2005-2020. The number of deferrals rose to a peak of 2,008 cases in 2010, and then declined to a low of only 556 in 2020 (although this number is likely to have been affected by the restrictions in place that year due to the pandemic). The 58% decline in the number of deferred sentences between 2010 and 2019 greatly exceeds the overall reduction in the number of people sentenced by the courts of 13% in this period.

**Figure 1: Deferred sentences imposed, 2005-2020**



## Offence Categories

As seen in Table 1, in 1981, approximately half of all cases of deferred sentencing involved theft or handling. The offence categories are not directly comparable in the more recent data, but this trend appears to be maintained. Of all deferred sentence cases during the period (2005-2020) included in the data, over half involved theft. Although the data provide no further information on

<sup>7</sup> In 2005-2010 (inclusive) there were 63 instances of deferred sentencing in the Crown Court recorded in the data, compared to 6,985 in the magistrates' courts, and so the Crown Court accounted for less than 0.9% of deferred sentences during this period.

the offenders' personal circumstances, these cases may well have involved drug dependent offenders beginning or undergoing drug treatment of some kind. Theft offences account for significant numbers of immediate prison sentences – particularly short sentences. In 2019, 13,167 sentences of less than 12 months were imposed on adult offenders for theft offences.<sup>8</sup> This profile of offender is a key category if expanded use of deferred sentencing takes place. The more serious offences accounted for very small numbers of deferred sentences. Violence against the person offences, sexual offences and robbery together accounted for a very small percentage of all deferrals.<sup>9</sup>

Table 3 summarises the offences resulting in deferral over the entire period from the Ministry of Justice data (2005-2020). As can be seen, theft accounts for over half (56%) of deferrals granted during the period. The next most common category (20% of all deferrals) was summary non-motoring offences, followed by drug offences (6%).

**Table 3: Deferred sentence by offence category, 2005-2020**

Offence group	Number of deferred sentences	Percentage of all deferred sentences
<b>Violence against the person</b>	565	3%
<b>Sexual offences</b>	30	<1%
<b>Robbery</b>	3	<1%
<b>Theft offences</b>	10,695	56%
<b>Criminal damage and arson</b>	183	1%
<b>Drug offences</b>	1,145	6%
<b>Possession of weapons</b>	243	1%
<b>Public order offences</b>	874	5%
<b>Miscellaneous crimes against society</b>	803	4%
<b>Fraud offences</b>	309	2%
<b>Summary non-motoring</b>	3,726	20%
<b>Summary motoring</b>	415	2%
<b>Total</b>	<b>18,991</b>	<b>100%</b>

Percentages rounded.

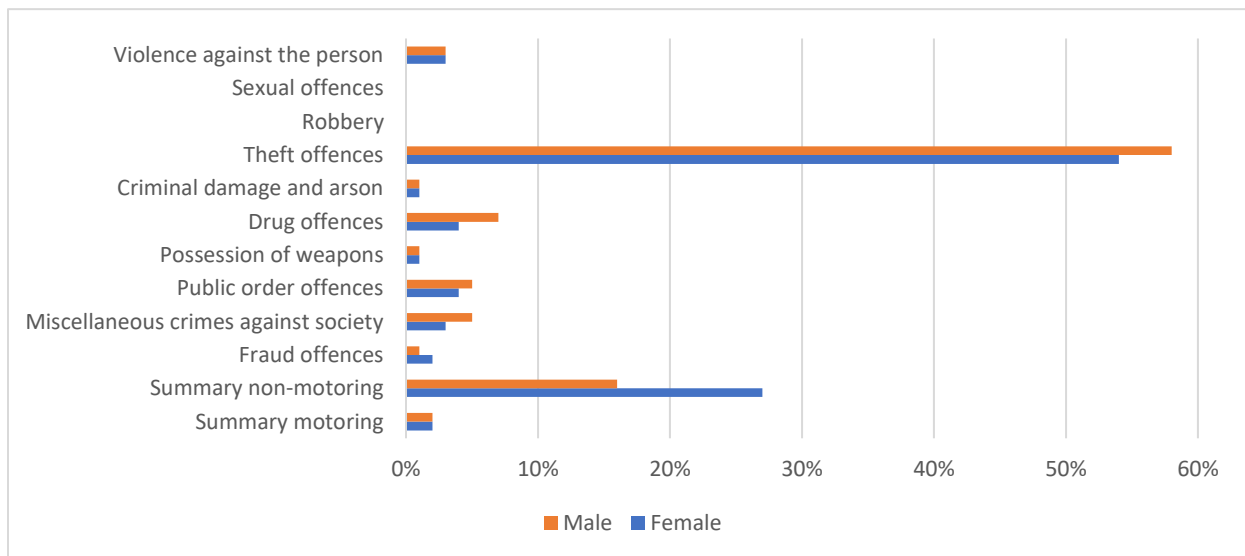
<sup>8</sup> Ministry of Justice (2021) *Criminal Justice System Statistics publication: Outcomes by Offence 2010 to 2020: Pivot Table Analytical Tool for England and Wales, 12 months ending December 2010 to 12 months ending December 2020*.

<sup>9</sup> This finding holds even in the years 2005-2010 inclusive where we have data from the Crown Court as well as the magistrates' courts. In those years, violence against the person offences accounted for 1.46% of deferrals (103 out of a total of 7,048 deferrals), sexual offences accounted for 0.18% of deferrals (13 out of 7,048) and robbery accounted for 0.04% of deferrals (3 out of 7,048).

Overall, male offenders account for 72% of deferred sentences in the data, female offenders account for 27%, with the other 1% being Not Stated/Other.

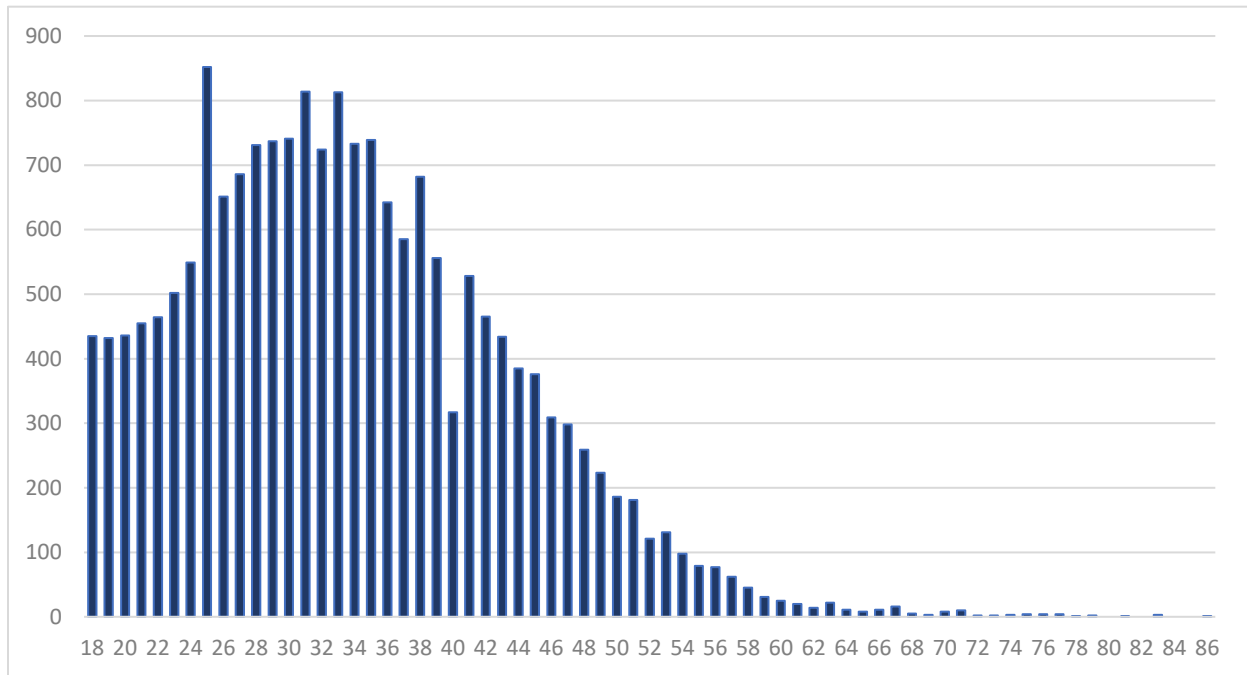
Figure 2 reveals that theft accounts for the highest percentage of cases for male and female offenders, although the percentage is higher for males. Female offenders are more likely to have sentencing deferred for summary non-motoring offences whilst male offenders are more likely to have sentencing deferred for drug offences, public order offences and miscellaneous crimes against society.

**Figure 2: Offence categories resulting in deferral, by gender, 2005-2020**



Finally, Figure 3 provides a breakdown of cases in the data by age. The courts appear to have moved away from employing deferral more often in cases of young adult offenders. The database records septuagenarians (and even some octogenarians), suggesting the courts may be using the provision to recognise offenders with exceptional personal circumstances.

**Figure 3: Age distribution of offenders deferred, 2005-2020**





## **Chapter 3: Guidance for Courts**

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*This chapter summarises guidance from the Court of Appeal over the past 40 years. Deferred sentencing has generated few appellate judgments, and R v George, from 1984 remains a leading authority. Part II discusses the limited guidance from the Sentencing Council, and Part III reviews the additional directions for courts found in the latest edition of the Crown Court Compendium which is issued by the Judicial College.*

### **Court of Appeal**

Much of the case law generated by the Court of Appeal in this area has related to procedural matters surrounding deferment. The leading case of *George*<sup>10</sup> itself deals with both procedural matters and the substantive question of whether an offender can expect a non-custodial sanction in the event that s/he complies with the terms of the deferment. In the case's first appearances before the Court of Appeal, on the 4<sup>th</sup> and 14<sup>th</sup> of May 1984, the Court set out clearly what the purpose of deferment was:

'The purpose of deferment pursuant to section 1 of the Powers of Criminal Courts Act 1973, as amended, is to enable the court to take into account the defendant's conduct after conviction or any change in circumstances and then only if it is in the interests of justice to exercise the power. However, great care should be exercised by the court when exercising that power, for it is not to be used as an easy way out for a court which is unable to make up its mind about the correct sentence.'<sup>11</sup>

Thus, it has been made clear the deferment should be a considered decision taken on the basis that there is likely to be information as to conduct or circumstances that will be greater after a period of deferment, and which will assist the court in making a sentencing decision. Usually that sentencing decision will be a choice between either an immediate custodial sentence, or a sentence that is (initially, at least) to be served in the community. Thus, a defendant who has complied with the terms of a deferred sentence would usually expect to receive either an SSO or a community order.

On the 24<sup>th</sup> of May, the Court gave their reasons for quashing the sentence of immediate detention given by the Judge to Mr George,<sup>12</sup> and substituting it for a conditional discharge for 12 months. In doing so, they highlighted that during the period of deferment, according to the probation report, Mr George had attended twice in February, but had missed later appointments, making his response to the deferment 'impossible to assess'.<sup>13</sup> Presumably for these reasons, at the end of the period of deferment, the Judge gave him a period of three months' detention. As the Court of Appeal noted, however, it was not clear that the effect of missing appointments had been made clear to Mr George. Indeed, it was not clear what he had been told about the effect of him doing,

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<sup>10</sup> (1984) 79 Cr. App. R. 26 – the defendant had pleaded guilty to assault occasioning actual bodily harm.

<sup>11</sup> (1984) 79 Cr. App. R. 26 at p. 26-7.

<sup>12</sup> (1984) 6 Cr. App. R. (S.) 211.

<sup>13</sup> (1984) 6 Cr. App. R. (S.) 211 at p. 211.

or not doing, anything, other than that he was to keep out of any further criminal trouble.<sup>14</sup> Doubtless it is for this reason that:

'It is essential that the deferring court should make a careful note of the purposes for which the sentence is being deferred and what steps, if any, it expects the defendant to take during the period of deferment. Ideally the defendant himself should be given notice in writing of what he is expected to do or refrain from doing, so that there can be no doubt in his mind what is expected of him.'<sup>15</sup>

Where a young person is involved, such requirements should be in terms that they can understand and, if necessary, they should be explained further by their legal representative.

It is also crucial that the person consents to the course of deferring sentence, this being one of the important principles highlighted by *L*.<sup>16</sup> If the offender's consent was not given under the 1973 Act, then the sentence that had been imposed amounted to an error of law by the Judge as to their sentencing powers.<sup>17</sup> This confirmed the position in *McQuaide*,<sup>18</sup> where the Court of Appeal urged courts to be 'meticulously careful'<sup>19</sup> when deferring sentence, to ensure that all procedural requirements were met. As the requirement for an offender's consent remains in the Sentencing Act 2020, along with a number of other procedural details, it is likely that errors such as a failure to obtain the offender's consent would still amount to an error of law in the sentencing process, making it susceptible to appeal. It is necessary, therefore, to ensure that sentencers receive training on the use and procedure of deferred sentences as part of their training, to ensure confidence and precision in their use, and also that sentencers consider them as part of the sentencing armoury, especially when sentencing a young person or young adult.

The reasons for which a sentence can be deferred are restricted to those set out in the legislation. In *Sinclair*,<sup>20</sup> the defendant was serving a sentence of imprisonment when he came before the court to be sentenced for further offences. His barrister argued that the Judge should defer sentence, as in the period of the deferment the defendant was due to be released from prison, and therefore on the deferred date would be eligible for a suspended sentence. The Court of Appeal made clear that this would not have been a valid reason for deferring the sentence, and the Judge was right not to do so.<sup>21</sup>

Giving the parameters of possible sentences after a deferment, the Court of Appeal in *Davis* stated:

'Nor is [this] a case where a sentence of imprisonment could have been suspended but, because the judge was not quite sure whether suspension was appropriate, deferral was a suitable course. In such cases deferral may be appropriate and useful but deferral is

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<sup>14</sup> (1984) 6 Cr. App. R. (S.) 211 at p. 212.

<sup>15</sup> (1984) 6 Cr. App. R. (S.) 211 at p. 213.

<sup>16</sup> [1999] 2 Cr. App. R. (S.) 7.

<sup>17</sup> Under section 36(2) of the Criminal Justice Act 1988.

<sup>18</sup> (1974) 60 Cr. App. R. 239.

<sup>19</sup> (1974) 60 Cr. App. R. 239 at p. 241.

<sup>20</sup> [2020] EWCA Crim 1805.

<sup>21</sup> [2020] EWCA Crime 1805 at paras. 8 and 9.

really there for cases where a community order is at least a realistic possibility if the judge were to pass sentence on that day.<sup>22</sup>

It has, however, been established that a defendant should not understand a deferral to mean that they will get a community order instead of an SSO – and a Judge deferring a sentence creates no legitimate expectation of a non-custodial, as opposed to non-immediate custodial, sentence.<sup>23</sup> Neither should a deferral of sentence be taken to indicate that the offence is not so serious as to justify immediate custody.<sup>24</sup>

For all these reasons, the Judge should be precise about what is being done and why, both when deferring, and when they conclude the sentencing exercise after the period of deferment:

'First the purpose of the deferment and any requirement imposed by the deferring court must be ascertained. Secondly the court must determine if the defendant has substantially conformed or attempted to conform with the proper expectations of the deferring court, whether with regard to finding a job or as the case may be. If he has, then the defendant may legitimately expect that an immediate custodial sentence will not be imposed. If he has not, then the court should be careful to state with precision in what respects he has failed.'<sup>25</sup>

In *George*, this had not been done:

'In the present instance the necessary precautions were not taken. The expectations of the sentencer were not spelt out at the time of deferment, and in particular the appellant was never explicitly warned that full compliance with the requirements of the probation service would be essential, if he was to avoid a custodial sentence.'<sup>26</sup>

It should also be noted that during the period of deferment the defendant is not on bail – rather they are subject only to the conditions of the deferment. Therefore, no questions of failure to surrender when the case is listed for sentence after the deferment period arise.<sup>27</sup> However, a failure to attend court without a good reason on the sentencing date might well be seen by a Judge as a breach of the general principle that the deferment period was an opportunity for the defendant to demonstrate a pro-social and responsible attitude. Furthermore if an offender is required to abide by a curfew during the deferment period, that does not stop the Judge then imposing the maximum permitted curfew<sup>28</sup> under a community order where that is the eventual sentence passed on the deferred date.<sup>29</sup> This principle can be assumed to also apply to SSOs, as the Court's rationale was that anything required under the deferment was 'history' by the time the

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<sup>22</sup> [2020] EWCA Crim 1701 at para. 42.

<sup>23</sup> *Woodward* [2018] EWCA Crim 1563 at para. 20 and 27.

<sup>24</sup> For the purposes of section 1(4A)(c) of the Criminal Justice Act 1982, now repealed, which stated that an offender qualifies for a custodial sentence if 'the offence of which he has been convicted or found guilty was so serious that a non-custodial sentence for it cannot be justified': *Bray* (1990-91) 12 Cr. App. R. (S.) 705.

<sup>25</sup> *George* (1984) 6 Cr. App. R. (S.) 211 at p. 213.

<sup>26</sup> (1984) 6 Cr. App. R. (S.) 211 at p. 214.

<sup>27</sup> *Mizan* [2020] EWCA Crim 1553.

<sup>28</sup> As specified at that time in section 204(3) of the Criminal Justice Act 2003.

<sup>29</sup> *SA* [2011] EWCA Crim 2747.

sentence was passed on the deferred date, and therefore did not 'count' towards the eventual sentence passed.<sup>30</sup>

Sentencing judges must also take care to ensure that when deferring sentence, they are not indicating an unduly lenient sentence if the deferment conditions are abided by. Case law is clear that the act of deferring a sentence in itself can be unduly lenient – but such undue leniency arguments are usually predicated on the fact that the sentence indicated if the deferment is complied with would be unduly lenient. It is not the case that a first instance Judge's decision to defer sentence on some co-defendants and not others will necessarily make the deferrals unduly lenient. Although not the point on appeal, in *Warden and Nicholls*,<sup>31</sup> the Court observed that the Judge had given an explanation that, by implication, the Court of Appeal found acceptable. The Court noted that there were two co-defendants 'of similar ages [to the appellants]' who the judgment says were 12 at the time of the offence, and 13 and 14 on the appeal date.<sup>32</sup> His rationale for that decision was that, in the case of defendants so young, even where their offence deserved the same punishment but where there had been even tentative signs of improvement, the Court ought to endeavour to encourage it.

In *L*,<sup>33</sup> a case decided when deferred sentences were governed by section 1 of the Powers of Criminal Courts Act 1973, the Court of Appeal held that any appeal against deferring a sentence as being in itself an unduly lenient approach should be brought immediately on the sentence being deferred. In other words, if the prosecution concluded that the very deferring of sentence was unduly lenient, then the time for it to appeal was immediately after the Judge had deferred the sentence, not at the later point when the Judge then imposed the final sentence. Counsel for *L* sought to argue that deferment was not a 'sentence' within the meaning of section 50 of the Criminal Appeal Act 1968, as applied to section 36 of the Criminal Justice Act 1988, and therefore could not be the subject of a reference by the Attorney General for being unduly lenient. This reasoning was not accepted on the policy ground that it was in the interests of the public and all parties that there was a mechanism for prompt challenge of an order deferring sentence.

The Court ruled that the decision to defer did fall within the meaning of 'sentence' and thus the Attorney General could challenge such a decision for being unduly lenient. The justification for this position was that the word 'sentence' in section 35(6) of the Criminal Justice Act 1988 was stated to have the same meaning as 'sentence' had under the Criminal Appeal Act 1968, which defined 'sentence' as '[...] in relation to an offence, includes any order made by a court when dealing with an offender'.

This was thought to be the case following the earlier decision in *Attorney General's Reference No. 22 of 1992*,<sup>34</sup> but in that case the issue had not been fully argued. *L* resolved the issue conclusively, confirming the Court's approach in *Attorney General's Reference Number 22 of 1992* and *Attorney Generals' Reference Numbers 36 and 38 of 1998*. Lord Bingham explained the decision in the

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<sup>30</sup> SA [2011] EWCA Crim 2747 at para. 19.

<sup>31</sup> [1998] 1 Cr. App. R. (S.) 66.

<sup>32</sup> *Warden and Nicholls* [1998] 1 Cr. App. R. (S.) 66 at p. 66.

<sup>33</sup> [1999] 2 Cr. App. R. (S.) 7 – *L* was a youth who had pleaded guilty to offences of false imprisonment, wounding contrary to section 20 of the Offences Against the Person Act 1861, and affray.

<sup>34</sup> Also sometimes known as *Thomas* (1993) 97 Cr. App. R. 275 – the offence in that case was one of wounding with intent to do grievous bodily harm, contrary to section 18 of the Offences Against the Person Act 1861.

following way; that although the court 'has made and announced a decision not to pass sentence on that occasion, it has in practice committed itself to a sentencing strategy any departure from which, in breach of the understanding indicated, would found a successful appeal by the defendant'.<sup>35</sup>

As with any sentence, the eventual sentence imposed on the defendant after a period of deferment can be appealed by the defendant on the grounds that it was wrong in law or manifestly excessive. This applies whether the defendant abided by the conditions of the deferment and received the lower sentence, or did not do so and was consequently sentenced to the longer term indicated when sentence was deferred (as in *Smith*,<sup>36</sup> where the longer term was held to be manifestly excessive and reduced).

## **Guidance from the Sentencing Council**

The Sentencing Council is the other principal source of guidance for courts in England and Wales. There is no specific guideline in England and Wales to assist a court in deciding whether to defer sentencing. However, some guidance is provided in the Sentencing Council's 'explanatory materials':

***Deferred sentences will be appropriate only in very limited circumstances*** [emphasis in original]

- *deferred sentences are likely to be relevant predominantly in a small group of cases close to either the community or custodial sentence threshold where, should the offender be prepared to adapt his behaviour in a way clearly specified by the sentencer, the court may be prepared to impose a lesser sentence;*
- *sentencers should impose specific and measurable conditions that do not involve a serious restriction on liberty;*
- *the court should give a clear indication of the type of sentence it would have imposed if it had decided not to defer;*
- *the court should also ensure that the offender understands the consequences of failure to comply with the court's wishes during the deferment period.*

*If the offender fails to comply with any requirement imposed in connection with the deferment, or commits another offence, he or she can be brought back to court before the end of the deferment period and the court can proceed to sentence.*<sup>37</sup>

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<sup>35</sup> [1999] 2 Cr. App. R. (S.) 7 at p. 10.

<sup>36</sup> [2020] EWCA Crim 1820.

<sup>37</sup> Available at: <https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/deferred-sentences/>.

This guidance derives from earlier advice published by the Sentencing Guidelines Council in 2004. The Sentencing Guidelines Council took the view that the expanded use of the SSO as a result of the Criminal Justice Act 2003 (which removed the requirement for ‘exceptional circumstances’ to be found in order to suspend a sentence) meant that deferral was ‘likely to be used in very limited circumstances’ (Sentencing Guidelines Council, 2004, p. 14; Irwin Rogers and Roberts, 2019). This report has noted the decline in the use of deferral at sentencing but this preceded the expansion of the use of suspended sentences after 2003. In light of the Government’s intention to promote greater use of deferred sentences noted in the 2020 White Paper,<sup>38</sup> the Council’s guidance may need revisiting. One question concerns the status of the Council’s guidance. When sentencing an offender, courts have a statutory duty to follow ‘any relevant guideline’. But the Council’s guidance regarding deferred sentencing is found in its ‘explanatory materials’. These have not been subject to the extensive public and professional consultation which occurs when the Council issues a guideline. This being the case, are courts as bound to follow this advice as they are to follow the Council’s guidelines?

Courts might benefit from greater guidance regarding the kinds of offenders for whom deferral is appropriate. This guidance may suggest specific profiles of individual such as those discussed later in this report. The guidance could also identify factors indicating when it may be appropriate (or inappropriate) for a court to defer sentence. The Council has issued ‘factors indicating’ guidance with respect to the related question of whether it is possible to suspend a sentence of custody (Sentencing Council, 2017a, p. 8), and it could do the same for deferred sentencing. Once a court has taken a decision to defer, there remains the question of which conditions to impose. Courts have wide discretion in this area, and have imposed a wide range of requirements. The Sentencing Compendium offers examples of appropriate requirements (Judicial College, 2021), but the range of potentially useful conditions is wide and may include: non-association/ no contact; curfews possibly with tagging; writing of letters of apology/ explanation – to name a few. The court would need to consider the number and onerousness of these conditions when imposing the final sentence.

The Sentencing Council might also provide advice regarding the question of how much to reduce (or whether to change) the sentence in the event that the offender completes the period of deferment in full compliance with the requirements imposed. In contrast to the Sentencing Guidelines Council’s advice, the Council’s guidance says nothing about this issue. The earlier guideline noted that ‘if the offender complies with the requirements, a different sentence will be justified at the end of the deferment period’ (Sentencing Guidelines Council, 2004, p. 15). The Sentencing Guidelines Council had in mind a step down in the hierarchy of disposals, noting ‘this could be a community sentence instead of a custodial sentence, or a fine instead of a community sentence’ (2004, p. 15). This direction suggests a methodology by which a court might identify the sentence envisaged at the time of deferral and thus also the sentence below this on the scale of sanctions which would be imposed if the offender successfully complies with requirements over the deferment period.<sup>39</sup>

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<sup>38</sup> In The White Paper the Government noted that: ‘Where the court has the capacity, we want to encourage them to use existing legislation on deferred sentences’ (Ministry of Justice, 2020, p. 52).

<sup>39</sup> The Sentencing Guidelines Council guideline suggests deferment may ‘rarely enable a custodial sentence to be suspended rather than imposed immediately’ (2004, p. 15). It is hard to see why an SSO would not be a natural replacement for an immediate prison sentence. The Sentencing Guidelines Council may have wished to preserve the

In our view, there should be a strong presumption that following compliance with requirements during the deferment, the sentence identified at the time of deferment should be imposed. In addition, the sentence ultimately imposed should be an SSO or a sanction lower on the hierarchy of sentences. The offender needs an incentive to comply, and the incentive should be awarded following compliance. Furthermore, the imposition of an immediate custodial sentence following the successful completion of a deferment period may undermine the progress made during this period. At present, there is insufficient clarity with respect to the effect of a successful deferment. Worrall and Hoy, for example, note that there is 'no guarantee of the nature of the eventual punishment' (2005, p. 7). A guarantee is necessary to incentivise the offender.

The outcome of the deferment will not always be a straightforward success or failure. In some cases, the offender will have partially complied with the requirements set down at the time of deferral. When this occurs the court's decision will be more complicated. It would be overly simplistic to simply deny the offender the mitigated sentence promised at deferral in the event of full compliance. Rather, courts should consider, in an individualised manner, the degree of compliance, and the reasons why the offender failed to achieve full and complete compliance. In the interests of consistency across courts, guidance on this aspect may be useful.

If the Government hopes to increase the number of deferred sentences, how might this goal be achieved? The Sentencing Council might review its guidance regarding deferral. One way of attracting further attention to the deferral provision would be to issue a guideline for courts contemplating deferral. In the alternate, the Council could introduce reference to deferral into its imposition guideline which provides guidance on the use of the principal disposals. The imposition guideline (Sentencing Council, 2017a) contains a flow chart for the use of these sentences, but contains no mention of deferred sentencing. This flowchart includes a stage at which the court, having established that the custody threshold has passed, is now to determine whether the sentence of imprisonment may be suspended.

The guideline asks: 'Can the sentence be suspended?' (Sentencing Council, 2017a, p. 10). To answer the question, the flowchart directs courts to consider additional guidance on the factors indicating when it would be appropriate or inappropriate to suspend sentence. At this point courts could be directed to consider whether deferral is an option, and additional text might provide factors suggesting that deferral is appropriate. This text could flag younger offenders as a population worthy of particular consideration for a deferred sentence.

Guidance could also address some key procedural aspects of the decision. For example, Harris and Walker argue that it is important for courts to give reasons when deferring sentence in the more serious cases (2020, p. 141). Clear reasons help forestall uninformed commentary that may arise in response to particular cases covered in the media. The question of whether to defer, for how long, and with what kinds of requirements is likely to be fact-specific. Nevertheless, some general principles of application might assist courts. In addition, guidance could help a court determine the kinds of requirements pertinent to deferral. All community orders must carry a requirement for the purpose of punishment, unless there are exceptional circumstances which would make it unjust to do so.<sup>40</sup> In contrast, any requirements imposed during a deferment period

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view that an SSO is a prison sentence, and therefore represents no change from an immediate prison sentence. However, this is at odds with the impact of these two forms of imprisonment.

<sup>40</sup> Section 208 of the Sentencing Act 2020.

are not imposed to be punitive, or imposed for the purposes of punishment.<sup>41</sup> Rather, they should guide and assist the offender and assist the court's evaluation of whether the offender's conduct during the period of deferment justifies significant mitigation of sentence.

### **Crown Court Compendium**

We note one final resource for courts, namely the Crown Court Compendium (Judicial College, 2021). This document usefully supplements the Council's guidance. For example, after listing the statutory elements of deferral, the Compendium notes that 'Sentence should not be deferred unless the sentencer is prepared to pass a sentence that does not involve immediate custody if [the defendant] complies with the requirements of deferment' (Judicial College, 2021, S2.4(6)). This suggests that cases appropriate for deferral should be those facing immediate custody prior to deferment, and also that an SSO or a community order should be the presumptive response following successful completion of the deferment period.

The Compendium then notes a number of requirements for a court imposing a deferment:

*'13. Imposing the deferment. The court must:*

*(1) Explain the reasons for deferment.*

*(2) Identify clearly the requirements with which [the defendant] would be expected to comply.*

*(3) Obtain undertakings and consent from [the defendant] personally.*

*(4) Set the date for the deferred sentence*

*(5) Direct that a short progress report should be written by the person supervising [the defendant].*

*(6) Explain the consequences of compliance with or failure to comply with the undertakings given.*

*(7) Direct that a transcript of the court's remarks must be prepared [within 14 days] and be served on [the defendant] [via solicitor], on the court and on any person supervising [the defendant].'* (Judicial College, 2021, S2.4(13))

The Compendium also provides a useful template to guide a court with respect to the wording of a deferral order. This information should be made available to sentencers in the magistrates' courts since a number of deferrals take place at that level of court.

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<sup>41</sup> At least that appears to be the state of play at present. A thorough examination of the procedure may see some merit in the imposition of punitive requirements, to ensure some degree of punishment at the same time that the offender is working towards rehabilitation. This would align the deferral period with the community order.



## **Chapter 4: Deferred Sentencing and Young Adults**

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*In light of the particular relevance of deferred sentencing for young adults, this chapter takes a closer look at this population of defendant. We note that there has been a surprising decline in the use of deferred sentencing for young adults.*

There is a growing consensus in many jurisdictions that when sentencing young adults, courts should make an additional effort to restrict the use of custody as a sanction (e.g., Sentencing Advisory Council of Victoria (2019); Howard League (2017); Shust (2018); Casey et al., (2022)).<sup>42</sup> Young adult offenders represent a distinct group, in large measure because they are still maturing, and because any sentence will likely have a disproportionate effect upon their career or educational prospects. As with young offenders, contact with the criminal justice system may increase their risk of subsequent offending. A number of individuals and organisations have called for courts and the Sentencing Council to develop and issue formal sentencing guidelines for young adults. These would mirror those applicable to sentencing children and young people and would bridge the gap between children and mature adults. Courts should be particularly restrictive in the use of immediate imprisonment when sentencing young adults.

Currently there is an overarching definitive sentencing guideline on sentencing children and young people that has been in force since June 2017 (Sentencing Council, 2017b). This, however, deals with principles of these sentencing exercises, and not numbers. In the Court of Appeal's decision in *RB*,<sup>43</sup> it was made clear that there should usually be a specific step inserted into the sentencing exercise that provides a reduction to reflect youth. However, that is usually understood only to apply to those who are legally youths; that is, under 18 years of age. For those who are young adults, but not legally youths, first instance courts find themselves without meaningful assistance in what, if any, adjustment to make to reflect this 'grey' area between youth and adulthood.

In this respect, deferred sentencing offers an additional means of sparing a young adult imprisonment and also encouraging (and rewarding) their attempts to address the causes of their offending during the period of deferment. Whilst custodial sentences for those under 18 are decreasing, there were still, on average, 560 under 18 year olds in custody each day in the 12 months from March 2020 – March 2021 (Youth Justice Board / Ministry of Justice, 2022, para. 7.1). Meanwhile, in June 2021, those aged 18-24<sup>44</sup> accounted for 15.2% of the prison population – some 11,912 prisoners (Sturge, 2021, p. 11). When considering the severity of the collateral consequences of imprisonment, which can include issues obtaining local authority housing, insurance and employment (Hoskins, 2019) there is a clear social imperative to keeping young people out of prison wherever possible. Where a Judge is unsure whether a young person will squander a chance to show that they are serious about turning away from offending behaviour, the deferred sentence offers a sensible and responsive mechanism that enables the young person to show that they can follow a law-abiding life.

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<sup>42</sup> See also the website of the Transition to Adulthood initiative: <https://t2a.org.uk/>.

<sup>43</sup> [2020] EWCA Crim 643, at para. 25.

<sup>44</sup> Due to the breakdown of the numbers, it was not possible to disaggregate the 25 years olds from within the 25-29 group.

As noted in Chapter 2, deferred sentences were once predominantly used for the youngest adult offenders: individuals under 21 accounted for approximately two-thirds of deferred sentences imposed in 1981. To what extent is this still the case today? As can be seen in Table 4, the available data since 2005 suggest that it is no longer viewed by courts as primarily being a useful tool when dealing with younger adult offenders. Thus, in the most recent three years (2018-2020), about 15% of deferrals were aged 18-25, down from around 28% in the period 2005-2007.

**Table 4: Young adults as a proportion of total deferred sentences, 2005-2020**

Year	Number of deferred sentences for those aged 18-25	Total deferred sentences	Those aged 18-25 as a proportion of total deferred sentences
2005	33	108	31%
2006	171	678	25%
2007	257	884	29%
2008	427	1,499	28%
2009	478	1,871	26%
2010	481	2,008	24%
2011	472	1,979	24%
2012	337	1,594	21%
2013	327	1,535	21%
2014	262	1,417	18%
2015	179	1,073	17%
2016	172	1,040	17%
2017	169	924	18%
2018	147	976	15%
2019	123	849	14%
2020	97	556	17%
<b>Total</b>	<b>4,132</b>	<b>18,991</b>	<b>22%</b>

Percentages rounded

The data we have been provided with for 2005 to 2020 demonstrate that the 18- to 25-year-old age group have represented a declining proportion of the deferred sentence cohort in recent years. Overall, this age group has accounted for 22% of all deferred sentences imposed in this period, although it should be noted that 18- to 25-year-olds have been proportionately declining in recent years and have not accounted for more than 18% of deferred sentences in any year since 2013.

In order to understand the proportionate use of deferred sentencing for this age group we need to compare this data to the overall sentencing statistics to discover whether young adults are, on average, more likely to be recipients of deferred sentencing today. Unfortunately, the Ministry of Justice’s overall sentencing data does not quite align with the 18- to 25-year-old age group as their age categories include 25-year-olds in an older age group. Therefore, Table 5 slightly under-captures the young adult cohort as it excludes those aged 25. However, those aged 18- to 24-years-old made up 22% of those sentenced between 2005 and 2020 – exactly the same proportion as 18- to 25-year-olds made up of deferred sentences over this period.<sup>45</sup>

**Table 5: Young adults as a proportion of all sentenced adults, 2007-2020**

Year	Young adults as a proportion of all sentenced adults
2007	24%
2008	25%
2009	26%
2010	25%
2011	25%
2012	23%
2013	21%
2014	20%
2015	19%
2016	18%
2017	18%
2018	17%
2019	17%
2020	16%
<b>Average 2005-2020</b>	<b>22%</b>

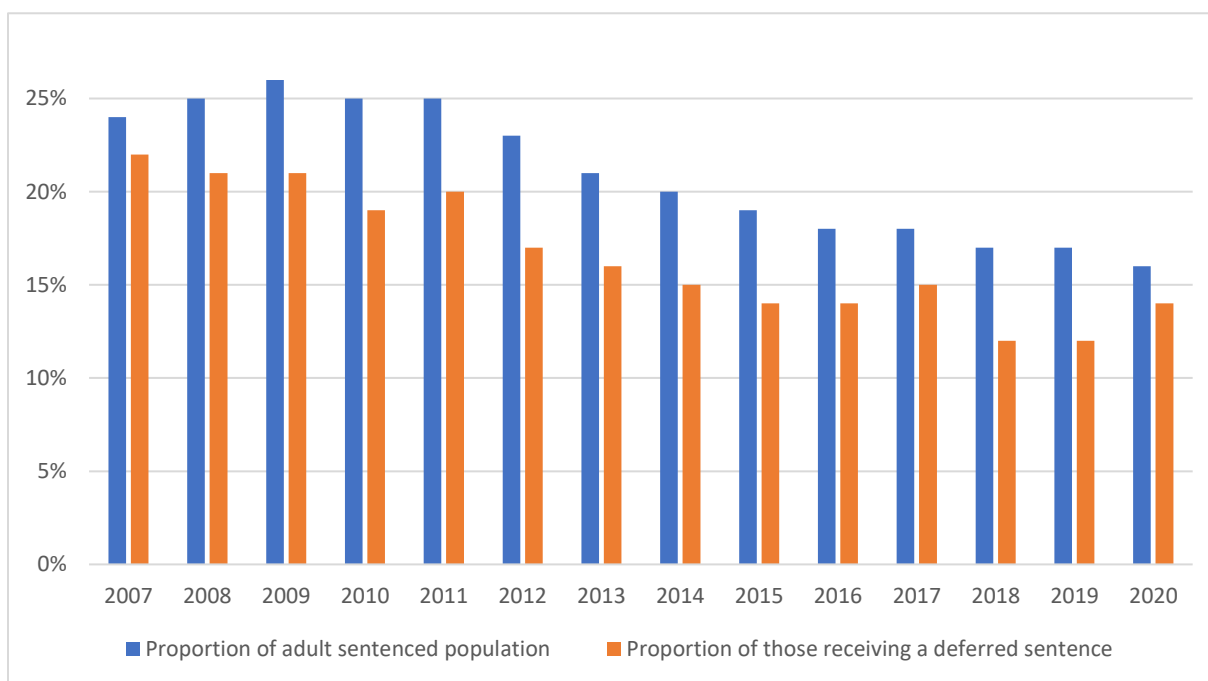
Percentages rounded. Excludes age ‘Not Known’. Source: Ministry of Justice *Outcomes by Offence* data tool.

These trends suggests that deferred sentencing is no longer used as a particularly appropriate option for young adults. This age group is now very slightly under-represented in the overall use of deferred sentences as those in this age group tend to be over-represented in the overall

<sup>45</sup> The age categories are only available in the Ministry of Justice data from 2007 onwards. Prior to this, all offenders aged 21+ were included in a single age category.

sentenced population. Using the available sentencing data for the 18- to 24-year-old age group, defendants in this age cohort were under-represented in the deferred sentence population compared to their numbers in the overall sentenced population in every year from 2007 to 2020. That is, for every year for which we have data, individuals in this age category were slightly *less* likely to have their sentence deferred than an older adult.

**Figure 4: Defendants aged 18- to 24-years old as a proportion of those receiving a deferred sentence compared to this age group as a proportion of the adult sentenced population<sup>46</sup>**



One other area of analysis possible from the data obtained from the Ministry of Justice is to compare the use of deferred sentencing by offence group. If younger adults were being treated differently to older adults in the use of deferred sentencing, we might expect to see a significant divergence in the offence groups for which it was being used. For example, we might expect younger adults to be much more likely to have their sentence deferred for a drug offence or an offence of violence committed under the influence of alcohol than would be expected for older adults who might have a longer prior history of such offending. However, with the exception of the categories of 'theft offences' and 'summary non-motoring' offences (with younger adults under-represented in the former and over-represented in the latter compared to the overall use of deferred sentencing) no clear differences emerged by offence group.

<sup>46</sup> Excludes age 'Not Known'. The age categories are only available from 2007 onwards. Source: Ministry of Justice *Outcomes by Offence* data tool.

**Table 6: Proportionate use of deferred sentencing by offence group, young adults compared to overall use by offence group**

Offence group	Proportion of deferred sentences for those aged 18-25, 2005-2020	Proportion of all deferred sentences, 2005-2020
<b>Violence against the person</b>	3%	3%
<b>Sexual offences</b>	<1%	<1%
<b>Robbery</b>	<1%	0
<b>Theft offences</b>	46%	56%
<b>Criminal damage and arson</b>	2%	1%
<b>Drug offences</b>	8%	6%
<b>Possession of weapons</b>	2%	1%
<b>Public order offences</b>	4%	5%
<b>Miscellaneous crimes against society</b>	5%	4%
<b>Fraud offences</b>	2%	2%
<b>Summary non-motoring</b>	27%	20%
<b>Summary motoring</b>	2%	2%

Percentages rounded

Overall, it would now appear that young adults no longer represent a distinct group for the use of deferred sentencing despite its origins as a disposal considered to be particularly applicable in the cases of younger offenders.

## **Chapter 5: Key Issues and Research Priorities**

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*This chapter identifies a number of aspects of deferred sentencing which require further consideration or additional empirical research. The chapter should be a useful resource for the Government if it wishes to increase the number of deferred sentences. We identify some of the categories of offender for whom deferral is most likely to be useful and appropriate.*

### **Key Issues**

#### **Deferred Sentencing and Young Adults**

Deferred sentencing provides courts with a way of responding to a particular profile of offender: individuals whose lives are in transition, and whose personal circumstances are likely to change for the better within a short period of time. Many, if not most, teenagers and young adults conform to this description. Independent of the deferred sentencing literature there is now widespread consensus that young adults represent a distinct group requiring a distinct approach (e.g., Howard League for Penal Reform, 2019; Emmanuel et al., 2021; Shust, 2014).

There are several reasons why young adults are a primary target group. In addition to their changing life circumstances, e.g., with respect to employment, education or professional training, young adults are likely to be disproportionately affected by an immediate prison sentence. Serving a prison sentence will likely be more professionally and personally disruptive for a 20-year-old. Courts currently exercise restraint in imposing an immediate prison sentence on young adults, but deferred sentencing offers an additional avenue to consider. It represents one last opportunity for the offender to demonstrate that their changing circumstances justify a sentence other than immediate imprisonment.

If young adults are a primary clientele for consideration for deferral, how might this be achieved? One option would involve a protocol for a court to formally consider the possibility of deferral when sentencing young adults who are facing a short term of imprisonment. Such a protocol would also alert legal advisers to the possibility of a deferred sentence, ensuring that all offenders for whom this sentence may be appropriate receive consideration.

Issuing a stand-alone Sentencing Council guideline on deferral would be another way of increasing the visibility and hence use of deferred sentencing. Such a guideline would serve two primary purposes. First, to highlight the kinds of offenders for whom deferral may be appropriate and the point during the sentencing decision-making process that deferral should be considered. This would highlight the special circumstances of many young adults. Second, to provide guidance on all aspects of the deferred sentence, e.g., the duration, the requirements imposed during deferral, and the impact that deferral should have upon the sentence ultimately imposed.

A key research priority is to determine whether there is a need for more detailed guidance with respect to deferred sentencing. The Centre for Justice Innovation, among other organisations, has called for greater guidance: 'what is needed is clear policy and guidance about when deferred sentences should be used, with further detail about what types of cases the Ministry wants to be in scope' (2020, p. 6). Further, they note that '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' (Centre for Justice Innovation, 2020, p. 2.). Research with sentencers is

necessary to discover whether there is a desire for more guidance and, if so, what issues this guidance might address.

### **Female Offenders**

A number of scholars and practitioners have drawn attention to the promise of deferred sentencing to help address the challenges of sentencing female offenders. Women represent an important category for consideration. Female offenders are more likely to have sole or primary caring responsibilities. They also account for a disproportionate number of lower seriousness acquisitive offences and generally represent a lower risk of serious re-offending. Courts should be particularly aware of the potential use of deferral in cases of female offenders falling into these categories. Minson et al. (2015, p. 17) advocate the creation of a presumption in favour of sentence deferral for women with primary or sole caring responsibilities. Finally, while there are only small numbers of pregnant defendants at risk of custody, deferred sentencing offers a straightforward way of sparing these individuals the experience of giving birth while imprisoned (see Epstein (2022), for discussion).

### **Ensuring Parity and Proportionality**

Section 57(2) of the Sentencing Act 2020 specifies five purposes of sentencing.<sup>47</sup> Deferred sentencing is most consistent with promoting reform and rehabilitation. By encouraging the offender to actively engage in his or her rehabilitation, deferral may increase the likelihood of desistance. Deferred sentencing also promotes the goal of compensation, by allowing the offender time to make reparation to the crime victim, where appropriate.

Yet sentencing in England and Wales is underpinned by the principle of proportionality which requires sentencing to reflect the harm caused and culpability of the offender (Ashworth and Kelly, 2021). The custody threshold is determined by the seriousness of the offence. Section 230 of the Sentencing Act 2020 requires that a custodial sentence should be imposed only if the offence was so serious that no lesser sanction is appropriate.<sup>48</sup> If a deferment results in the imposition of a non-custodial option where the offence had passed the custody threshold, this may create a conflict with proportionality. The offender's changing circumstances have no obvious bearing on the harm caused or threatened or his/her culpability for that offence. The proportionate sentence may be significantly reduced for reasons unrelated to the components of a proportional sanction.

Courts deferring sentence will need to guard against undermining proportionality or parity at sentencing. Two remedial steps may help. First, when the sanction changes following a successful deferral, the court should attempt to craft a sentence which is nevertheless roughly the equivalent in terms of its impact on the offender. This is of course challenging when, as is

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<sup>47</sup> *The court must have regard to the following purposes of sentencing - (a) the punishment of offenders, (b) the reduction of crime (including its reduction by deterrence), (c) the reform and rehabilitation of offenders, (d) the protection of the public, and (e) the making of reparation by offenders to persons affected by their offences.*

<sup>48</sup> *The court must not pass a custodial sentence unless it is of the opinion that the offence that – (a) the offence, or (b) the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence.*

likely the case, an immediate prison sentence is replaced upon deferral by a community order. One option would be for the court to replace a short prison sentence with an intensive community order with rigorous conditions, and for a longer duration than the prison sentence which otherwise would have been imposed. The suspended sentence order would appear to be a natural alternative to an immediate prison sentence, and again a court could ensure that the SSO carries the appropriate requirements. The purpose of deferral is not to permit the offender to evade punishment, but to avoid the most punitive sentencing option of immediate imprisonment. Achieving some kind of 'rough' penal equivalence will not be easy, and this may be an area where guidance is desirable.

The second step to address concerns about the sanction following deferral is for the court to issue very clear reasons both at the time of deferral and subsequently when imposing the 'ultimate' sentence. In its reasons the court should highlight the statutory power to defer as well as the reasons for doing so in this particular case. At sentencing following deferment the court should detail the offender's progress and positive conduct, noting the effect this has had on the sentence finally imposed. These steps will help to inform all stakeholders and may also forestall ill-informed media commentary of the kind that periodically arises in response to deferred sentencing cases.

### ***Addressing 'Social Class Disadvantage'***

There is a danger that deferred sentencing may disproportionately benefit offenders with sufficient resources to mobilise a 'deferral plan' for the courts to consider, such as paying privately for drug rehabilitation. Many offenders whose circumstances will or may change for the better may be unable to undertake the necessary steps to achieve positive change, or they may not even be aware that addressing their personal difficulties, achieving positive change, making reparation or participating in a restorative justice programme is an option which they may invoke to influence the sentence ultimately imposed.

Section 6(2) of the Sentencing Act 2020 identifies two key issues to which courts 'may have regard in dealing with the offender: (i) the making of reparation for the offence; and (ii) the extent to which the offender has complied with any deferment requirements'. The latter issue should apply equally across all offenders, but some offenders may be willing but incapable of making reparation. Or the offence may be one for which reparation is impossible or inappropriate. Again, courts will have to exercise care to ensure that offenders with the capacity to make reparation do not gain an unfair advantage which results in a mitigated punishment.



## **Research Priorities and Knowledge Gaps**

If the Government hopes to encourage a greater use of deferred sentencing, it needs to know a lot more about the way the mechanism currently operates. Given the paucity of research, much remains to be done.

### ***Deferral Usage and Outcomes after Deferment***

The most pressing priority involves the current use of deferrals and the outcomes of cases deferred. This report has drawn only on limited data from Freedom of Information requests and this is not complete due to the lack of available data from the Crown Court. A more thorough analysis is required. It should be relatively straightforward for the Ministry of Justice to produce a *comprehensive* portrait of deferred cases over the past decade, including the number of cases, the offences for which sentencing has been deferred, as well as the sentences imposed following deferral. As noted, in the early years of the deferral regime most deferrals were granted to young offenders and young adult offenders – the age groups most likely to have changing life circumstances. Is this profile of offender still the most likely to attract a deferred sentence? Our analyses of Ministry of Justice data to 2020 suggest that courts may have moved away from the earlier focus on younger offenders.

The Ministry of Justice would also be able to conduct a retrospective re-offending analysis of offenders who had their sentences deferred. This could involve tracking any re-arrests or reconvictions of offenders with a deferred sentence beginning, say, in 2010. By applying its matched case and propensity methods, the Ministry of Justice could determine whether deferral was related to more positive or negative outcomes. Put simply, was deferral associated with higher or lower rates of re-offending? This information is not simply for the purposes of understanding a little-used, once more popular sentencing option. Courts contemplating deferring sentence need to know the extent to which deferral has had beneficial effects.

At present, aside from any direct experience they may have had deferring sentence, courts are invited to consider deferral in the absence of any knowledge of its likely effects. This is little short of sentencing in the dark. In contrast, a great deal is known about the principal sentencing options such as short immediate prison sentences, suspended sentence orders and community orders. Much of this work has been published by the Ministry of Justice (2015). Finally, it would be useful to know how much variation exists across different regions of the country and court centres with respect to the use of deferred sentencing.

### ***Practitioner Awareness, Experiences and Perspectives***

Deferred sentencing is a little-known element of sentencing law. A survey of the judiciary would provide useful information both on the level of awareness of the power to defer sentence and judicial attitudes to the utility of this power.<sup>49</sup> Research involving the judiciary is one of the highest

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<sup>49</sup> Anecdotal evidence suggests that there is considerable interest in the deferred sentencing regime. During the course of this research for the Barrow Cadbury Trust we have spoken to magistrates who expressed a desire to know more about deferral, and in particular to have the benefit of research – hence our call for a thorough, evidence-based evaluation of deferred sentencing.

priorities. This research should focus on the magistracy since almost all cases of deferral to date have arisen in the magistrates' courts. Are magistrates familiar with the deferral provisions? Do magistrates see the power to be exercised only in quite exceptional circumstances, or do they regard it as a mechanism which has far greater potential?

Research should also explore legal advisers' attitudes and guidance regarding deferral. We know almost nothing about the requirements courts impose on offenders during the deferral period, and research would generate information on this issue. Anecdotally, our experience suggests that many magistrates are unfamiliar with their power to defer sentence, perhaps because the issue is not a priority for legal advisers. The Sentencing Council's direction that deferred sentencing is only a consideration in very limited circumstances may explain why legal training for magistrates pays little attention to the option.

Finally, Chapter 3 noted a number of aspects of deferred sentencing for which guidance is absent and this report has suggested that the level of guidance for courts could be improved. Ultimately however, sentencers are the key source of insight on this matter. If sentencers were to express a desire for greater or more focused guidance, the Sentencing Council could consider incorporating the issue into its future workplan. A survey of magistrates would answer the question of whether the current guidance from the Sentencing Council and the Court of Appeal is sufficient. This would make an important contribution to the debate about the future of the deferred sentencing regime, and in particular the adequacy of current guidance.

### ***Restorative Justice and Reparation***

The most significant recent development in the deferred sentence regime is the increased emphasis on using deferral to facilitate restorative and reparative justice. The 2020 White Paper expressed an intention to encourage the use of deferral for a number of categories of offender and also to provide 'more opportunities for restorative justice to be deployed' (Ministry of Justice, 2020, p. 52). It would be useful to conduct a research review of existing restorative justice programmes in England and Wales as well as Scotland with a view to determining how deferral may best contribute to these initiatives. At present, we only have a series of individual research reports available, and no overarching conclusions have been drawn.

### ***Comparative Research: Drawing Lessons From Other Jurisdictions***

As noted in our description of the origins of the power, deferred sentencing was proposed by the 1970 Advisory Council following a review of the Scottish provision and an informal consultation involving the senior judiciary and the Magistrates Association. No original research was conducted or commissioned, and the Advisory Council lacked the resources to examine analogous deferred sentencing provisions in other common law jurisdictions. Yet many countries operate deferral regimes, and there may be important lessons to learn from these foreign systems (e.g., Carrington et al., 2011). A research review should also examine the experience with deferral in other countries.

To take one example, the duration of deferral is more limited in England and Wales than elsewhere. Most foreign jurisdictions permit deferrals in excess of six months, and some (like Scotland) place no temporal limit on the deferral. For example, the Crimes (Sentencing) Act 2005

in the Australian Capital Territory permits deferral for up to one year. A number of commentaries have argued that the six month limit in England and Wales is too short (e.g., Gerry, 2017). If the research evidence supports the Government's intention to expand the use of deferred sentencing, raising the statutory ceiling on the deferral period is an obvious way of encouraging more deferrals.

A multi-jurisdictional review of the international experience with different time limits would inform the debate about the length of time a sentence may be deferred. Several jurisdictions are actively examining the potential of deferred sentencing. For example, in the Australian state of Victoria, the Sentencing Advisory Council has recently launched a consultation as part of its examination of whether there may be room for increased or improved use of deferred sentence orders.<sup>50</sup>

### **Role of Pre-Sentence Reports**

The PSR represents the primary source of independent, professional information about the offender, including his or her suitability for different sanctions (see Robinson, 2022). As Robinson notes, 'For decades, Pre-Sentence Reports have been prepared for the criminal courts by probation staff, typically following an adjournment between conviction and sentence.' (2017, p. 338). The PSR should also be of assistance in helping a court determine whether deferral is worth considering. If the court is intending to defer (with the consent of the offender), the PSR should be of assistance in terms of the appropriate requirements to impose as well as the length of any deferment. Yet no research of which we are aware has explored probation officers' awareness of deferral as a sentencing option. In light of their important role at sentencing, it would be useful to know how aware probation officers are of deferred sentencing, and whether the authors of PSRs address deferment in their reports.

### **Offenders, Crime Victims and the Public**

It is important to understand the reactions of stakeholders. Research into the experiences of offenders would help improve the current regime. Involving and incentivising offenders is one of the key justifications for deferred sentencing. To what extent do they see the deferral period as an opportunity to influence the court's decision regarding sentencing? Victims have a legitimate expectation that sentencing will not be delayed unduly or without cause. There are likely to be few deferred sentencing cases involving crimes of violence or property crimes causing serious loss or harm. Nevertheless, it would be worth exploring the reactions of crime victims, or victim advocacy groups to the concept of deferred sentencing.

Public opinion sets broad limits on sentencing options. A sanction or element of sentencing which attracts widespread public criticism is likely to be infrequently imposed. Adverse public reaction to suspended sentences in the Australian state of Victoria played an important role in the abolition of the disposal (Freiberg, 2017). We know nothing about public reaction to deferred

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<sup>50</sup> In addition to sentence deferral which has a 12-month limit, courts in Victoria also have the option of an adjourned undertaking as a low-end order. It involves a court postponing a case for up to five years with or without recording a conviction. This allows the person to participate in rehabilitation programmes and demonstrate that they can be of good behaviour; see [www.sentencingcouncil.vic.gov.au/projects/sentence-deferrals-and-adjourned-undertakings](http://www.sentencingcouncil.vic.gov.au/projects/sentence-deferrals-and-adjourned-undertakings).

sentencing. Deferral of sentence may be seen as benefitting only the offender; the public may take it as an example of sentencing leniency. On the other hand, research has demonstrated that the public are sensitive to the costs of sentencing (Hough and Roberts, 2005), and may well support deferral in appropriate cases if it leads to cost savings. Extrapolating from the public opinion research more generally it seems likely that the seriousness of the offence for which sentencing is being deferred will be critical. Public opposition to deferred sentencing is likely to emerge if the offence involves serious violence but, as we have found, deferral in such cases is very rare.

## **Conclusion**

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We draw a number of key conclusions from this preliminary examination of the evolution and current practice of deferred sentencing in England and Wales.

First, deferred sentencing is a potentially useful, yet currently under-utilised sentencing option for courts. The full potential of the provision will only become clear once additional research has been conducted. What is clear now is that courts in previous years have used deferral more frequently than at present. This decline in the use of the provision is one of the questions that research needs to answer. It would be a lost opportunity to simply ignore the provision.

Second, reducing the use of immediate prison sentences in a safe and principled way remains a priority for the criminal justice system in England and Wales. The need to exercise great restraint with respect to the use of custody as a sanction will likely only grow in future years, as the costs of imprisonment increase, and the criminal justice budget contracts. Deferred sentencing may be able to make a modest, but useful, contribution to reducing prison sentences.

Third, deferred sentencing brings together a number of current policy priorities. There is a clear desire, shared by many groups, to address the unique circumstances of young adult offenders. Deferred sentencing offers an innovative means by which courts may recognise these circumstances. In addition, deferring sentence may also create opportunities for restorative justice initiatives which are precluded if the court proceeds to sentence the offender immediately. It is worth noting that increasing the use of deferred sentencing is a rare example of a Government initiative which has attracted the support of a diversity of stakeholders in the field.

As a result of the pandemic, the courts are facing lengthy backlogs of cases. Finding a place for deferred sentencing in the landscape of English sentencing may therefore be challenging at this time. Nevertheless, deferral offers sentencers a potentially useful additional tool at sentencing, one that may make a useful contribution to reducing the use of short prison sentences and thereby achieving cost savings in the prison estate. As Osborough noted, 'to delay is not merely to buy time; it may be prudent policy' (1981, p. 262). More specifically, the deferral mechanism offers a means to recognise the distinct needs of young adult offenders whose lives are in transition in ways that affect sentencing.

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