

Community Correction Orders

Third Monitoring Report (Post-Guideline Judgment)

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- conduct research and disseminate information on sentencing matters
- gauge public opinion on sentencing
- consult on sentencing matters
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Community Correction Orders

Third Monitoring Report (Post-Guideline Judgment)

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Contributors

Authors

Geoff Fisher
Anusha Kenny

Sentencing Advisory Council

Chair

Arie Freiberg AM

Deputy Chair

Lisa Ward

Council Members

Carmel Arthur
Hugh de Kretser
Fiona Dowsley
Helen Fatouros
David Grace QC
John Griffin PSM
Sherril Handley
Brendan Kissane QC
Shane Patton
Barbara Rozenes
Geoff Wilkinson OAM
Kornelia Zimmer*

*Did not participate in any deliberations regarding this report.

Chief Executive Officer

Cynthia Marwood

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Abbreviations

CBO Community-based order

CCO Community correction order

ICO Intensive correction order

Glossary

Case In this report, a collection of one or more proven charges against a person sentenced at the one hearing.

Charge In this report, a single proven allegation of an offence.

Combined order In this report, a sentence of imprisonment combined with a community correction order.

Community-based order A flexible, non-custodial sentence that includes community service, supervision, and personal development. This order was replaced from 16 January 2012 with the community correction order.

Community correction order A sentencing order available since 16 January 2012 that may require an offender to comply with a range of conditions including unpaid community work, treatment, and supervision by a community corrections officer. A community correction order may also include curfews, restrictions on an offender's movements, and non-association conditions (*Sentencing Act 1991* (Vic) pt 3A).

Defendant A person who is charged with a criminal offence.

Fine A monetary penalty imposed by a court as a sentence.

Higher courts In this report, the County Court of Victoria and the Supreme Court of Victoria.

Indictable offence A serious offence heard before a judge in a higher court. Some indictable offences may be triable summarily.

Mean The most commonly used measure of the central tendency of a distribution of values, also known as the 'average'.

Median The middle value in a set or a distribution of values. For example, in the following set of values:

1, 2, 2, 3, 3, 4, 5, 5, 6, 6, 7

4 is the median value. The median represents a statistical midpoint where half of the values (1, 2, 2, 3, 3) are below the median and half of the values (5, 5, 6, 6, 7) are above the median. If a set has an even number of values, the two middle values (sometimes defined as the lower median and the upper median) are averaged to find the median.

Non-parole period	The period of imprisonment set by the court that an offender must serve in prison before he or she is eligible for release on parole.
Offender	A person who has been found guilty of an offence.
Parole	Supervised and conditional release of an offender from prison before the end of his or her prison sentence. While on parole, an offender is still serving the sentence and is subject to conditions designed to help him or her rehabilitate, reintegrate into the community, and reduce the risk of reoffending.
Percentage point change	The absolute difference between two percentages. For example, if the percentage of cases that received imprisonment increased from 60% to 70%, the percentage point change would be an increase of 10.
Principal CCO	In this report, a community correction order imposed as a principal sentence.
Principal sentence	The most severe sentence imposed on a charge within a case.
Summary offence	A less serious offence than an indictable offence. Summary offences are usually heard by a magistrate.
Suspended sentence	A term of imprisonment that is suspended (that is, not activated) wholly or in part for a specified period (the 'operational period'). If an offender reoffends during this period, he or she could be imprisoned for the total duration of the sentence. Suspended sentences have been abolished in the higher courts for all offences committed on or after 1 September 2013 and in the Magistrates' Court for all offences committed on or after 1 September 2014.
Total effective sentence	The product of individual sentences (and orders for cumulation or concurrency of those sentences) imposed on a person on the same occasion. In a case involving a single charge, the total effective sentence is the sentence imposed for that charge. The total effective sentence is also known as the 'head sentence'.
Triable summarily	Specific indictable offences that can be prosecuted in the Magistrates' Court of Victoria, subject to the consent of the accused and the magistrate.
Youth justice centre order	<p>A sentence requiring an offender aged 15–20 years at the time of sentencing to be detained in a youth justice centre.</p> <p>In the Children's Court, a youth justice centre order is the most severe sentence that may be imposed on an offender aged 15–20 years at the time of sentencing (under the <i>Children, Youth and Families Act 2005</i> (Vic)). The maximum length of detention is two years for a single offence or three years for more than one offence.</p> <p>In an adult court, offenders aged 15–20 years at the time of sentencing may be sentenced to a youth justice centre order as an alternative to imprisonment (under the <i>Sentencing Act 1991</i> (Vic) ss 7(1)(d), 32–35). A youth justice centre order may be imposed for a maximum of two years in the Magistrates' Court or three years in the County and Supreme Courts.</p>

Executive summary

This report examines how Victorian courts have used the community correction order (CCO) since its introduction in 2012, with a particular focus on the 2015 calendar year, the year following the Court of Appeal's guideline judgment in *Boulton v The Queen*.¹

The report addresses five research questions in relation to the courts' use of the CCO:

1. Was there a change in the number and type of CCOs imposed in 2015 compared with previous years?
2. Was there a change in the offence profile, offender demographics, or the duration and conditions of CCOs imposed as principal sentences in 2015 compared with previous years?
3. How do the offence profile, offender demographics, and the duration and conditions of CCOs imposed in combination with imprisonment differ from those of CCOs imposed as a principal sentence?
4. Which factors contributed to a change in the numbers of CCOs imposed as principal sentences in 2015 compared with previous years?
5. Which factors contributed to a change in the numbers of CCOs imposed in combination with imprisonment in 2015 compared with previous years?

The findings for each of these questions are summarised below.

Number and type of CCOs in 2015

Between 2014 and 2015, there were substantial increases in the number of CCOs imposed in Victorian adult courts. In the Magistrates' Court, there was a 36% increase (to 10,508) in the number of offenders who received a CCO as a principal sentence and a 100% increase (to 2,028) in the number of offenders who received imprisonment combined with a CCO (a 'combined order'). In the higher courts, the number of CCOs imposed as a principal sentence increased by 15% (to 393) while the number imposed as a combined order increased by 370% (to 356).

Characteristics of CCOs imposed as principal sentences

The increased number of offenders who received a CCO as a principal sentence in 2015 compared with previous years was accompanied by three important changes in the offence profile, offender demographics, and conditions and duration of CCOs imposed. First, the age of offenders who received a CCO increased. Between 2012 and 2015, the percentage of offenders aged 25 years and over who received a CCO increased in the higher courts (from 50.9% to 69.0%) and in the Magistrates' Court (from 68.9% to 75.7%).

Second, CCOs became longer, and CCO conditions became more intensive. In the Magistrates' Court, there was a steady increase in the duration of CCOs imposed between 2012 and 2015: the mean duration increased from 11.7 months to 12.8 months. Further, between 2014 and 2015, there was a substantial increase in the percentage of CCOs that included a supervision condition (from 28.8% to 49.7%). However, there was no increase in the use of unpaid community work, and new conditions such as curfews and electronic monitoring continued to be used infrequently. In the higher courts, the duration of CCOs increased between 2014 and 2015: the mean rose from 2.0

1. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014).

years to 2.3 years. Compared with the January 2012 to June 2013 period, the May 2015 to December 2015 period saw increases in the use of supervision, unpaid community work (including increases in the number of hours offenders were required to work), and a number of other conditions.

Third, the offence profile of offenders who received a CCO shifted modestly away from non-sexual violent offences. In the Magistrates' Court in 2015, CCOs continued to be imposed most frequently for assault (30.7%), traffic (19.2%), and theft and deception (13.8%) offences; however, there was a small shift away from assault offences towards traffic and weapons offences between 2014 and 2015. In the higher courts in 2015, CCOs were most commonly imposed for assault (30.8%), sexual offences (20.9%), and robbery and burglary offences (19.6%); however, there was a shift away from assault and robbery offences towards theft and deception offences.

Characteristics of CCOs imposed in combination with imprisonment

The offence profile, offender demographics, and duration and conditions of CCOs imposed in combination with imprisonment differed in a number of ways from those of CCOs imposed as principal sentences. First, offenders who received a CCO in combination with imprisonment were more likely to be male and were typically older than offenders who received a CCO as a principal sentence. Second, the duration of CCOs imposed in combination with imprisonment tended to be longer than the duration of CCOs imposed as principal sentences. For example, in the Magistrates' Court, the average duration of CCOs imposed in combination with imprisonment was 14.6 months, whereas the average duration of CCOs imposed as principal sentences was 12.7 months.

Compared with CCOs as principal sentences, CCOs combined with imprisonment were less likely to involve a condition of unpaid community work and more likely to involve supervision. For example, in the Magistrates' Court, unpaid community work was used for 32.0% of CCOs imposed in combination with imprisonment and 76.6% of CCOs imposed as principal sentences.

Finally, the offence profile differed between CCOs imposed in combination with imprisonment ('combined orders') and CCOs imposed as principal sentences ('principal CCOs'). In the higher courts, combined orders were more likely than principal CCOs to be used for robbery and burglary offences and less likely to be used for sexual offences. In the Magistrates' Court, combined orders were more likely than principal CCOs to be used for drug offences, assaults, and robbery and burglary offences and less likely to be used for traffic and theft and deception offences.

Factors contributing to a change in the number of CCOs imposed as principal sentences

The abolition of suspended sentences, combined with legislation that encouraged the use of CCOs in place of suspended sentences, was the most influential factor in the increase in the number of CCOs imposed as principal sentences. Following the abolition of suspended sentences in the higher courts for any offence committed on or after 1 September 2013, the percentage of cases that received a suspended sentence in that jurisdiction declined from 15.0% in the March quarter of 2014 to 2.8% in the December quarter of 2015. Likewise, following the abolition of suspended sentences in the Magistrates' Court for any offence committed on or after 1 September 2014, the percentage of cases that received a suspended sentence in that jurisdiction declined from 5.2% in the September quarter of 2014 to 0.6% in the December quarter of 2015.

The guideline judgment, handed down in December 2014, was referred to in many sentencing remarks throughout 2015. It appeared to have an initial effect on the volume of CCOs imposed as principal sentences, but this effect was unsustainable. In the quarter following the guideline judgement (the March quarter of 2015), the percentage of cases that received a CCO as a principal sentence increased from 17.7% to 27.4% in the higher courts and from 8.8% to 10.3% in the Magistrates' Court. While no concurrent decline in the use of imprisonment was observed in the Magistrates' Court over this period, such a decline was observed in the higher courts, where the percentage fell from 68.7% to 58.9%, suggesting that CCOs were used to replace a small portion of imprisonment sentences. However, by the December quarter of 2015, the use of imprisonment sentences in the higher courts had increased to 73.1% of all cases, and the use of CCOs as a principal sentence had declined to 20.0% of all cases. However, the increased duration and intensity of conditions of CCOs imposed in 2015 may be attributable to the guideline judgment.

Factors contributing to a change in the number of CCOs imposed in combination with imprisonment

As mentioned, the influence of the guideline judgment on the volume of CCOs imposed as principal sentences was not sustained throughout 2015. Rather, the guideline judgment seemed to play a greater role in the use of CCOs in combination with imprisonment. The rates at which these combined orders were imposed increased immediately following the guideline judgment. Between the December quarter of 2014 and the December quarter of 2015, the percentage of imprisonment sentences combined with a CCO increased from 28.8% to 34.3% in the Magistrates' Court and from 17.7% to 35.3% in the higher courts. These increases occurred on top of the increases that occurred in the December quarter of 2014 that followed the change in September 2014 in the maximum imprisonment sentence that could be combined with a CCO from three months to two years. Therefore, the guideline judgment appears to have accelerated an increase in the use of combined orders. Use of combined orders, however, has also been influenced by the courts' preference for using a CCO in combination with imprisonment over fixing a non-parole period after imposing an imprisonment sentence. For example, in the higher courts, the percentage of imprisonment terms of one to under two years that included a CCO increased from 5.3% to 81.3% between the September quarter of 2014 and the December quarter of 2015, while the percentage that had a non-parole period declined from 89.5% to 10.7% during the same period.

Community correction orders and the focus of this report

The community correction order (CCO) occupies an important place in the Victorian sentencing hierarchy, bridging the gap between custodial sentences and non-custodial sentencing options, such as fines. It is:

a non-custodial order, to which are attached certain mandatory conditions laid down by the legislature. In addition, the sentencing court can attach to a CCO a range of conditions which are variously coercive, prohibitive, intrusive and rehabilitative.²

Further, it is:

a flexible sentencing option, enabling punitive and rehabilitative purposes to be served simultaneously. The CCO can be fashioned to address the particular circumstances of the offender and the causes of the offending, and to minimise the risk of re-offending by promoting the offender's rehabilitation.³

This report examines the use of CCOs by Victorian courts since the introduction of CCOs in 2012. The report particularly focuses on the 2015 calendar year, the year following the Court of Appeal's guideline judgment in *Boulton v The Queen* ('*Boulton*'), which provided sentencing courts with guidance on how the CCO could serve the various purposes of sentencing.⁴ The guideline judgment was predicted to result in an increase in the use of the CCO,⁵ both as an individual sentence and in combination with a sentence of imprisonment. Indeed, *Boulton* was cited in approximately 25% of cases sentenced in the County Court in 2015.⁶

The Council's previous work on CCOs

This report follows the Council's three previous reports examining the use of CCOs by Victorian courts. Published in 2014, the first report, *Community Correction Orders: Monitoring Report*, examined the use of CCOs both in the higher courts (the Supreme and County Courts), and in the Magistrates' Court over the first 18 months of the order's operation (January 2012 to June 2013). The report found that:

- in the Magistrates' Court, the median duration of CCOs was 12 months and in the higher courts the median duration was 24 months;
- in the Magistrates' Court, the CCO was used in similar numbers and for similar types of cases to the orders it had replaced: the community-based order (CBO) and the intensive correction order (ICO); and
- in the higher courts in 2012, the CCO was used in place of not only CBOs and ICOs but also in place of some suspended sentences, which were declining in use; however, in the first half of 2013 CCOs gradually declined, while imprisonment increased, suggesting that the higher courts became more inclined to use imprisonment than CCOs to replace suspended sentences.⁷

2. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) [1].

3. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) [2].

4. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) [4]; *Sentencing Act 1991* (Vic) s 5(1).

5. See for example, Richard Edney, 'A New Sentencing Landscape for Victoria: Abolition of Suspended Sentences, *Boulton v The Queen* [2014] VSCA 342 and the "Rise" of Community Correction Orders?' (Paper presented at Foley's List CPD Seminar, Melbourne, 15 April 2015).

6. This percentage is based on a search for the term 'Boulton' in County Court sentencing remarks that are available to the Council. The search found that 'Boulton' was referred to in 292 of the 1,159 cases with available sentencing remarks. The percentage is an approximation as the Council has access to sentencing remarks for only 67% of cases sentenced in the County Court in 2015.

7. Sentencing Advisory Council, *Community Correction Orders: Monitoring Report* (2014).

Also published in 2014, *Community Correction Orders in the Higher Courts: Imposition, Duration, and Conditions* presented quantitative and qualitative analyses of sentencing remarks for CCOs imposed in the higher courts between January 2012 and June 2013. The report analysed variables affecting the imposition of a CCO, the duration of CCOs, and the most frequently imposed conditions.⁸

Published in 2015, the second monitoring report, *Community Correction Orders: Second Monitoring Report (Pre-Guideline Judgment)*, examined the second 18 months of the CCO's operation (July 2013 to December 2014).⁹ Key findings of that report related to the December quarter of 2014. First, in the Magistrates' Court CCOs were increasingly used in place of suspended sentences, which were abolished for offences committed on or after 1 September 2014.¹⁰ Second, late in the 2014 calendar year in both the higher courts and Magistrates' Court, there was a clear increase in the number of imprisonment terms that were combined with a CCO.

A more recent study by the Council, *Parole and Sentencing: Research Report*, found that, when combined with imprisonment, CCOs had, to some extent, replaced imprisonment sentences that include a non-parole period.¹¹ For imprisonment terms of one to under two years, courts have the discretion to impose a non-parole period.¹² For these imprisonment sentences in late 2014 and early 2015, there was a clear decline in the proportion that included a non-parole period and a commensurate increase in the proportion that were combined with a CCO.

What is a CCO?

Introduced in January 2012, the CCO replaced a number of sentencing orders, most notably the community-based order (CBO).¹³ While sharing many of the features of the CBO, the CCO has the potential to be more punitive because it can be of longer duration and it offers courts a wider range of conditions that can be attached to it than could be attached to the CBO. While the maximum term available for a CBO was two years, the maximum term available for a CCO is equivalent to the maximum term of imprisonment available for the offence being sentenced, except in the Magistrates' Court, where the maximum ranges from two to five years depending on the number of offences being sentenced.¹⁴ In practice, the length of CCOs imposed in both the Magistrates' Court and the higher courts has tended to be longer than the length of CBOs.¹⁵

Like the previous CBO, the CCO consists of both mandatory terms and a range of optional conditions, from which courts must choose at least one.¹⁶ However, the range of optional conditions available to the courts is substantially wider for the CCO than the CBO. In addition to the conditions

8. Sentencing Advisory Council, *Community Correction Orders in the Higher Courts: Imposition, Duration, and Conditions* (2014).

9. Sentencing Advisory Council, *Community Correction Orders: Second Monitoring Report (Pre-Guideline Judgment)* (2015).

10. Suspended sentences were removed as a sentencing option in the higher courts for all offences committed on or after 1 September 2013 by the *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic). Suspended sentences are no longer available in the Magistrates' Court for all offences committed on or after 1 September 2014.

11. Sentencing Advisory Council, *Parole and Sentencing: Research Report* (2016) 28–29.

12. *Sentencing Act 1991* (Vic) s 11(2).

13. Community correction orders were introduced by the *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic). For further background on the history of the CCO, see Sentencing Advisory Council (2014), above n 7, 1–3.

14. Section 38(1)(a) of the *Sentencing Act 1991* (Vic) was amended in 2014 to clarify that the period of a CCO imposed in the Magistrates' Court must not exceed two years in respect of one offence, four years in respect of two offences, and five years in respect of three or more offences. Section 41A of the *Sentencing Act 1991* (Vic) provides that the period of cumulative CCOs imposed in the Magistrates' Court in respect of multiple offences committed at the same time must not exceed five years. Section 44(1B) provides that in sentencing an offender to a combined CCO and imprisonment order, the Magistrates' Court must not impose a sentence that exceeds in the whole five years.

15. Sentencing Advisory Council (2014), above n 7, 26, 42.

16. *Sentencing Act 1991* (Vic) s 47.

available under the CBO (for example, that the offender performs unpaid community work, undergoes treatment and rehabilitation, and is supervised by a community corrections officer), the CCO includes a number of new optional conditions, including that the offender:

- does not contact or associate with a person, or a class of people, specified in the order;
- resides or does not reside at a particular place specified in the order;
- does not enter or remain in a specified area or place;
- does not enter, remain at, or consume alcohol at specified or unspecified licensed premises or at a location of any major event;
- pays a bond;
- is monitored by the court; and/or
- is electronically monitored.¹⁷

In practice, the courts have infrequently imposed these new condition types. Between 2012 and 2014, less than one per cent of CCOs imposed in the Magistrates' Court included at least one of the following conditions: non-association, alcohol exclusion, place restriction, curfew, and residential restriction.¹⁸ The most commonly used new condition was judicial monitoring, which was applied in one in 10 CCOs. The most commonly used conditions were assessment and treatment (80%), unpaid community work (73%), and supervision (40%).

The CCO in combination with other sentences

In addition to setting the duration and conditions attached to a CCO, courts may also combine a CCO with other orders. When the CCO was introduced, it could be combined with a fine or an imprisonment sentence of up to three months.¹⁹ Subsequent amendments to the *Sentencing Act 1991* (Vic) have changed the orders with which a CCO may be combined. First, in August 2012, amending legislation clarified that courts could not suspend a sentence of imprisonment that was combined with a CCO.²⁰ This amendment resulted in an immediate cessation of the practice of combining a CCO with a suspended sentence.²¹

Second, in September 2014, the maximum term of imprisonment with which a CCO could be combined was increased from three months to two years.²² Like the August 2012 reform, this reform also had an immediate effect on sentencing practices. Between the September quarter of 2014 and the December quarter of 2014, the number of imprisonment sentences combined with a CCO trebled – from 18 to 61 – in the higher courts and increased by nearly two-thirds – from 239 to 388 – in the Magistrates' Court.²³

One consequence of allowing CCOs to be combined with a greater range of imprisonment terms is that this provides courts with an alternative to fixing a non-parole period for some imprisonment terms. Courts have the discretion to fix a non-parole period for imprisonment terms of one to

17. *Sentencing Act 1991* (Vic) pt 3A div 4. For intellectually disabled offenders, a court may also attach a justice plan to a CCO in accordance with *Sentencing Act 1991* (Vic) pt 3BA div 2.

18. Sentencing Advisory Council (2015), above n 9, 16.

19. *Sentencing Act 1991* (Vic) s 44 (since amended).

20. Section 8 of the *Road Safety and Sentencing Acts Amendment Act 2012* (Vic) amended *Sentencing Act 1991* (Vic) s 44.

21. Sentencing Advisory Council (2014), above n 7, 16, 39.

22. *Sentencing Act 1991* (Vic) s 44, amended by *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) s 18. For arson offences, a court may impose a CCO in combination with a sentence of imprisonment of any length: *Sentencing Act 1991* (Vic) s 44(1A). In the Magistrates' Court, when imposing a sentence of a CCO in combination with imprisonment in respect of multiple offences, the combined sentence cannot exceed five years' duration.

23. Sentencing Advisory Council (2015), above n 9, 10, 17.

under two years.²⁴ The Council has previously reported that, in the higher courts, the percentage of imprisonment terms of one to under two years that included a non-parole period declined from 94.1% to 20.9% between the September quarter of 2014 and the June quarter of 2015.²⁵ In contrast, the percentage of these imprisonment terms that were combined with a CCO increased from 0.0% to 72.1% over the same period. A similar but less dramatic shift occurred in the Magistrates' Court.²⁶

Reforms encouraging greater use of CCOs

In addition to the increase in the length of imprisonment term with which a CCO could be combined, two other changes to the *Sentencing Act 1991* (Vic) relevant to the use of the CCO came into operation in September 2014. One of these changes was aimed at encouraging the courts to use the CCO and its range of punitive conditions in place of some sentences of imprisonment. This provision establishes that a court must not impose a sentence involving the confinement of an offender if the purposes of sentencing can be achieved by a CCO with one or more of the following conditions attached: non-association, residence restrictions or exclusions, place or area exclusions, curfews, and/or alcohol exclusions.²⁷

The other amendment was aimed at encouraging the courts to use the CCO in place of suspended sentences, which were abolished in the higher courts for offences committed on or after 1 September 2013 and in the Magistrates' Court for offences committed on or after 1 September 2014. The provision states that a CCO may be considered an appropriate sentence in cases in which a wholly suspended sentence may have been imposed prior to that order being abolished.²⁸

These amendments promoted greater utilisation of the CCO by sentencing courts, increasing the flexibility and reinforcing the potential of the CCO to meet both the punitive and the rehabilitative purposes of sentencing.²⁹

The guideline judgment

Along with these legislative reforms relating to the CCO, on 22 December 2014 the Court of Appeal handed down *Boulton*, a guideline judgment on how the CCO can serve the purposes of sentencing. The guideline judgment was intended to promote a consistent approach to the use of the new sentencing disposition and highlight its potential as an alternative to imprisonment.³⁰

The guideline judgment states that a court, after turning its mind to the objective nature and gravity of the offence and the moral culpability of the offender, should consider whether:

- a. the crime as so assessed is so serious that nothing short of a sentence wholly comprised of an immediate term of imprisonment will suffice to satisfy the requirements of just punishment; or
- b. a CCO, either alone or in conjunction with a sentence of imprisonment, would satisfy the requirements of just punishment.³¹

24. *Sentencing Act 1991* (Vic) s 11(2).

25. Sentencing Advisory Council (2016), above n 11, 28.

26. *Ibid* 29.

27. *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) s 16, inserting section 5(4C) into the *Sentencing Act 1991* (Vic).

28. *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) s 17, inserting section 36(2) into the *Sentencing Act 1991* (Vic).

29. Victoria, 'Sentencing Amendment (Emergency Workers) Bill 2014', *Parliamentary Debates*, Legislative Assembly, 26 June 2014, 2398 (Robert Clark, Attorney-General).

30. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014).

31. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) app 1 [4].

The court considered that, due to the punitive nature of the order, a CCO could provide substantial general and specific deterrence.³² The court also considered it 'neither necessary nor desirable to seek to define any outer limits on the suitability of a CCO as a sentencing option,'³³ and advised that 'sentencing judges should proceed on the basis that there is a very broad range of cases in which it will be appropriate to impose a suitably structured CCO ... including cases where a sentence of imprisonment would formerly have been regarded as the only option'.³⁴

Court of Appeal decisions since the guideline judgment

In the 15 months following the guideline judgment,³⁵ the Court of Appeal has made further statements on the issues of general and specific deterrence and whether these can be achieved through the imposition of a CCO in particular circumstances, as well as whether any particular offence or class of offence is less likely to be suitable for a CCO. These cases provide some guidance on the outer limits of the appropriateness of a CCO as a sentencing disposition following the guideline judgment.

General and specific deterrence

Imprisonment is generally considered to provide the greatest level of both general and specific deterrence. However, the Court of Appeal in *Boulton* states that a CCO can provide substantial general and specific deterrence due to the punitive effects of the order.³⁶

In the 15 months following *Boulton*,³⁷ the Court of Appeal has developed this approach to deterrence, noting that certain kinds of offences may be less likely to attract a CCO due to a particular need for general deterrence. Analysis of the approach of the Court of Appeal to particular offenders provides guidance on the limits of the appropriateness of a non-custodial sentencing disposition in certain circumstances. Overall, the cases demonstrate that a CCO is less appropriate where there is a particular need for general deterrence and/or denunciation, or where there is a particular need for specific deterrence due to a lack of deterrence from previous non-custodial sentencing options.

For example, in *Director of Public Prosecutions v Dix*,³⁸ the Director appealed a sentence of 18 months' imprisonment for a charge of recklessly causing serious injury, which involved an unprovoked 'glassing' of a victim with a beer bottle in a nightclub. The offender had been sentenced less than a year earlier for a similar offence, having received a partially suspended sentence. The defence, relying on *Boulton*, argued that if the court were to find the sentence of 18 months manifestly inadequate, the resentencing should involve the imposition of a CCO, which could be used to 'rehabilitate and punish simultaneously', rather than an increased term of imprisonment.³⁹

32. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) [124].

33. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) app 1 [29].

34. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) app 1 [30].

35. This report considers cases handed down by the Court of Appeal on and before 31 March 2016.

36. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) [124].

37. Court of Appeal cases have been reviewed up to 31 March 2016.

38. *Director of Public Prosecutions v Dix* [2015] VSCA 118 (25 May 2015).

39. *Director of Public Prosecutions v Dix* [2015] VSCA 118 (25 May 2015) [29] quoting *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) [186].

The court (comprising Maxwell P, Weinberg, and Beach JJA) concluded that the sentence was manifestly inadequate, highlighting the particular need for general deterrence in glassing cases (as was established in *Winch v The Queen*⁴⁰). In resentencing the offender to a term of 3 years and 6 months' imprisonment on the glassing charge, the court also highlighted the need for specific deterrence in the case of this offender.⁴¹

Similarly, in *Raveche v The Queen*,⁴² the court rejected an appeal against sentence for an offender who had pleaded guilty to one charge of affray and one charge of recklessly causing serious injury arising from an unprovoked, alcohol-fuelled incident. The offender had received an aggregate sentence of 3 years and 8 months' imprisonment, with a non-parole period of 1 year and 9 months. Despite the relative youth of the offender (who was 23 at the time of the offence), the court highlighted the need for general deterrence given the 'prevalence of this type of offending where youth and alcohol are involved'.⁴³ The court also emphasised the need for specific deterrence given that this offender had not been deterred from further offending of this nature by a previous non-custodial sentence on a charge of intentionally causing serious injury that had occurred in similar circumstances.⁴⁴

In *Hutchinson v The Queen*,⁴⁵ the applicant had pleaded guilty to a number of charges including reckless conduct endangering serious injury and recklessly causing injury. The applicant had lost control of his vehicle while drink driving, mounted a footpath, and collided with a nine year old child, narrowly missing another child and their grandmother. As a result of the collision, the victim's head became wedged between a fence and a street sign, and she suffered an undisplaced fracture of the pelvis and a torn liver. The applicant had been sentenced to 5 months' imprisonment with a CCO of 18 months' duration.

In dismissing the defence's application for leave to appeal against sentence, the court referred to the sentencing judge's observation that general deterrence was significant, stating that 'this was a case where a CCO — standing alone — would have been inadequate to satisfy the need to punish and denounce the applicant's conduct, and to provide a measure of general deterrence'.⁴⁶ Priest JA emphasised the need for the applicant's offending to be denounced 'in the strongest of terms'.⁴⁷

With regard to 'white collar' offences, the case of *Dyason v The Queen* ('Dyason')⁴⁸ has confirmed that the considerations raised in *Director of Public Prosecutions v Bulfin* ('Bulfin')⁴⁹ continue to apply. In *Bulfin*, Charles JA (Winneke P and Callaway JA agreeing) outlined the reasons for emphasising general deterrence in cases involving white collar crime. It was stated that, while such offenders usually have no prior criminal history and generally have good prospects of rehabilitation, these factors can have the tendency to detract from the importance of general deterrence.⁵⁰ In *Bulfin*, the court rejected the submission that, in sentencing white collar cases, there should be a 'wider than normal gap' between the head sentence and the non-parole period.⁵¹ Applying this reasoning, the court in *Dyason* rejected the submission that a short period of imprisonment combined with a CCO would be sufficiently

40. *Winch v The Queen* (2010) 27 VR 658.

41. *Director of Public Prosecutions v Dix* [2015] VSCA 118 (25 May 2015) [18]–[21].

42. *Raveche v The Queen* [2015] VSCA 99 (15 May 2015).

43. *Raveche v The Queen* [2015] VSCA 99 (15 May 2015) [67].

44. *Raveche v The Queen* [2015] VSCA 99 (15 May 2015) [67].

45. *Hutchinson v The Queen* (2015) 71 MVR 8.

46. *Hutchinson v The Queen* (2015) 71 MVR 8, 13.

47. *Hutchinson v The Queen* (2015) 71 MVR 8, 13.

48. *Dyason v The Queen* [2015] VSCA 120 (26 May 2015).

49. *Director of Public Prosecutions v Bulfin* [1998] 4 VR 114.

50. *Director of Public Prosecutions v Bulfin* [1998] 4 VR 114, 131–132.

51. *Director of Public Prosecutions v Bulfin* [1998] 4 VR 114, 131–132.

punitive for the serious financial offending in question.⁵² The court noted, however, that this does not mean ‘that a sentence involving a CCO would never be appropriate for a “white collar” offender’.⁵³

As noted in *Boulton*, factors such as an offender’s youth may moderate the need for general deterrence in relevant cases.⁵⁴ The Court of Appeal recently allowed an appeal on the grounds of manifest excess for a 23 year old offender who was sentenced for multiple electronic fraud-based offences. The offender had committed the offences when aged between 17 and 20 years, and the County Court had sentenced the offender to a total effective sentence of 4 years and 9 months’ imprisonment. The Court of Appeal resented the offender to one year’s imprisonment in combination with a three-year CCO.⁵⁵

In *Sherritt v The Queen*,⁵⁶ the offender had pleaded guilty to sexual offences committed against his half-sister 20 to 25 years earlier, when he was aged between 14 and 17 and she was aged between 5 and 9. Maxwell P highlighted the ‘exceptional circumstances’ of the case, including that the offender was a child when he committed the offences (lessening his moral culpability and the need for denunciation), the offender had not offended further in the 20 years that had elapsed since, and the trial judge had found that specific deterrence was irrelevant.⁵⁷ Priest JA stated that general deterrence was also moderated, given that the offender was a child at the time of the offence. Maxwell P concluded that, in the circumstances of this case, it was not open to the sentencing judge to determine that the applicable purposes of punishment could only be served by a term of imprisonment.⁵⁸

Therefore, in cases in which specific deterrence is of limited relevance and general deterrence is also moderated, it may not be tenable for a court to conclude that the applicable purposes of punishment can only be served by a term of imprisonment. However, as was seen in *Director of Public Prosecutions v Dix*,⁵⁹ *Raveche v The Queen*,⁶⁰ and *Director of Public Prosecutions v Natoli*,⁶¹ in which a previous non-custodial order had not deterred the offenders from further offending of a similar nature, other mitigating factors may assume secondary importance to the need for specific deterrence, denunciation, and protection of the community.

Category of offence and CCO suitability

As stated above, the court in *Boulton* considered that a CCO could be appropriate for cases in which a sentence of imprisonment would formerly have been regarded as the only option.⁶² Indeed, the court went on to state that:

a CCO may be suitable even in cases of relatively serious offences which might previously have attracted a medium term of imprisonment (such as, for example, aggravated burglary, intentionally causing serious injury, some forms of sexual offences involving minors, some kinds of rape and some categories of homicide).⁶³

52. *Dyason v The Queen* [2015] VSCA 120 (26 May 2015) [39].

53. *Dyason v The Queen* [2015] VSCA 120 (26 May 2015) [40].

54. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) [183]–[190].

55. *Boyton v The Queen* [2016] VSCA 13 (22 February 2016).

56. *Sherritt v The Queen* [2015] VSCA 1 (28 January 2015).

57. *Sherritt v The Queen* [2015] VSCA 1 (28 January 2015) [42].

58. *Sherritt v The Queen* [2015] VSCA 1 (28 January 2015) [20] (Priest JA), [48] (Maxwell P).

59. *Director of Public Prosecutions v Dix* [2015] VSCA 118 (25 May 2015).

60. *Raveche v The Queen* [2015] VSCA 99 (15 May 2015).

61. *Director of Public Prosecutions v Natoli* [2016] VSCA 35 (11 March 2016).

62. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) app 1 [30].

63. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) [131].

Consistent with this approach, there have been no decisions that identify a particular category of offences as inappropriate for a CCO. Courts have considered a CCO alone to be appropriate for a small number of charges of sexual penetration with a child under 12⁶⁴ and intentionally causing serious injury where there have been compelling mitigating factors in the case.⁶⁵ A CCO in combination with a term of imprisonment has been deemed appropriate for a range of offences,⁶⁶ and it appears that these combined orders have the potential to reconcile the deterrent, punitive, and rehabilitative aspects of a sentence.

More significant to the ultimate sentencing outcome than the type of offence are the other sentencing factors present in the case. For example, two recent cases involving charges of intentionally causing serious injury yielded different results in the Court of Appeal. *Director of Public Prosecutions v Kemp*⁶⁷ involved a Director's appeal on the grounds of manifest inadequacy against a sentence of 2 years' imprisonment with a 15-month non-parole period and an 18-month CCO for one charge of intentionally causing serious injury. The offence involved an unarmed victim who was stabbed 27 times while in his own home. The court allowed the appeal, finding that the sentence was outside the permissible range, referring to the brutality of the offence, the fact that the offender had relevant prior convictions, and the injury to the victim. The court concluded that a CCO in combination with the permissible maximum sentence of imprisonment (two years) did not 'satisfy the requirements of just punishment' in this case.⁶⁸ The offender was resentenced to a term of imprisonment of 6 years with a non-parole period of 3 and a half years.

In *Director of Public Prosecutions v Natoli*,⁶⁹ the offender was charged with a range of offences committed in a family violence context, including using a listening device, common law assault, false imprisonment, making a threat to kill, and being a prohibited person in possession of a firearm. At first instance, the offender was sentenced to 5 months' imprisonment, combined with a CCO of 18 months' duration, with conditions. The Court of Appeal stated that the sentencing judge had mischaracterised the gravity of the offending, and that a number of the charges constituted serious examples of the offences. Further, it was found that the sentencing judge had placed too great an emphasis on the rehabilitation of the offender, particularly in light of the offender's history of violent offending, as well as prior convictions for breaching non-custodial dispositions. The court stated that the offending was 'too serious'⁷⁰ for a sentence of imprisonment combined with a CCO.

In *Director of Public Prosecutions v Maxfield* ('Maxfield'),⁷¹ however, which concerned an offender who had pleaded guilty to intentionally causing serious injury for stabbing her partner four times, the court

64. This was the case for 4.7% of charges sentenced in the higher courts between July 2010 and June 2015: Sentencing Advisory Council, *Sexual Penetration with a Child Aged under 10/12* (SACStat – Higher Courts, 2016) <http://www.sentencingcouncil.vic.gov.au/sacstat/higher_courts/HC_6231_45_2A.html> at 1 June 2016. A review of a sample of sentencing remarks for cases involving a charge of sexual penetration with a child under 12 receiving CCOs during this period indicates that significant mitigating factors are present in cases receiving a CCO. A high proportion of the offenders in the cases reviewed had significant cognitive impairments or mental illnesses, and/or were under 18 at the time of the offence.

65. This was the case for 4.2% of charges sentenced in the higher courts between July 2010 and June 2015: Sentencing Advisory Council, *Causing Serious Injury Intentionally* (SACStat – Higher Courts, 2016) <http://www.sentencingcouncil.vic.gov.au/sacstat/higher_courts/HC_6231_16.html> at 1 June 2016. A review of a sample of sentencing remarks for cases involving a charge of intentionally causing serious injury receiving a CCO within this period indicates that there were compelling mitigating factors present in each case that led the court to impose a CCO.

66. See for example: *Boyton v The Queen* [2016] VSCA 13 (22 February 2016) (several charges including obtaining financial advantage by deception), *Marocchini v The Queen* [2015] VSCA 29 (25 February 2015) (several charges including recklessly causing serious injury), and *Mackay v The Queen* [2015] VSCA 125 (27 May 2015) (one charge of armed robbery).

67. *Director of Public Prosecutions v Kemp* [2015] VSCA 108 (19 May 2015).

68. *Director of Public Prosecutions v Kemp* [2015] VSCA 108 (19 May 2015) [52].

69. *Director of Public Prosecutions v Natoli* [2016] VSCA 35 (11 March 2016).

70. *Director of Public Prosecutions v Natoli* [2016] VSCA 35 (11 March 2016) [47].

71. *Director of Public Prosecutions v Maxfield* [2015] VSCA 95 (12 May 2015).

maintained that a CCO was an appropriate sentencing disposition. The defence contended that the offender had been subjected to domestic violence prior to her offending, and although no finding was made, the prosecutor accepted that there had been an element of provocation.⁷²

The offender in *Maxfield* had an intellectual disability and an operative mental illness. The court emphasised that it was a 'very unusual case', requiring the offender to be treated differently from a person who had committed the same offence without those disabilities.⁷³ The court stated that *Maxfield* 'serves to emphasise the capacity of the CCO to satisfy the purposes of sentencing even in cases concerning "relatively serious offences which might previously have attracted a medium term of imprisonment"'.⁷⁴ However, given the highly unusual circumstances in that case, the court has been critical of subsequent offenders seeking to rely on *Maxfield* as a comparable case for sentencing purposes.⁷⁵

A recent decision by the Court of Appeal in *Director of Public Prosecutions v Borg*⁷⁶ further explored the limits of the appropriateness of a CCO where the objective gravity of the offending is assessed as high. Following a plea of guilty to two counts of dangerous driving causing death and two counts of dangerous driving causing serious injury, the offender was sentenced in the County Court to a CCO of 5 years' duration. The sentence was appealed by the Director of Public Prosecutions on the grounds that it was manifestly inadequate. In the course of its decision, the Court of Appeal acknowledged that, because of the objective gravity of the offending, this was a case that 'demanded at least some period of actual imprisonment'.⁷⁷ However, the court used its residual discretion to dismiss the appeal against sentence and to uphold the CCO, due to the manner in which the prosecution was conducted and the consequential delay, which had denied the offender the opportunity of receiving a youth justice centre order (the offender could have been sentenced prior to turning 21 years old).⁷⁸

Given the guideline judgment and the Court of Appeal's subsequent refinement and application of the guideline judgment's principles, there are two possible effects on sentencing outcomes. First, the CCO is likely to be used in some cases that would have previously received imprisonment, and second, the CCO is likely to be used more frequently in combination with imprisonment, in order to balance the need for specific and general deterrence, just punishment, and denunciation, with the desire to promote the offender's rehabilitation.

Measuring the changes in the relative use of sanctions resulting from the CCO's introduction is complicated by the many changes to the sentencing landscape that affect CCO use. These include the abolition of suspended sentences and directions by legislation that CCOs be used instead, changes to the likelihood of offenders being granted parole, the increase in the maximum term of imprisonment with which a CCO may be combined, and the impact of the guideline judgment.

72. The prosecutor described the violence leading up to the incident as 'a bit of argy bargy': *Director of Public Prosecutions v Maxfield* [2015] VSCA 95 (12 May 2015) [14]–[15].

73. *Director of Public Prosecutions v Maxfield* [2015] VSCA 95 (12 May 2015) [46].

74. *Director of Public Prosecutions v Maxfield* [2015] VSCA 95 (12 May 2015) [46] quoting *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) [131].

75. See for example, *Director of Public Prosecutions v Kemp* [2015] VSCA 108 (19 May 2015) [44]–[45].

76. *Director of Public Prosecutions v Borg* [2016] VSCA 53 (23 March 2016).

77. *Director of Public Prosecutions v Borg* [2016] VSCA 53 (23 March 2016) [111].

78. *Director of Public Prosecutions v Borg* [2016] VSCA 53 (23 March 2016) [120].

Research questions

This report addresses five questions. The first three questions seek descriptive answers:

1. Was there a change in the number and type of CCOs imposed in 2015 compared with previous years?
2. Was there a change in the offence profile, offender demographics, or the duration or conditions of CCOs imposed as principal sentences in 2015 compared with previous years?
3. How do the offence profile, offender demographics, and the duration and conditions of CCOs imposed in combination with imprisonment differ from those of CCOs imposed as a principal sentence?

The final two questions seek explanations for the changes described in question 1:

4. Which factors contributed to a change in the numbers of CCOs imposed as principal sentences in 2015 compared with previous years?
5. Which factors contributed to a change in the numbers of CCOs imposed in combination with imprisonment in 2015 compared with previous years?

Data used for investigation

The data used in this report were provided to the Council by Court Services Victoria. The data represent cases sentenced in Victoria's adult criminal courts in the four years from January 2012 to December 2015.

First instance sentencing

The sentencing information about each case represents the sentence imposed at first instance rather than the sentence imposed by an appellate court. Only a small proportion of cases have their sentence changed on appeal and those that do tend to receive imprisonment sentences at first instance, not CCOs. Therefore, it is unlikely that the inclusion of appellate data would have any noticeable effect on the aggregate sentencing data presented in this report.

Sentence type and length

Cases often contain multiple sentence types, either on separate or on individual charges. Generally, in this report the sentence type counted is the principal or most severe sentence type within the case. Severity is assessed using the Victorian hierarchy of sentence types.⁷⁹ For example, if a case receives a combination of a CCO and a fine, the CCO is counted as a principal sentence. The only parts of the analysis that do not use the principal sentence are those that examine CCOs used in combination with imprisonment.

The lengths of both CCOs and imprisonment sentences are considered in this report. Sentence length for imprisonment is the total effective imprisonment term, that is, the term imposed on a case as a whole.

CCO conditions

Data on CCO conditions were only available for the higher courts for the periods from January 2012 to June 2013 and from May 2015 to December 2015. Conditions data were not collected in the source data for the intervening period.

Conditions data were available for the Magistrates' Court for the entire reference period.

Offender demographics

Demographic information about offenders includes the age of the offender at the time of sentencing and the gender of the offender.

Offence

Many cases include multiple offence types. However, in this report only one offence per case is counted. The offence counted is known as the principal offence, which represents the offence that received the most severe sentence or is ranked highest on the National Offence Index.⁸⁰ For presentation purposes, principal offences are grouped into broad offence categories that conform with categories traditionally used by Victoria Police.

79. *Sentencing Act 1991* (Vic) s 7.

80. Australian Bureau of Statistics, *National Offence Index*, cat. no. 1234.0.55.001 (2009).

Number and type of CCOs

CCOs can be categorised into two distinct groups. The first is the CCO imposed as a principal sentence (a 'principal CCO'), meaning that the CCO is the most severe sentence in a case and it is served immediately following the sentencing decision. The second is the CCO imposed in combination with a sentence of imprisonment, meaning that the CCO must be served at the completion of a prison sentence. This second type of CCO is referred to in this report as either 'imprisonment combined with a CCO' or a 'combined order'.

Magistrates' Court

Figure 1 (page 13) presents the annual number of CCOs imposed in the Magistrates' Court from 2012 to 2015 according to the type of CCO. For both types of CCO, there was an increasing trend over the four years, with relatively large increases between 2014 and 2015. Between these years, the number of CCOs imposed as principal sentences increased by 36% to 10,508, and the number of imprisonment sentences combined with a CCO increased by 100% to 2,028.

Higher courts

Although the volume of cases in the higher courts was much lower than in the Magistrates' Court, an increasing trend for both types of CCO was also evident in the higher courts (see Figure 2, page 13). Over the four-year period, the largest increase in the number of principal CCOs imposed occurred between 2013 and 2014 (40.6%) while a much smaller increase occurred between 2014 and 2015 (14.6%).

For imprisonment combined with a CCO, there was a dramatic increase between 2014 and 2015. The number of combined orders increased from 96 in 2014 to 356 in 2015 – an increase of 370%. In fact, in 2015 it was nearly as common for a CCO to be imposed in combination with imprisonment as it was for a CCO to be imposed as a principal sentence (356 and 393 respectively).

Figure 1: Number of CCOs by type of CCO and sentencing year, Magistrates' Court, 2012 to 2015

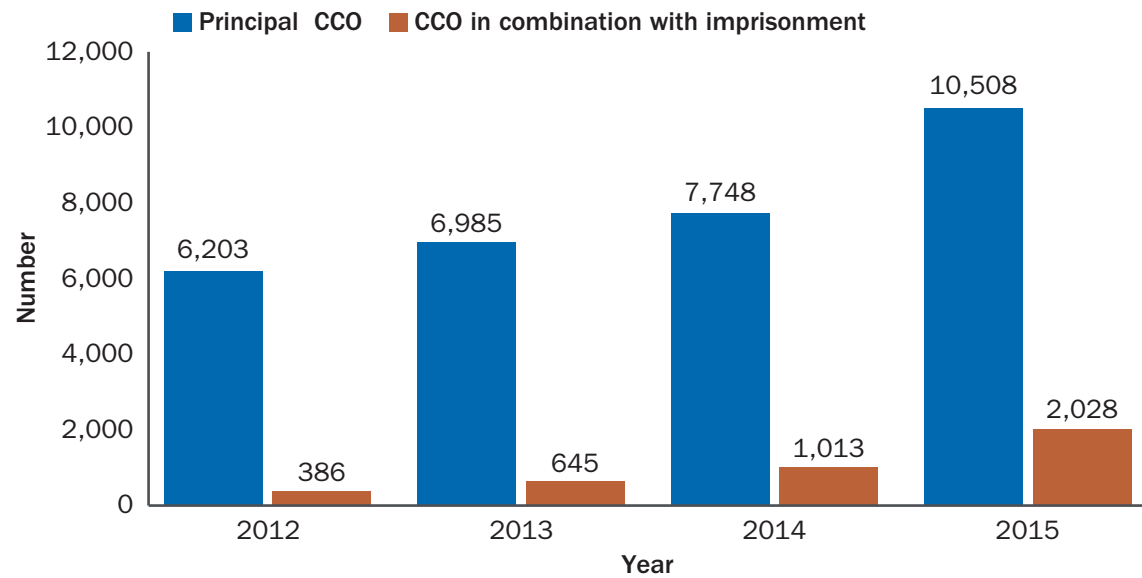
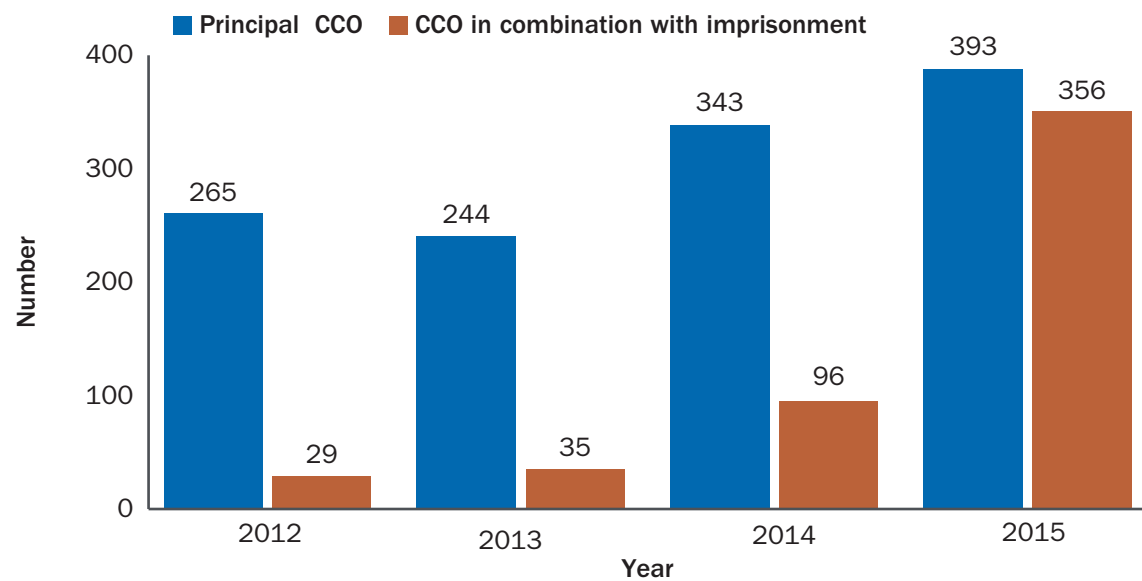


Figure 2: Number of CCOs by year and type of CCO, higher courts, 2012 to 2015



Characteristics of principal CCOs

This section focuses on CCOs imposed as principal sentences and addresses the question: Was there a change in the offence profile, offender demographics, or the conditions and duration of CCOs imposed as principal sentences in 2015 compared with previous years? Practices in the Magistrates' Court are considered first, followed by the higher courts.

Magistrates' Court

Offence profile

As Figure 3 (page 15) shows, in 2015 the most common offence category for CCOs imposed in the Magistrates' Court was assault (30.7%) followed by traffic (19.2%) and theft and deception offences (13.8%). The majority of charges within the assault category were recklessly causing injury (30.4%) and unlawful assault (28.6%). The majority of charges within the traffic category were exceeding the prescribed concentration of alcohol while driving a vehicle (21.6%), driving while disqualified or suspended (26.6%), and careless driving (9.4%).

Figure 4 (page 15) shows the change (in percentage points) between 2014 and 2015 in the proportion of principal offence categories that received a principal CCO. Between 2014 and 2015, the largest changes occurred for traffic offences, which increased by 2.6 percentage points, and assault offences, which decreased by 2.2 percentage points. Theft and deception offences also declined (by 1.7 percentage points). Thus, there was a shift away from offences that involve physical violence or theft towards other non-violent offences, such as possession of illegal weapons, breach of court orders, and traffic offences.

Offender demographics

The majority of offenders who received a CCO as a principal sentence in the Magistrates' Court were male. In 2015, of the 10,508 offenders who received a CCO, 83.0% were male and 17.0% were female. This gender division differed from the general offender population in which a lower proportion of offenders sentenced in the Magistrates' Court were male (76.0%). The proportion of offenders receiving a CCO who were male increased slightly between 2012 and 2015 from 81.3% to 83.1%.

In relation to other sentence types, the proportion of offenders who were male tended to increase with the severity of the type of sentence imposed, with CCOs ranked relatively high. For example, in 2015, the proportion of offenders who were male was higher for imprisonment (91.1%) than for CCOs (83.1%), but lower for fines (78.2%), adjourned undertakings (70.7%), and dismissals (64.4%).

In 2015, the median age of offenders who received a CCO in the Magistrates' Court was 31 years. The majority of offenders (60.8%) were aged between 25 and 44, while one-quarter (24.3%) were aged under 25 and the remaining 14.9% were aged 45 and over.

There was an increase in the mean age of offenders who received a principal CCO between 2012 and 2015. The mean age in 2012 was 31.8 years; this rose steadily across the four years to 32.4 years in 2014 and 33.1 years in 2015. Similarly, the percentage of offenders aged 25 and over increased from 68.9% in 2012 to 75.7% in 2015. This 'ageing' of the CCO population reflects an increase in the age of offenders sentenced in the Magistrates' Court more generally (between 2012 and 2015, the overall mean age increased from 32 to 33 years for all offenders).

Figure 3: Percentage of principal CCO cases by category of the principal offence,⁸¹ Magistrates' Court, 2015

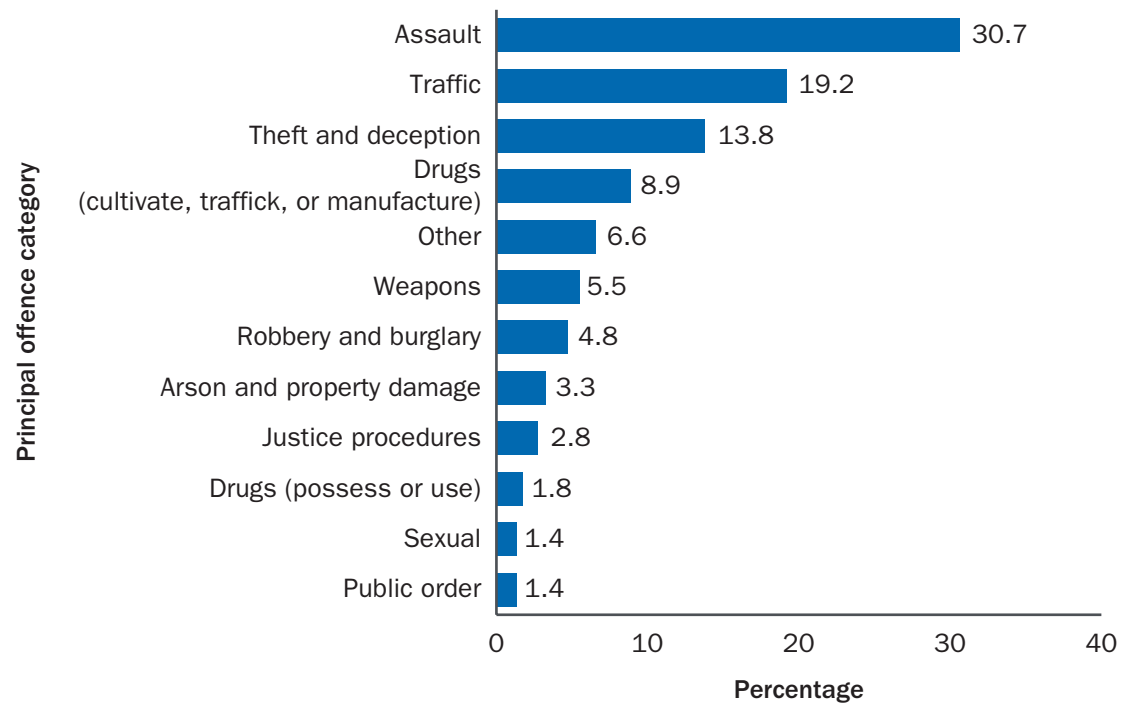
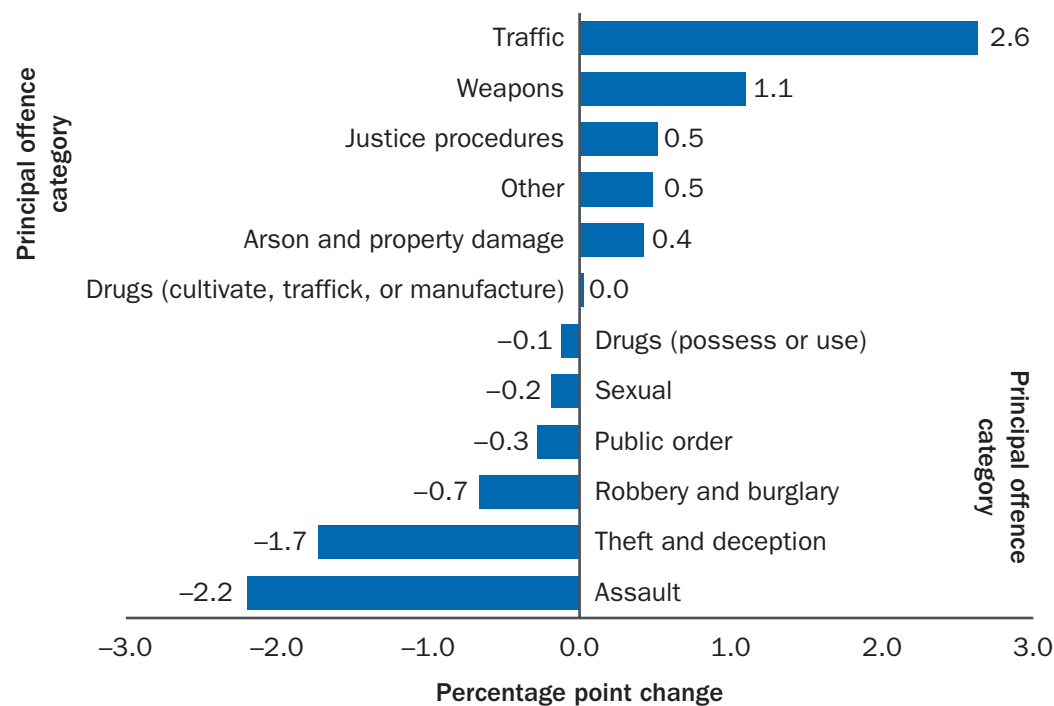


Figure 4: Percentage point change between 2014 and 2015, principal CCO cases by category of the principal offence, Magistrates' Court, 2015



81. Most charges in the justice procedures offence category were for the offence of fail to answer bail (60.1%).

Duration and conditions

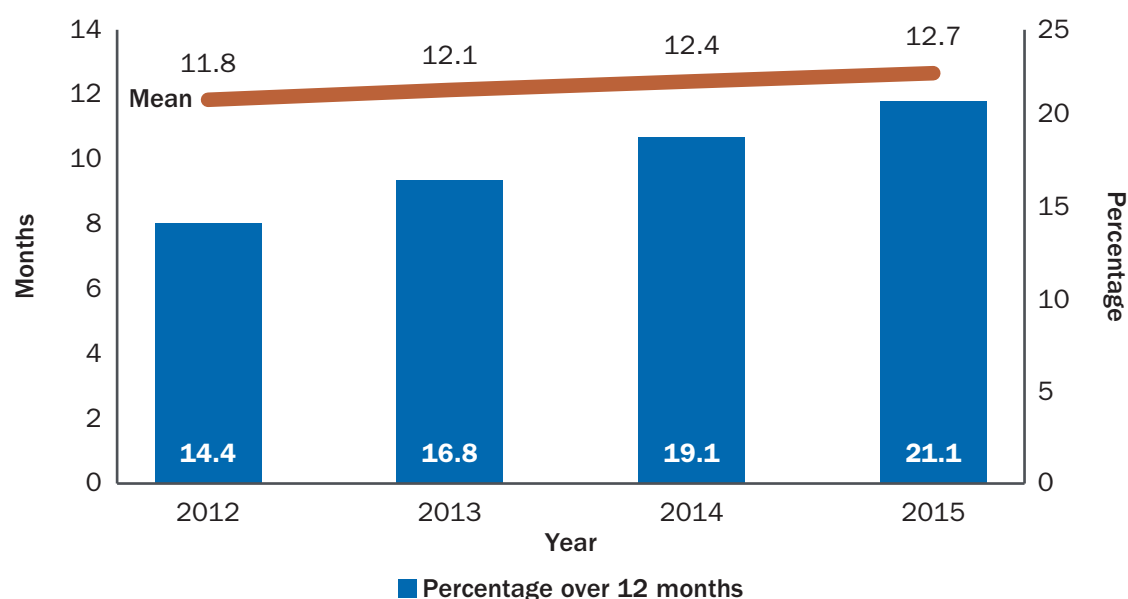
The duration of a CCO and many of the non-mandatory conditions available to be attached to a CCO are measures of the order's punitiveness. Unpaid community work, in particular, is a largely punitive condition,⁸² as are many of the conditions exclusive to the CCO regime, such as electronic monitoring or residence restrictions. The supervision condition can serve both a punitive and a rehabilitative purpose.

In the Magistrates' Court, the maximum duration available for a CCO is five years where an offender is sentenced for multiple charges, or two years where an offender is sentenced for a single charge.⁸³ In 2015, the duration of principal CCOs imposed in the Magistrates' Court ranged from one to 36 months, while the median was 12 months.

Over the four years from 2012 to 2015, there was a slight increasing trend in the duration of CCOs. As Figure 5 shows, the mean duration rose from 11.8 months to 12.7 months, and the percentage of CCOs of over 12 months in duration increased from 14.4% in 2012 to 21.1% in 2015. The gradual increase in the length of CCOs in the Magistrates' Court suggests that there has been an increase in the punitiveness of CCOs.

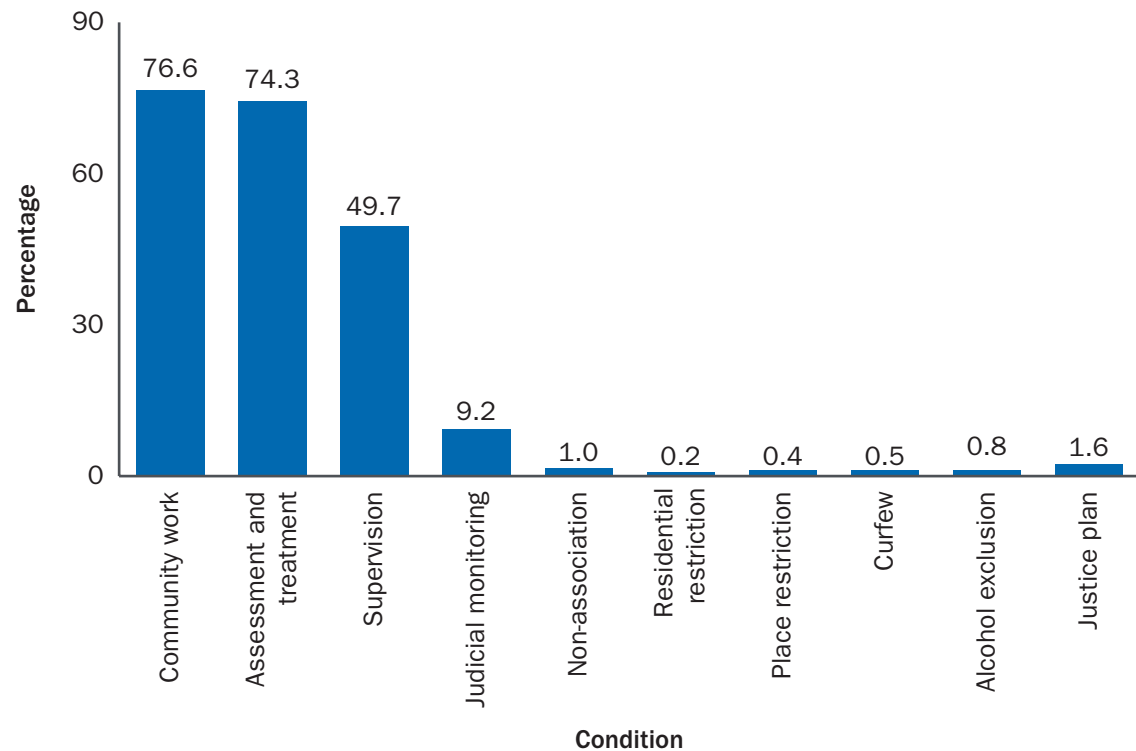
A profile of conditions for CCOs imposed in the Magistrates' Court in 2015 is presented in Figure 6 (page 17), which shows the percentage of principal CCOs imposed according to 10 condition types. As CCOs may have more than one condition type, the percentages shown sum to greater than 100 (for the combinations of conditions used, see Figure 8, page 18). Unpaid community work and assessment and treatment were the two most common conditions attached to a CCO, both comprising three-quarters of CCOs imposed in the Magistrates' Court. Supervision was the third most common condition (49.7%). Apart from judicial monitoring (approximately 10% of CCOs), all new conditions were used in less than one per cent of CCOs imposed in the Magistrates' Court.

Figure 5: Mean duration of CCOs and percentage of principal CCOs of over 12 months by year, Magistrates' Court, 2012 to 2015



82. *Sentencing Act 1991* (Vic) s 48C(2).

83. *Sentencing Act 1991* (Vic) s 38(1)(a).

Figure 6: Percentage of principal CCOs by condition, Magistrates' Court, 2015

There have been some important changes in the use of different conditions since the CCO was introduced in 2012. Figure 7 shows the percentage of principal CCOs according to the four most used conditions. While the use of assessment and treatment and judicial monitoring has remained relatively steady, the use of supervision declined between 2012 and 2014 (from 62.6% to 28.8%) before increasing substantially in 2015 (to 49.7%). The increase in the use of supervision by the Magistrates' Court between 2014 and 2015 translates into an increase of nearly 3,000 offenders (5,233 received supervision in 2015, up from 2,244 in 2014). A notable increase also occurred in the use of unpaid community work between 2012 and 2013. The percentage of CCOs that included this condition increased from 62.6% to 74.8%.

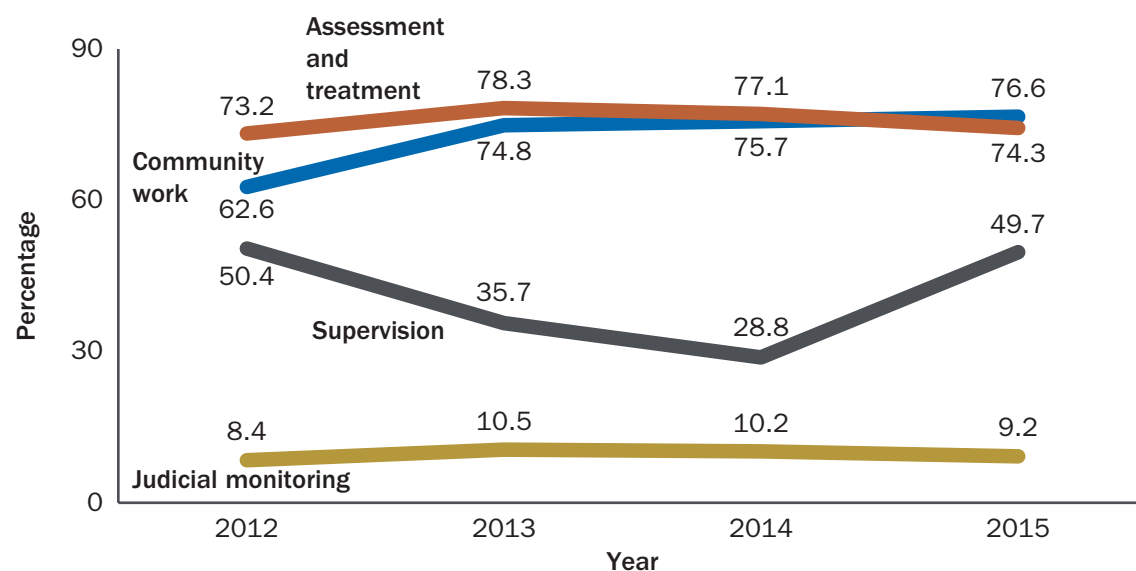
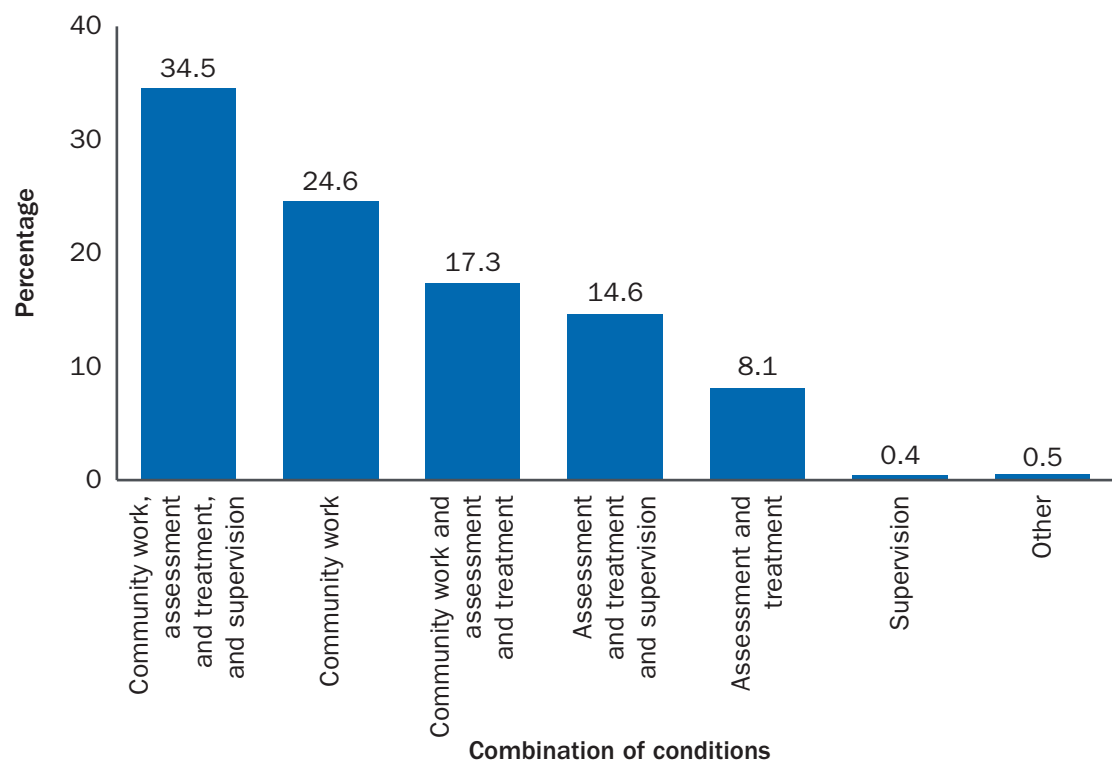
Figure 7: Percentage of principal CCOs by selected conditions and year, Magistrates' Court, 2012 to 2015

Figure 8: Percentage of principal CCOs by combination of conditions, Magistrates' Court, 2015

The analysis of change in the conditions and duration of principal CCOs imposed in the Magistrates' Court suggests that the punitiveness of CCOs has increased. The duration of CCOs increased each year between 2012 and 2014 while the use of the supervision condition increased substantially in 2015, following decreases in previous years. However, apart from the increase in 2013, use of unpaid community work has remained steady, and the use of other punitive conditions has remained low.

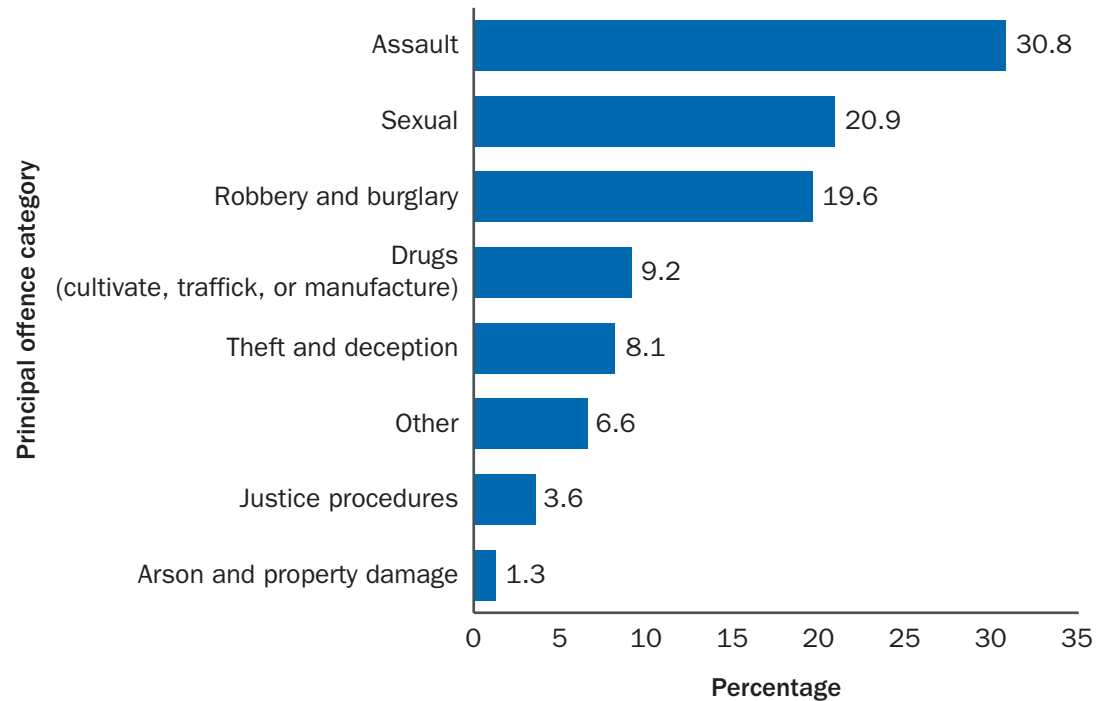
Figure 8 presents the frequency with which different combinations of conditions were used in 2015. It was common for courts to attach multiple conditions to a CCO. One-third of CCOs included the three major condition types (unpaid community work, assessment and treatment, and supervision) while one-quarter had community work as the only condition. Supervision on its own was attached to less than one per cent of CCOs.

Community work and supervision – two conditions that can be seen as primarily, or at least in part, punitive – were imposed either together or separately on 91.3% of CCOs. By comparison, the primarily rehabilitative condition of assessment and treatment was included as the only condition for 8.1% of CCOs.

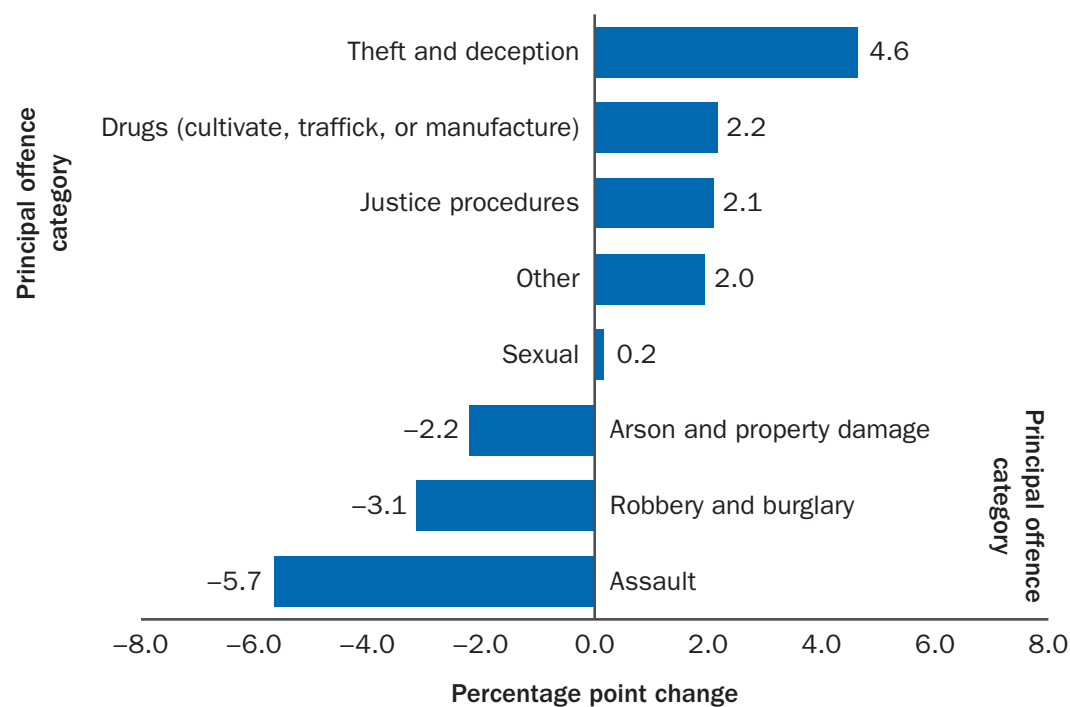
Higher courts

Offence profile

The offence profile for CCOs imposed in the higher courts in 2015 is presented in Figure 9 (page 19). Two-thirds of CCOs were imposed for one of three offence categories: assault (30.8%), sexual offences (20.9%), and robbery and burglary (19.6%). Intentionally causing injury and recklessly causing injury comprised approximately 50% of the assault category while sexual penetration with a child aged 12–16, indecent act with a child under 16, and indecent assault comprised 60% of the sexual offence category.

Figure 9: Percentage of offenders who received a principal CCO by category of principal offence,⁸⁴ higher courts, 2015

In 2015, there was a shift away from non-sexual violent offences towards non-violent offences. Compared with 2014 (see Figure 10), in 2015 there was a decline of 5.7 percentage points for assault, 3.1 percentage points for robbery and burglary offences, and 2.2 percentage points for arson and property damage. The most substantial increase occurred for theft and deception offences (4.6 percentage points).

Figure 10: Percentage point change between 2014 and 2015, principal CCOs by offence category, higher courts

84. Justice procedures offences comprise breaches of court orders, particularly breach of bail conditions.

Offender demographics

In 2015, 86.0% of offenders who received a principal CCO in the higher courts were male, and 14.0% were female. After remaining steady at approximately 85% in 2012 and 2013, the proportion of offenders who were male dropped to 81.9% in 2014 before increasing to 86.0% in 2015.

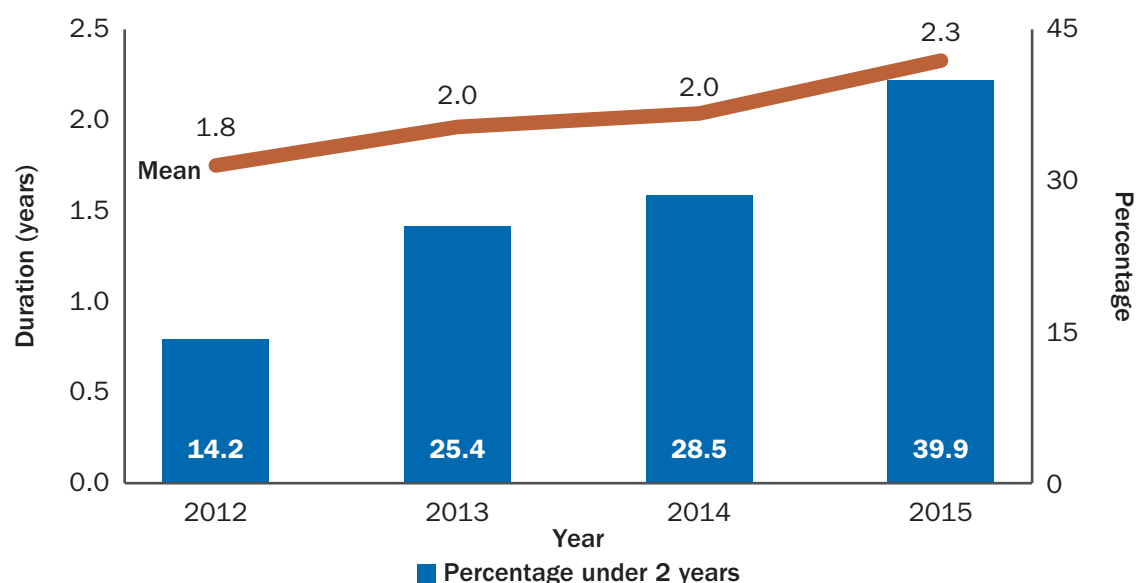
The age profile of offenders who received a CCO shifted in 2015. In that year, the mean age of offenders who received a CCO in the higher courts was 33.5 years, substantially higher than in the previous three years, when it ranged from 29.1 years in 2012 to 30.0 years in 2014. Likewise, the proportion of offenders aged under 25 years who received a CCO declined from 49.1% in 2012 to 31.0% in 2015.

Duration and conditions

The duration of a CCO is one of a number of indicators of the level of a CCO's punitiveness. The duration of CCOs imposed in the higher courts was higher in 2015 than in the previous three years. As Figure 11 shows, the mean CCO duration increased from 2.0 years in 2014 to 2.3 years in 2015, and the percentage of CCOs exceeding two years in duration increased from 28.5% to 39.9%. Figure 12 (page 21) shows the range of durations imposed on CCOs for each year between 2012 and 2015. The longest CCO has typically been five or six years. In 2013, a 10-year CCO was imposed, precipitating an appeal and the guideline judgment. On appeal, the duration of the CCO in this case was reduced to six years.⁸⁵

Like the duration of a CCO, the non-mandatory conditions imposed on a CCO can indicate the level of a CCO's punitiveness. Figure 13 (page 21) shows the distribution of conditions for two collection periods, January 2012 to June 2013 and May 2015 to December 2015. In both periods, at least one of three main conditions that were available under the CBO (assessment and treatment, unpaid community work, and supervision) was attached to the vast majority of CCOs,⁸⁶ while most of the new conditions made available under the CCO were rarely imposed. The most frequently used new condition was judicial monitoring. In 2015, a judicial monitoring condition was attached to approximately one in six CCOs in the higher courts, substantially higher than the use of this condition in the Magistrates' Court in the same year (one in 10).

Figure 11: Mean duration of CCO by year, higher courts, 2012 to 2015

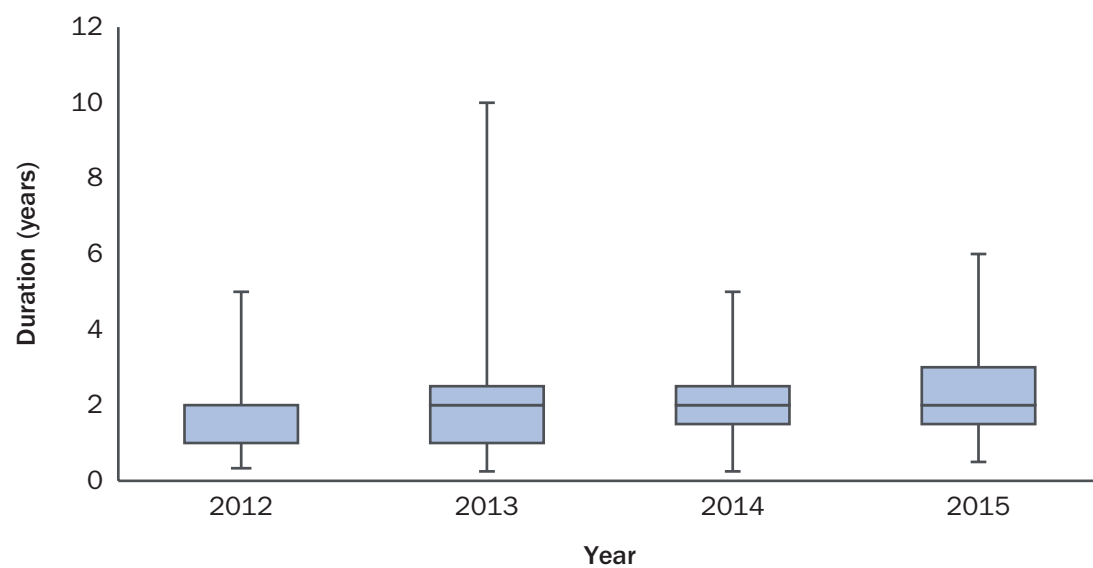


85. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) [279].

86. *Sentencing Act 1991* (Vic) pt 3 div 3 (since repealed).

Across the two collection periods, there were increases in the percentage of CCOs with at least one of the four most frequently used conditions attached. The largest increase occurred for community work – from 74.4% to 85.6% of CCOs – while smaller increases occurred for assessment and treatment (from 81.8% to 87.9%) and supervision (from 75.1% to 78.2%). The new condition of judicial monitoring increased from 14.1% to 17.9%, while conditions such as electronic monitoring, bond, and 'must not reside' were not imposed at all in the period from May 2015 to December 2015. Thus, while many of the new CCO conditions continued to be rarely imposed in 2015, there has been an increase in the use of some new punitive and rehabilitative conditions.

Figure 12: Range of duration of CCOs by year, higher courts, 2012 to 2015



*The 10-year CCO imposed in 2013 was later reduced to 6 years by the Court of Appeal.

Figure 13: Percentage of principal CCOs imposed according to condition type and period, higher courts

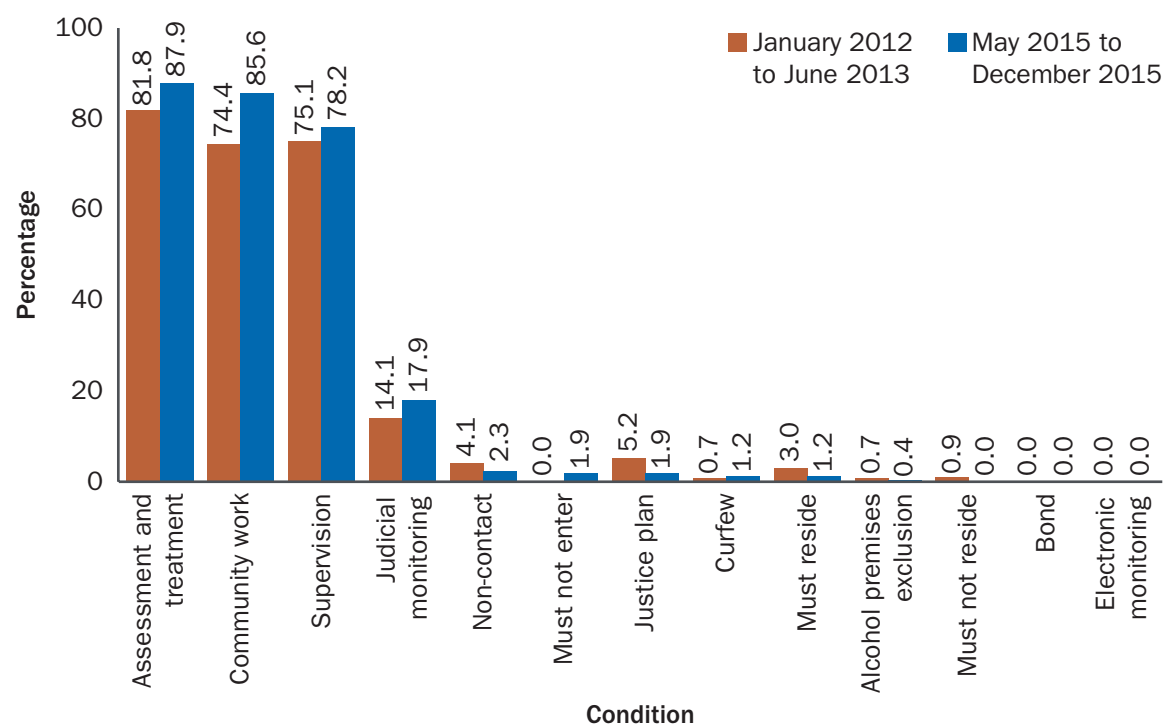
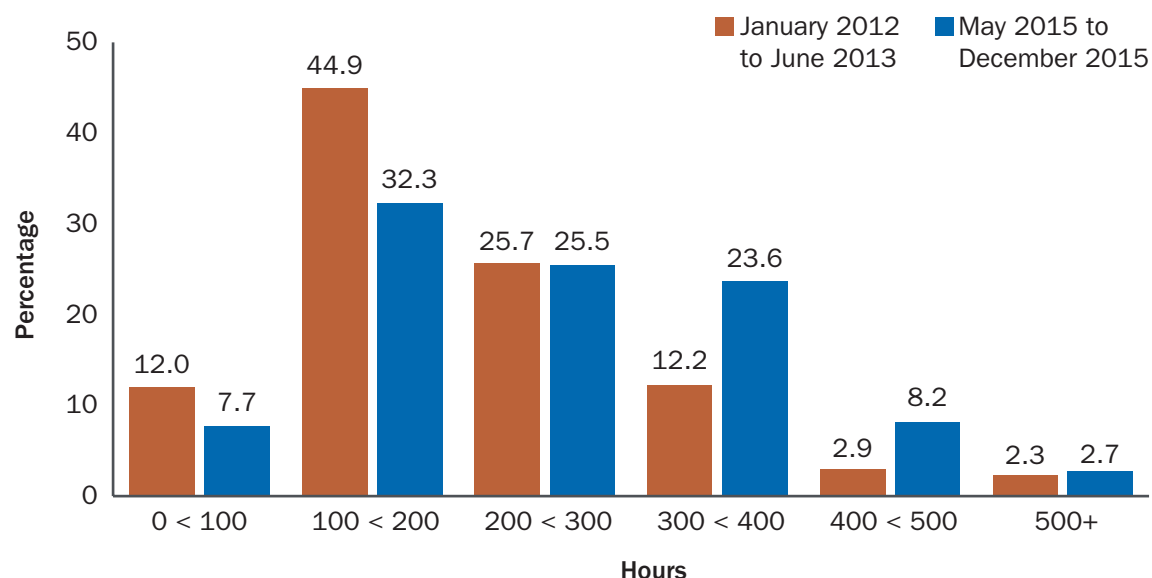


Figure 14: Percentage of CCOs with community work conditions by number of hours of community work and sentencing period, higher courts



When unpaid community work is set as a condition of a CCO, the court states the number of hours of community work that the offender must perform. Figure 14 shows the distribution of community work hours over the two collection periods. Across the two periods, there was an increase in the number of hours, with an increase in the percentage of community work conditions requiring 300 or more hours from 17.4% to 34.5%.

Summary

The increased number of offenders receiving a CCO as a principal sentence in 2015 compared with previous years was accompanied by three important changes. First, the age of offenders who received a CCO increased. Between 2012 and 2015, the percentage of offenders aged 25 years and over increased from 68.9% to 75.7% in the Magistrates' Court and from 50.9% to 69.0% in the higher courts.

Second, the offence profile of offenders who received a CCO shifted modestly away from non-sexual violent offences. In the Magistrates' Court in 2015, CCOs continued to be imposed most frequently for assault (30.7%), traffic (19.2%), and theft and deception (13.8%) offences. However, there was a small shift away from violent offences towards traffic and weapons offences between 2014 and 2015. In the higher courts in 2015, CCOs were most commonly imposed for assault (30.8%), sexual offences (20.9%), and robbery and burglary offences (19.6%). However, there was a shift away from assault and robbery towards theft and deception offences.

Third, CCOs became longer and more intensely supervised. In the Magistrates' Court between 2012 and 2015, there was a steady increase in the duration of CCOs imposed (the mean duration increased from 11.8 months to 12.7 months), and there was a substantial increase in the percentage of CCOs that included a supervision condition (from 28.8% to 49.7%). However, between 2014 and 2015, there was no increase in the use of unpaid community work, and new conditions continued to be used very infrequently. In the higher courts, the duration of CCOs increased between 2014 and 2015 (the mean rose from 2.0 years to 2.3 years). Compared with the period from January 2012 to June 2013, the period from May 2015 to December 2015 saw increases in the use of supervision, unpaid community work (including increases in the number of hours offenders were required to work), and a number of other conditions.

Characteristics of CCOs in combination with imprisonment

The use of imprisonment combined with a CCO increased significantly in 2015, doubling in the Magistrates' Court and nearly quadrupling in the higher courts. As at September 2014, a court may impose a CCO in combination with a sentence of imprisonment of up to two years. Prior to that date, the maximum term of imprisonment with which a CCO could be combined was three months.⁸⁷ The CCO component of the sentence commences on the release of the offender from imprisonment.⁸⁸ As reported in the Council's previous reports,⁸⁹ the legislative change prompted an immediate increase in the practice of combining imprisonment with a CCO. This increase coincided with a shift away from fixing non-parole periods for imprisonment terms of one to under two years.⁹⁰

There is no distinction in legislation between a CCO imposed in combination with imprisonment and a CCO imposed as a principal sentence.⁹¹ However, as imprisonment is a more punitive sentencing option than a CCO, one would expect that imprisonment combined with a CCO would be used for more serious offending than CCOs imposed as a principal sentence. This section compares the characteristics of CCOs imposed in combination with imprisonment ('imprisonment combined with a CCO' or 'combined order') with the characteristics of CCOs imposed as principal sentences ('principal CCOs'). The analysis is restricted to the 2015 calendar year as this was the first full year in which the combined order was used in substantial numbers.

Magistrates' Court

Offence profile

Compared with principal CCOs, CCOs imposed in combination with imprisonment were more likely to be used for drug trafficking or cultivation, assaults, and burglary offences, and less likely to be imposed for traffic-related and theft and deception offences (see Figure 15, page 24). This is consistent with the view that the CCO in combination with imprisonment is reserved for more serious offending than the principal CCO.

Offender demographics

Offenders who received imprisonment combined with a CCO were more likely to be male and were likely to be slightly older than offenders who received a principal CCO. Of the offenders who received imprisonment combined with a CCO, 90.8% were male. This was higher than the proportion of offenders receiving principal CCOs who were male (83.1%). The median age of offenders who received imprisonment combined with a CCO was slightly higher than the median age of offenders who received a principal CCO (32 years and 31 years respectively).

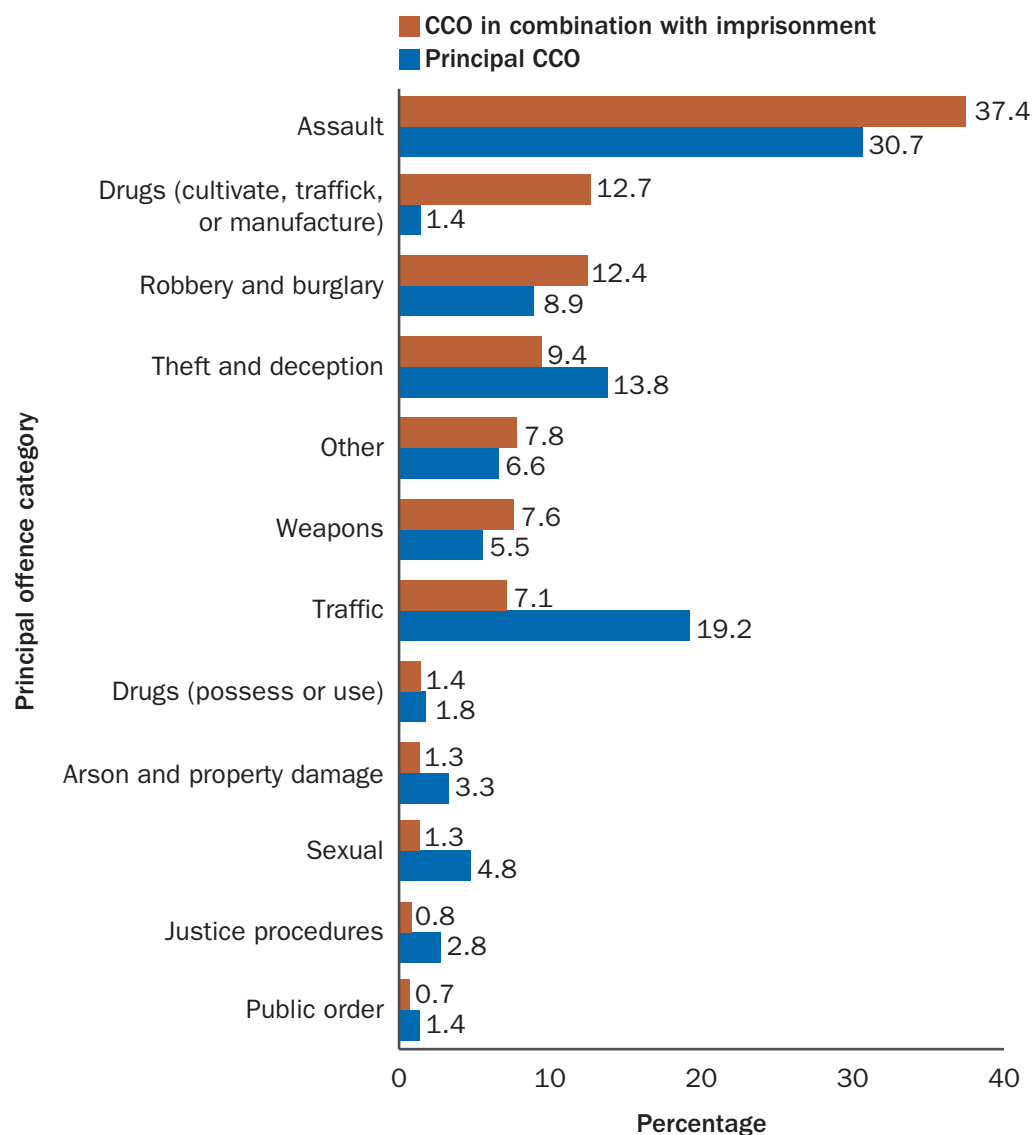
87. *Sentencing Act 1991* (Vic) s 44(1), amended by *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) s 18.

88. *Sentencing Act 1991* (Vic) s 44(3).

89. Sentencing Advisory Council (2015), above n 9; Sentencing Advisory Council (2016), above n 11.

90. Sentencing Advisory Council (2016), above n 11, 27–29.

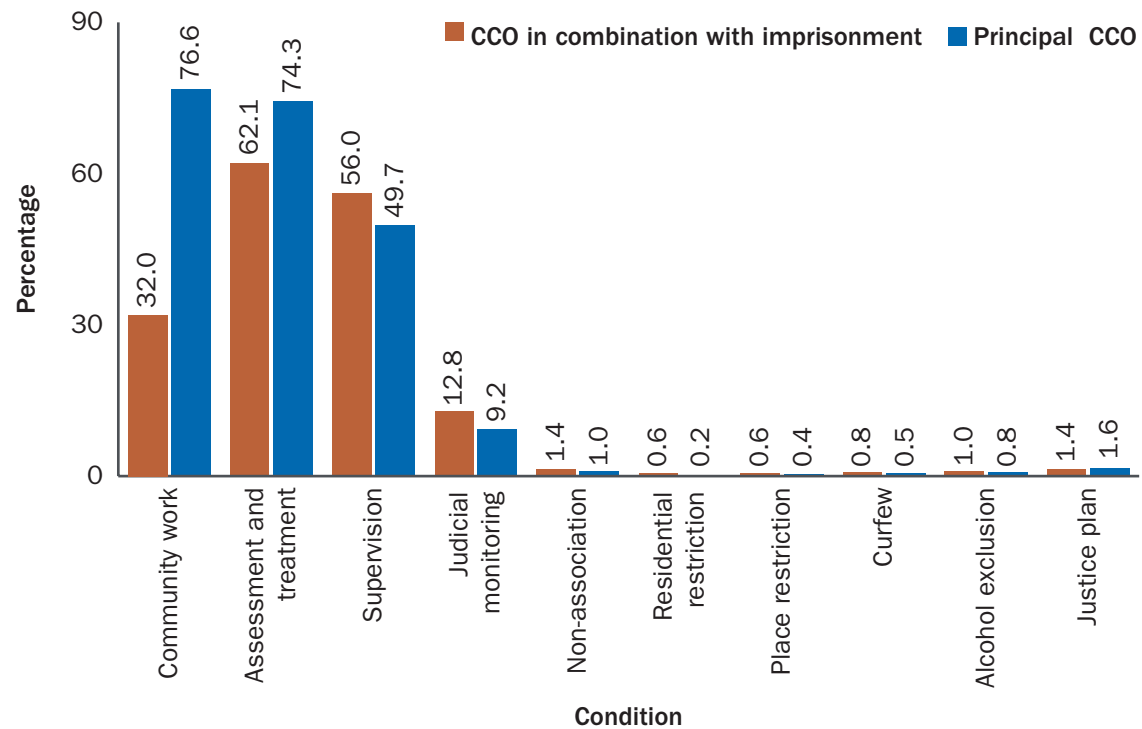
91. A court, however, is not to impose a sentence that involves the confinement of the offender if the purposes of sentencing can be achieved by an appropriately conditioned CCO: *Sentencing Act 1991* (Vic) 5(4C).

Figure 15: Percentage of CCOs by offence type and CCO type, 2015, Magistrates' Court

Duration and conditions

The duration of CCOs tended to be longer for CCOs in combination with imprisonment than for principal CCOs. In 2015, the mean duration was 14.6 months for combined orders and 12.7 months for principal CCOs.

The conditions attached to CCOs in combination with imprisonment differed from those attached to principal CCOs (see Figure 16, page 25). Compared with conditions attached to principal CCOs, in the Magistrates' Court conditions attached to a CCO in combination with imprisonment were far less likely to include unpaid community work (32.0% compared with 76.6%) and somewhat less likely to include an assessment and treatment condition (62.1% compared with 74.3%). Less frequent use of unpaid community work for combined orders suggests that magistrates typically view the punitive element of the combined order to be in the imprisonment component of the order rather than in the CCO component of the order.

Figure 16: Percentage of CCOs by condition type and CCO type, Magistrates' Court, 2015

Compared with principal CCOs, CCOs in combination with imprisonment were slightly more likely to include a supervision condition (56.0% compared with 49.7%) and a judicial monitoring condition (12.8% compared with 9.2%). This suggests that magistrates view offenders who receive a combined order as more likely to require supervision following release from prison than offenders who receive a principal CCO.

Higher courts

Offence profile

The offence profile of offenders who received CCOs in combination with imprisonment compared with offenders who received a principal CCO is presented in Figure 17 (page 26). The most common category of principal offence for the combined order was robbery and burglary (34.3%), followed by assault (28.9%) and drug offences (cultivate, traffick, or manufacture) (12.1%).

The major differences in the offence distribution between CCOs in combination with imprisonment and principal CCOs were the lower proportion of sexual offences and the higher proportion of robbery and burglary offences among offences receiving a CCO in combination with imprisonment.

Offender demographics

In the higher courts in 2015, the median age of offenders who received a CCO in combination with imprisonment was 30.5 years, which was very similar to the median age of offenders who received a principal CCO (31.0 years). The median age of offenders who received imprisonment without a CCO was substantially higher at 36.0 years. Thus, with regard to age, imprisonment sentences combined with a CCO are not distinguishable from principal CCOs, but they are distinguishable from imprisonment sentences that do not involve a CCO.

In terms of gender, 92.1% of offenders who received a CCO in combination with imprisonment were male. This was higher than the proportion of sentenced offenders receiving a principal CCO who were male (86.0%), but lower than the proportion of offenders who received an imprisonment sentence without a CCO (94.0%).

Duration and conditions

In the higher courts, the mean length of a CCO in combination with imprisonment was 2.3 years. This is equal to the mean length of a principal CCO.

The distribution of conditions attached to CCOs combined with imprisonment differed somewhat from conditions attached to principal CCOs (see Figure 18, page 27). The only condition that was used less frequently for combined orders was unpaid community work, which was used for 68.2% of CCOs in combination with imprisonment compared with 85.6% of principal CCOs. This suggests that judges view unpaid community work, which is primarily a punitive condition, as less important for CCOs where the offender also serves a term of imprisonment than for CCOs where the offender does not serve a term of imprisonment.

All other conditions were used more frequently for CCOs in combination with imprisonment than for principal CCOs. For example, 94.1% of combined orders had an assessment and treatment condition compared with 87.9% of principal CCOs, and 91.8% of combined orders had a supervision condition compared with 78.2% of principal CCOs. This may suggest that judges view the closely linked rehabilitative needs and reoffending risk to be greater for offenders who receive a CCO in combination with imprisonment than for offenders who receive a principal CCO.

Figure 17: Percentage of CCOs by category of principal offence and CCO type, higher courts, 2015

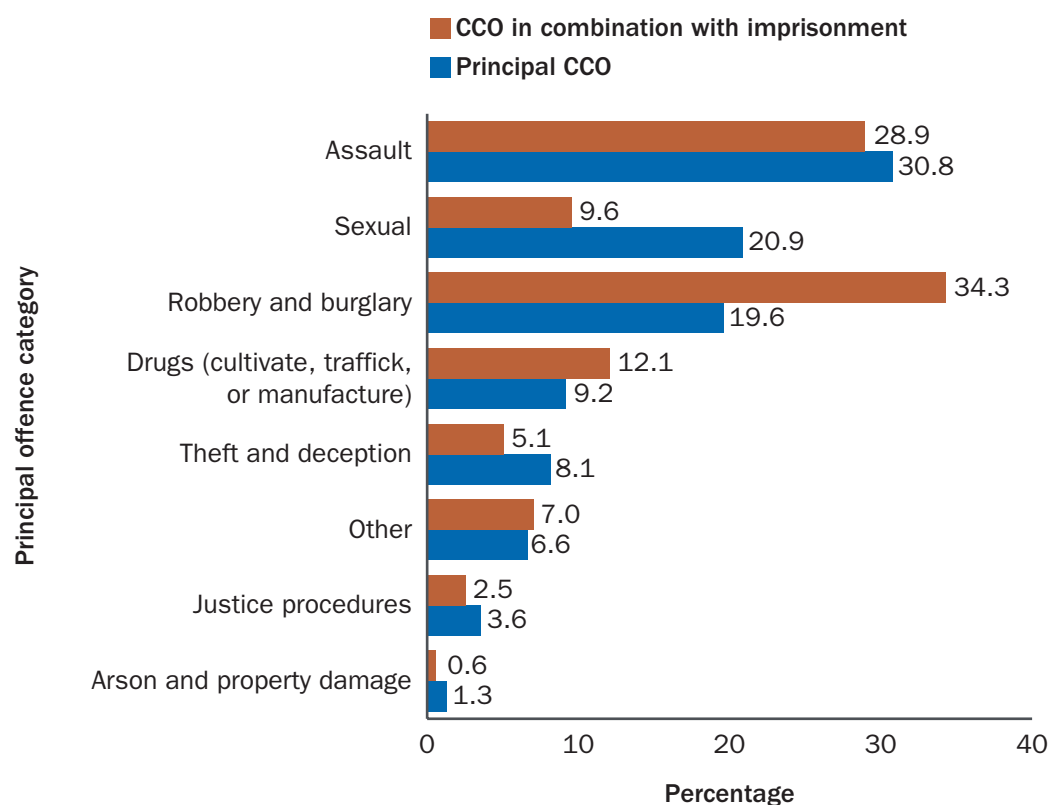
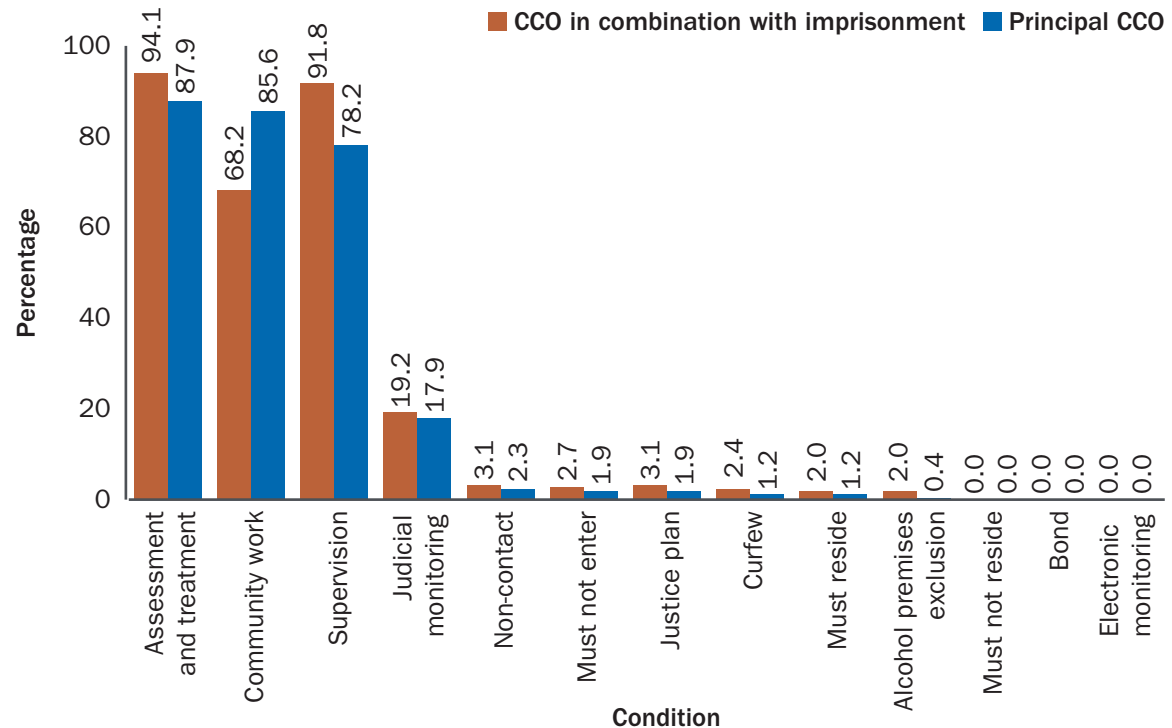


Figure 18: Percentage of CCOs by condition type, CCO type, higher courts, May 2015 to December 2015

Relationship between remand and combined orders

The increases in the use of combined orders may be influenced by changes to the number of offenders who, at the time of sentencing, have served time in custody (on remand) prior to their sentence. As a general principle, the amount of time an offender spends on remand is declared by the court and deducted from the total effective imprisonment sentence.⁹² As time served on remand does not bear upon the length of a sentence of a CCO alone, the courts may be choosing to impose a combined order to account for pre-sentence detention when a principal CCO would have been imposed were it not for the time served on remand.

The Council investigated the extent to which remand is related to the imposition of combined orders. Of the 356 offenders who received imprisonment combined with a CCO in the higher courts in 2015, 82% had already served some time in custody on remand at the time of sentencing.⁹³ This compares with just 2.8% of offenders who had served time on remand prior to receiving a principal CCO. Thus, offenders who receive a combined order are substantially more likely to have served time on remand than offenders who receive a principal CCO.

For offenders who had served time on remand when they received a combined order, the time spent on remand ranged from one day to just over 2 years and 7 months, while the average length of time spent on remand was 8 months. In relation to the length of the imprisonment component of their sentence, 37.1% of the 294 offenders who were sentenced to a combined order and had been

92. *Sentencing Act 1991* (Vic) s 18(1) states that any period during which an offender is held in custody in relation to proceedings for an offence or a related appeal must be 'reckoned' as a period of imprisonment or detention already served, unless the sentencing court otherwise orders. In relation to declaring and deducting pre-sentence detention, the Court of Appeal in *Boulton* adopted the position that a sentencing court may combine a CCO with a sentence of imprisonment if the custodial period remaining to be served after the deduction of the pre-sentence detention did not exceed the maximum length of imprisonment with which a CCO could be combined (now 2 years' imprisonment) *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) [235]–[238] (discussing the legislation as it then stood). For further discussion of this reasoning, see *Director of Public Prosecutions v Grech* [2016] VSCA 98 (10 May 2016) [50]–[52].

93. From the data available to the Council, it is not possible to determine the proportion of the period between arrest and sentence that offenders had served on remand.

on remand received an imprisonment term equal to their time served on remand. This equates to 30.6% of all offenders who received a combined order.⁹⁴

Recent increases in the size of the remand population in Victoria⁹⁵ may have resulted in more offenders being sentenced after having already served time on remand. This may, in turn, have led to greater use of the combined order.

Other factors may be driving the length of time on remand, which, in turn, may influence the use of the combined order.

Changes to bail laws will strongly influence the rate of offenders spending time on remand. As a general principle in Victoria, there is a presumption of bail.⁹⁶ However, exceptions to this presumption have been introduced over successive years. Most recently, in February 2016,⁹⁷ the *Bail Amendment Act 2016* (Vic) reversed the presumption of granting bail in circumstances in which a person is charged with a serious offence and has prior convictions for failing to appear on bail within the preceding five years. An accused in this category will have to 'show cause' as to why he or she should be released on bail.⁹⁸

There is a range of other offences that require a person, if charged with a relevant offence, to similarly show cause as to why detention in custody is not justified or to establish that 'exceptional circumstances', which justify the granting of bail, exist.⁹⁹

Other factors that may influence the apparent relationship between remand and the imposition of a combined order are that, generally speaking, people on remand are likely to be charged with more serious offences or to have more extensive criminal histories. These factors may, in turn, lead to the imposition of more severe sentencing penalties if the person is convicted.

Summary

CCOs imposed in combination with imprisonment differed in a number of ways from CCOs imposed as principal sentences. First, offenders who received a combined order were more likely to be male and were typically older than offenders who received a principal CCO. Second, in the Magistrates' Court the duration of CCOs imposed in combination with imprisonment tended to be longer than the duration of principal CCOs. Third, CCOs in combination with imprisonment were less likely than principal CCOs to involve a condition of unpaid community work and more likely to involve supervision. Finally, the offence profile differed between combined orders and principal CCOs. In the higher courts, combined orders were more likely than principal CCOs to be used for robbery and burglary offences, and less likely to be used for sexual offences. In the Magistrates' Court, combined orders were more likely than principal CCOs to be used for drug offences, assaults, and robbery and burglary, and less likely to be used for traffic, theft, and deception offences.

94. In some cases, courts are electing not to declare an offender's pre-sentence detention when imposing a combination sentence of up to two years' imprisonment with a CCO (see for example, *R v Hutchison* [2015] VSC 405 (12 August 2015)). However, the Court of Appeal has recently stated that the discretion to not declare an offender's pre-sentence detention is not unfettered. It further stated that it is not proper to exercise the discretion under section 18(1) in order to circumvent the requirement to fix a non-parole period under section 11(1). However, the court maintained that it may be appropriate to not give credit for the period of detention served before sentence if there is a compelling reason to not do so: *Director of Public Prosecutions v Grech* [2016] VSCA 98 (10 May 2016) [55]–[72].

95. Corrections Victoria, *Monthly Prisoner and Offender Statistics* (Corrections, Prisons & Parole, 2016) <<http://www.corrections.vic.gov.au/utility/publications+manuals+and+statistics/monthly+prisoner+and+offender+statistics>> at 1 June 2016.

96. *Bail Act 1977* (Vic) s 4(1).

97. These amendments are outside the reference period of this report.

98. 'Serious offences' for the purposes of the 'show cause' category include manslaughter, rape, child sexual offences, intentionally causing serious injury, abduction, kidnapping, threats to kill, armed robbery, and gross violence offences. A range of other offences have progressively been added to the 'show cause' category: see *Bail Act 1977* (Vic) s 4(4). Also introduced in 2016 is a presumption that bail will be refused for an accused charged with Victorian terrorism offences, unless there are exceptional circumstances: see *Bail Act 1977* (Vic) s 4(2), amended by *Bail Amendment Act 2016* (Vic) s 4.

99. *Bail Act 1977* (Vic) ss 4(2)–(4).

Factors associated with a change in principal CCOs

Between 2014 and 2015, the number of principal CCOs increased by 36% in the Magistrates' Court and 15% in the higher courts. These increases are not purely a result of more cases being sentenced. In fact, the total number of cases sentenced in the higher courts decreased by 9%. In the Magistrates' Court, there was an increase in the total number of cases, but the size of the overall increase was far smaller than the increase in the number of principal CCOs (10% and 36% respectively).

This section explores some possible reasons for the increases in the use of principal CCOs. The focus is on the guideline judgment and the abolition of suspended sentences.

The guideline judgment

Since *Boulton* was handed down in December 2014, the decision has been cited in the sentencing remarks for over 239 cases sentenced in the County Court and over 50 cases determined by the Court of Appeal.¹⁰⁰ The question arises as to whether the frequent reference to the guideline judgment in sentencing remarks has translated into a change in sentencing practices in relation to the use of the CCO.

As discussed above, a number of measures of the level of a CCO's punitiveness were higher in 2015 than in previous years, particularly in the higher courts. This can be interpreted as consistent with the guideline judgment, which promoted the CCO as a punitive sentencing option,¹⁰¹ an element of the judgment that is often referred to by sentencing courts. However, the guideline judgment particularly encouraged the greater use of principal CCOs as an alternative to imprisonment. The court highlighted the potential for an appropriately conditioned CCO to balance the purposes of sentencing, in contrast to imprisonment, which is 'skewed towards retribution and deterrence'.¹⁰² This is consistent with the *Sentencing Act 1991* (Vic), which states that a court should not impose a sentence that involves the confinement of the offender unless it considers that the purposes of sentencing cannot be met by the imposition of an appropriately conditioned CCO.¹⁰³ This section examines the interaction between imprisonment and the CCO before and after the guideline judgment. Trends in the higher courts are examined before trends in the Magistrates' Court, as the effect of the guideline judgment is most likely to be observed in the higher courts.

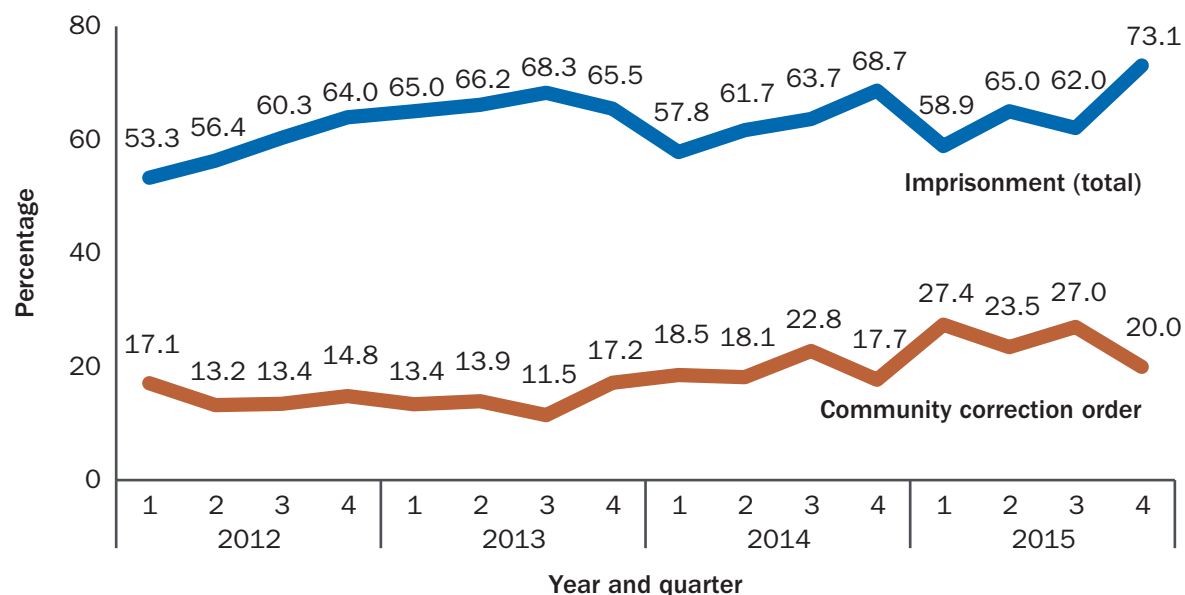
It appeared that CCOs were used in place of some sentences of imprisonment immediately following the guideline judgment. In the higher courts (see Figure 19, page 30) between the December quarter of 2014 and the March quarter of 2015, the proportion of cases that received imprisonment declined by 9.8 percentage points (from 68.7% to 58.9%), while the proportion of cases that received a CCO increased by 9.7 percentage points (from 17.7% to 27.4%). There was little change in the use of other sentence types over the same period (for example, suspended sentences remained at approximately 6%) suggesting that CCOs were used in place of approximately 13% of imprisonment sentences.

100. These figures are based on a search of the Australian Legal Information Institute's website on 18 April 2016 using the keywords 'Boulton' and 'sentence'. The figures are an undercount as the website contains an incomplete listing of cases.

101. See for example, *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) [138].

102. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) [113]–[115].

103. *Sentencing Act 1991* (Vic) s 5(4C).

Figure 19: Percentage of cases by principal sentence type and quarter, higher courts, 2012 to 2015

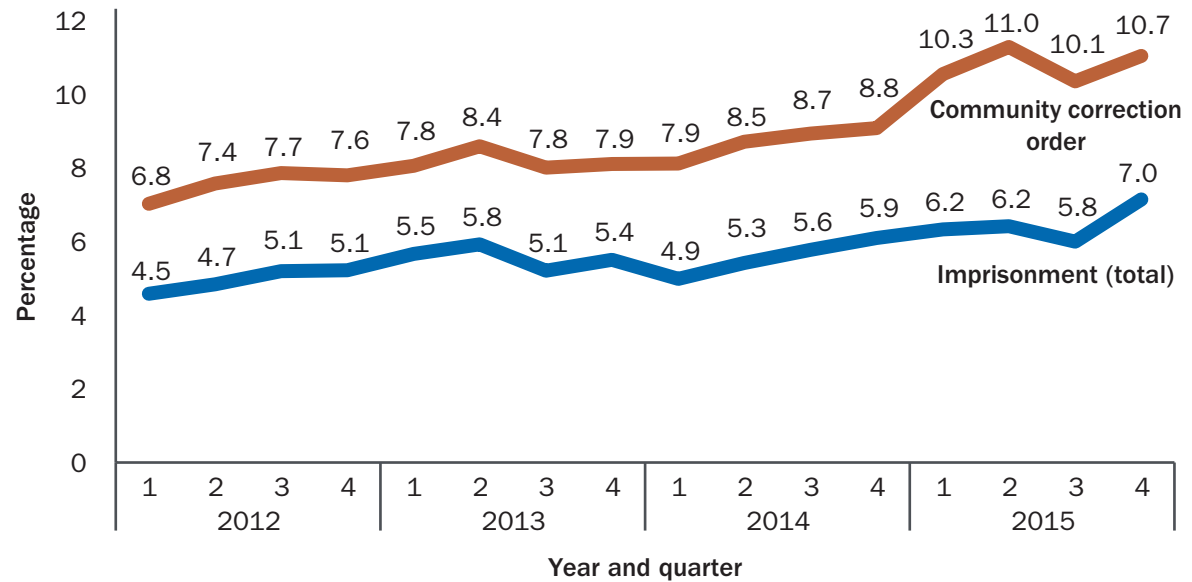
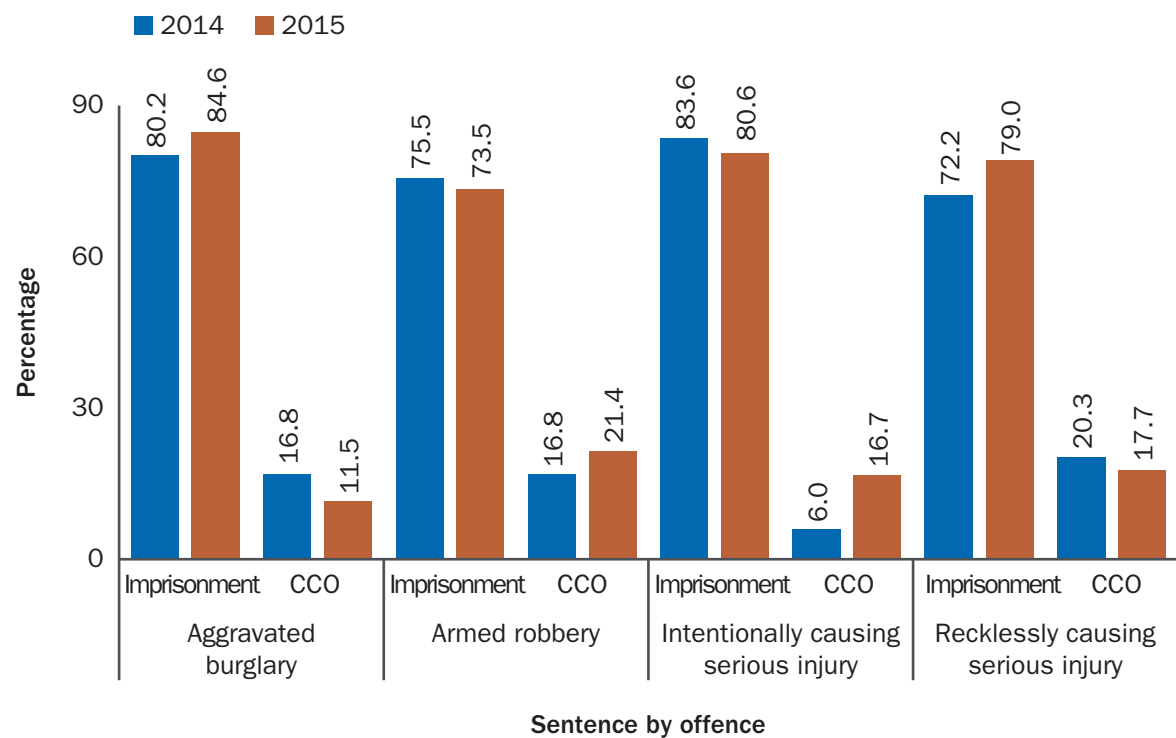
The shift away from imprisonment to CCOs that occurred in the first quarter of 2015 was not sustained throughout the remainder of that year. In the June quarter of 2015, the use of imprisonment as a principal sentence (which, therefore, includes combined orders, which are examined separately below) increased by 6.1 percentage points, and by the December quarter of 2015, the proportion of cases that received imprisonment had reached a four-year high of 73.1%. In that same quarter, the percentage of cases that received a CCO declined to 20.0%.

Likewise, there was little evidence in the Magistrates' Court of a sustained decline in the use of imprisonment following the guideline judgment.¹⁰⁴ In fact, between the December quarter of 2014 and the December quarter of 2015, the proportion of cases that received imprisonment increased from 5.9% to 7.0% (Figure 20, page 31). While there was an increase in the use of the CCO immediately following the guideline judgment, a concurrent rise in the use of imprisonment suggests the CCO was not used in place of imprisonment sentences, but it may have been used in place of other sentencing dispositions (see Figures 23 and 24 (page 34) for these other sentencing dispositions).

The analysis of trends in the use of imprisonment now turns to four offences sentenced in the higher courts. These are aggravated burglary, armed robbery, recklessly causing serious injury, and intentionally causing serious injury. These offences have been chosen because most cases involving these offences receive imprisonment sentences. Consequently, any shift away from imprisonment towards the CCO, as a result of the guideline judgment, will be readily apparent.

Figure 21 (page 31) presents the percentage of cases of each of these offences receiving either imprisonment or a principal CCO in 2014 and 2015. Over this time there was no consistent pattern that would suggest that there was a systematic shift away from imprisonment towards the CCO across all offences following the guideline judgment. Both armed robbery and intentionally causing serious injury had small reductions in the percentage of cases that received imprisonment and small increases in the use of the CCO. However, the opposite occurred for aggravated burglary and recklessly causing serious injury; that is, imprisonment was used more frequently and CCOs were used less frequently.

¹⁰⁴ The percentages for CCOs and imprisonment in the Magistrates' Court are far lower than in the higher courts because the Magistrates' Court handles offences of relatively low-level seriousness and uses a fine as the principal sentence in approximately 60% of cases.

Figure 20: Percentage of cases by principal sentence type and quarter, Magistrates' Court, 2012 to 2015**Figure 21:** Percentage of aggravated burglary cases by selected sentence types and year, higher courts

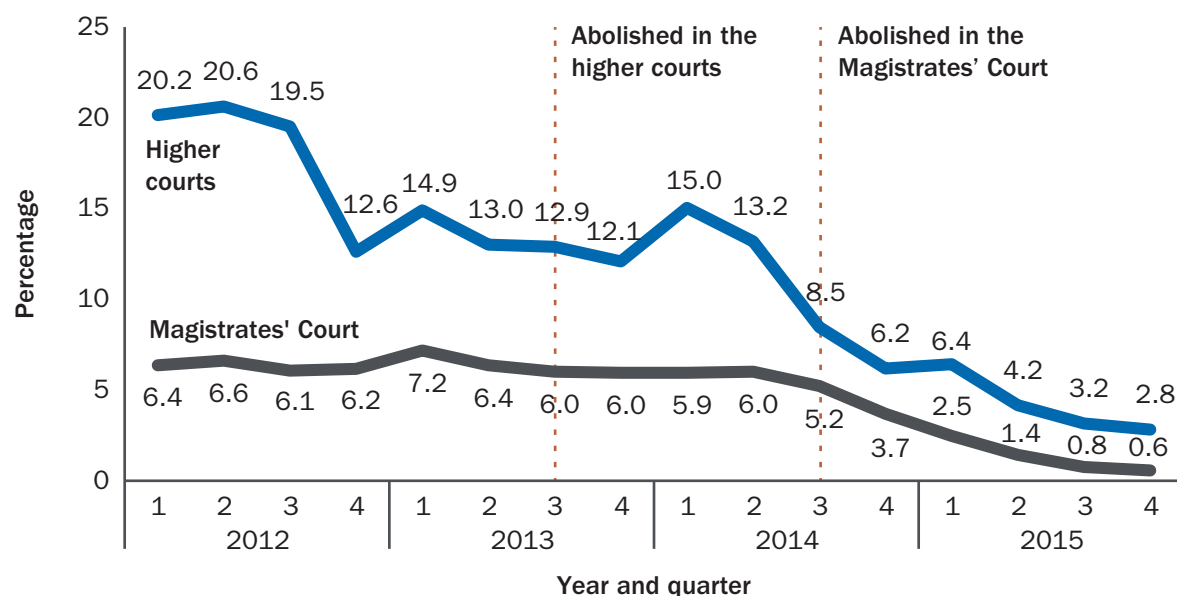
Suspended sentences

The *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic) progressively phased out suspended sentences in 2013 and 2014. From 1 September 2013, no offence heard in the higher courts committed on or after 1 September 2013 could receive a suspended sentence. Suspended sentences were abolished in the Magistrates' Court for any offence committed on or after 1 September 2014.

The abolition of suspended sentences only applies to offences committed on or after the commencement of the abolition provision. This means that the County Court and the Supreme Court may still impose suspended sentences for offences (other than serious or significant offences) committed before 1 September 2013. Similarly, the County Court and the Supreme Court may impose a suspended sentence for a serious offence or a significant offence if the offence was committed before 1 May 2011.¹⁰⁵

The effects of the abolition of suspended sentences on their use are evident in Figure 22. It shows the number of cases that received a suspended (partially or wholly) sentence as a percentage of all cases sentenced each quarter from 2012 to 2015. The first substantial decline in the use of suspended sentences occurred in late 2012 in the higher courts, when the proportion of cases that received a suspended sentence declined from 19.5% in the September quarter of 2012 to 12.6% in the following quarter. This decline is attributable to the lagged effect¹⁰⁶ of the first blanket abolition of suspended sentences, which occurred for serious and significant offences committed on or after 1 May 2011 and sentenced in the higher courts.¹⁰⁷

Figure 22: Percentage of cases that received a suspended sentence by court level, year, and quarter, 2012 to 2015



105. Suspended sentences were removed as a sentencing option in the higher courts for all offences committed on or after 1 September 2013 by the *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic). From 1 September 2014, suspended sentences were no longer available in the Magistrates' Court for all offences committed on or after that date. The removal of suspended sentences is not retrospective. Suspended sentences still may be imposed in the Magistrates' Court for offences committed before 1 September 2014, in the County and Supreme Courts for offences (other than serious or significant offences) committed before 1 September 2013, and in the County and Supreme Courts for serious or significant offences committed before 1 May 2011.

106. The effect of the reforms to suspended sentences is lagged in the sense that there has been a gradual decline in the use of suspended sentences following the legislative change. This is because sentencing trends in this report are assessed using the date of sentence, while reforms to suspended sentence have applied to the date of offence. This means that, in the periods shortly after the dates on which suspended sentences were abolished (1 September 2013 in the higher courts and 1 September 2014 in the Magistrates' Court), the mix of cases sentenced include offences committed prior to the date that the provision commenced, meaning that some offences could still receive a suspended sentence.

107. *Sentencing Amendment Act 2010* (Vic) s 12.

The second major decline in the use of suspended sentences in the higher courts commenced in the March quarter of 2014 and continued to the end of the reference period. Between the March quarter of 2014 and the December quarter of 2015, the percentage of cases that received a suspended sentence declined from 15.0% to 2.8%. The decline was due to the final stage of the abolition of suspended sentences in the higher courts from September 2013.¹⁰⁸

The first decline in the use of suspended sentences in the Magistrates' Court commenced in the September quarter of 2014, beginning in the same month in which suspended sentences were abolished in that jurisdiction. Between the June quarter of 2014 and the December quarter of 2015, suspended sentences declined from 6.0% to 0.6% of cases sentenced in the Magistrates' Court.

To what extent has the CCO replaced suspended sentences?

To address the question of the extent to which CCOs have replaced suspended sentences, the Council examined the change in the sentence distribution across the available sentencing dispositions between 2014 and 2015. The percentage point change from 2014 to 2015 in the sentence distribution is shown for the higher courts in Figure 23 (page 34). As a percentage of principal sentences in the higher courts, CCOs increased by 5.0 percentage points (from 19.2% to 24.2%), while the percentage of principal sentences that were suspended sentences declined by 6.6 percentage points (from 10.6% to 4.0%). This suggests that, in the higher courts, the increase in the use of CCOs between 2014 and 2015 was wholly due to CCOs being utilised as a replacement for suspended sentences. It is likely that imprisonment sentences were used to replace a minority of suspended sentences, as the use of imprisonment increased by 2.0 percentage points.

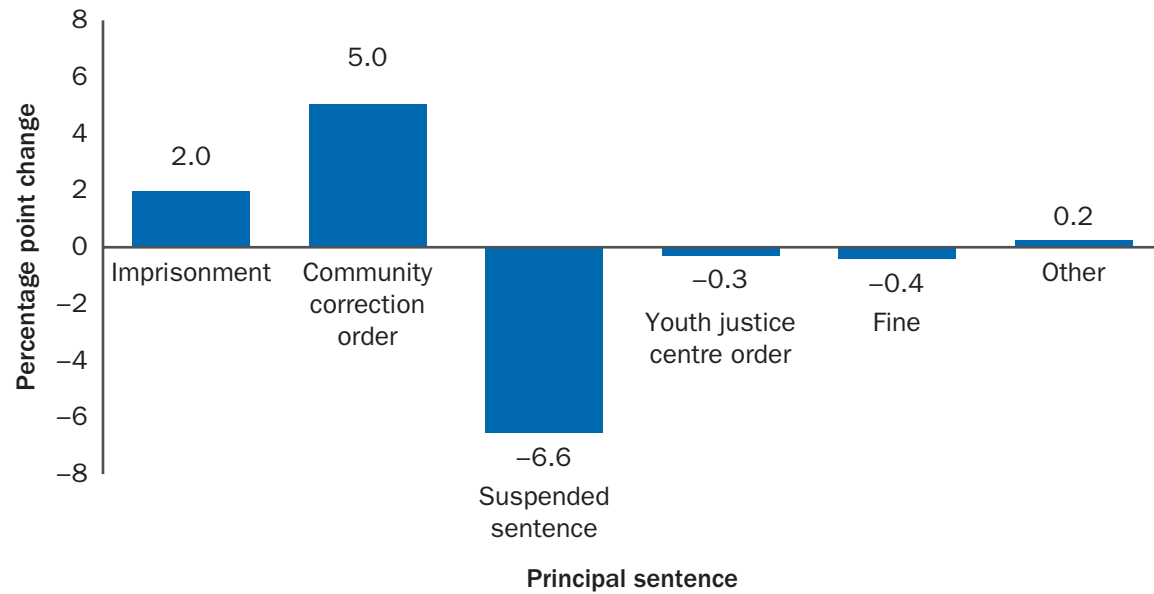
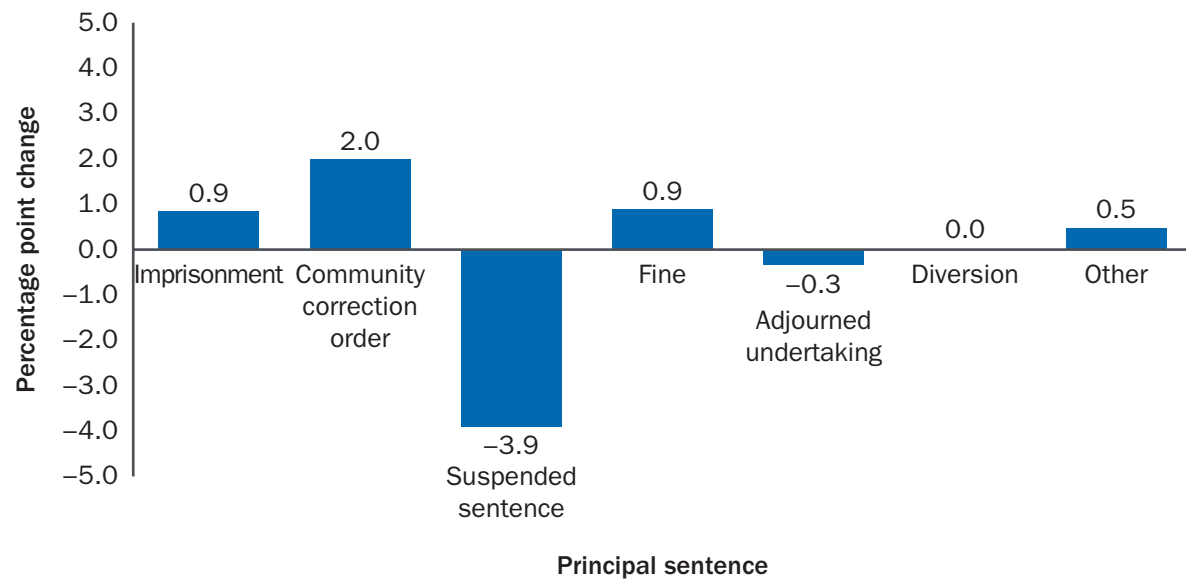
A similar pattern emerges in the Magistrates' Court. Figure 24 (page 34) shows the change in the use of different sentence types between 2014 and 2015. There was a 3.9 percentage point decline in the use of suspended sentences (from 5.2% to 1.3%), while there was a 2.0 percentage point increase in the use of CCOs (8.5% to 10.5%) and a 0.9 percentage point increase in the use of imprisonment (5.4% to 6.3%) and fines (56.2% to 57.1%). This suggests that, as in the higher courts, the rise in the use of CCOs in the Magistrates' Court is wholly attributable to the phasing out of suspended sentences. It also suggests that approximately half of suspended sentences in the Magistrates' Court were replaced by the CCO, while the other half were replaced by a combination of imprisonment sentences and fines.

Summary

The analysis of sentencing trends found that the abolition of suspended sentences was the primary driver of the increases in the use of the CCO as a principal sentence in 2015. While the guideline judgment resulted in an immediate increase in the use of CCOs and a concurrent decline in the use of imprisonment in the first half of 2015, the change was short-lived. Twelve months after the guideline judgment, the percentage of cases receiving imprisonment was particularly high.

The increases in the use of imprisonment between 2014 and 2015 were relatively small (2.0 percentage points in the Magistrates' Court and 0.9 percentage points in the higher courts). Coupled with substantial increases in the use of CCOs, this suggests that imprisonment has not been typically used to replace suspended sentences. The primary replacement of suspended sentences has been the CCO.

¹⁰⁸ Suspended sentences could no longer be imposed in the higher courts for offences committed on or after 1 September 2013: *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic) s 6.

Figure 23: Percentage point change, cases by principal sentence, higher courts, 2014 to 2015**Figure 24:** Percentage point change, cases by principal sentence, Magistrates' Court, 2014 to 2015

Factors associated with a change in combined orders

Between 2014 and 2015, the number of imprisonment sentences combined with CCOs increased by 100% (to 2,028) in the Magistrates' Court, and by 370% (to 356) in the higher courts. As reported in the Council's second monitoring report, the commencement of the increase in imprisonment combined with a CCO pre-dated the guideline judgment and, in fact, immediately followed the legislative change increasing the term of imprisonment with which a CCO may be combined.¹⁰⁹ The question examined here is whether the guideline judgment contributed to further increases in the use of CCOs in combination with imprisonment.

The guideline judgment

The guideline judgment occurred late in the December quarter of 2014. Therefore, changes in sentencing practices that resulted from the guideline judgment should be evident from the March quarter of 2015. This section investigates:

- a. whether imprisonment combined with a CCO was used for cases that would have previously received imprisonment alone; and
- b. whether the CCO in combination with imprisonment replaced any other sentence type, particularly partially suspended sentences of imprisonment.

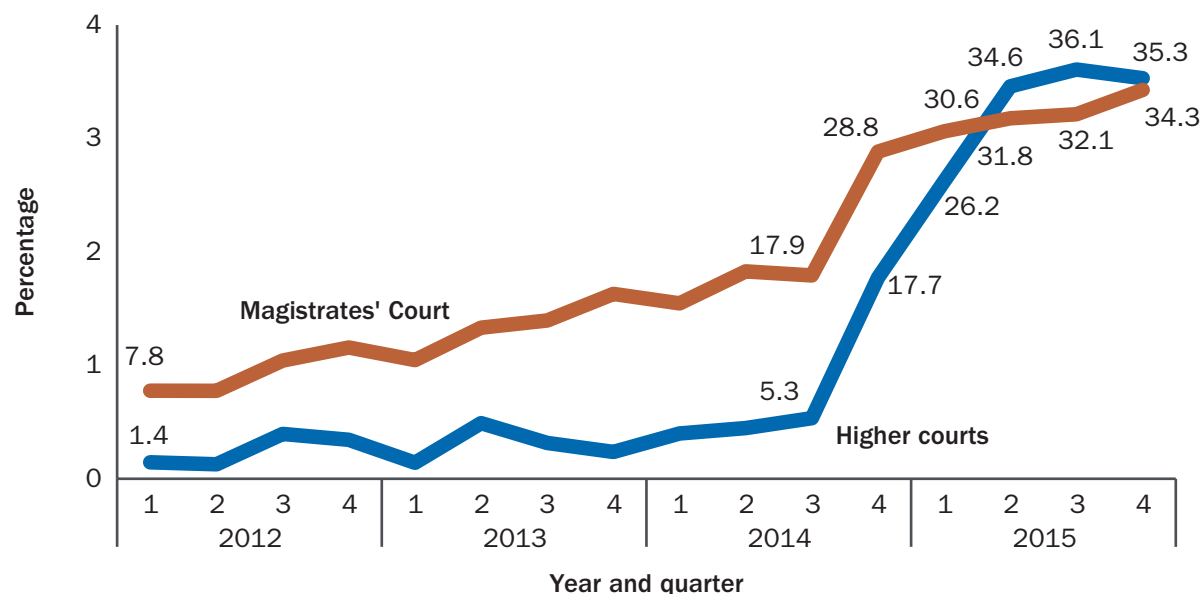
Figure 25 (page 36) presents the quarterly rate at which CCOs were combined with imprisonment according to court level. It clearly shows the effect of the legislative change in September 2014, which promoted the use of CCOs. After increasing gradually in both courts prior to the December quarter of 2014, the percentage of imprisonment sentences that included a CCO increased substantially in the December quarter of 2014: from 17.9% to 28.8% in the Magistrates' Court and from 5.3% to 17.7% in the higher courts.

Following the December quarter of 2014, the use of imprisonment combined with a CCO continued to increase in the higher courts, which is likely to be a consequence of the guideline judgment: between the December quarter of 2014 and the September quarter of 2015, the percentage of sentences of imprisonment combined with a CCO increased from 17.7% to 36.1%. In the December quarter of 2015, approximately three-quarters of imprisonment sentences of under two years were combined with a CCO in the higher courts.

In the Magistrates' Court, the use of imprisonment combined with a CCO also continued to increase following December 2014, rising from 28.8% of all imprisonment sentences to 34.3% in the December quarter of 2015. The continued increase in the use of imprisonment combined with a CCO following the guideline judgment is consistent with the conclusion that the guideline judgment encouraged the practice of imposing sentences combining imprisonment with a CCO.

109. Sentencing Advisory Council (2015), above n 9, 10. The term of imprisonment that could be combined with a CCO was increased to two years in September 2014, while the guideline judgment was handed down on 22 December 2014.

Figure 25: Imprisonment combined with a CCO as a percentage of all imprisonment sentences by year, quarter, and court level



The guideline judgment has not been the only driver of the use of the combined order. The legislative change to the combined order in September 2014 clearly increased the order's versatility, expanding its appeal as a sentencing option. Another driver of the increase in the use of the combined order is the decline in the use of non-parole periods for terms of imprisonment of one to under two years, which, in turn, is likely to have been driven by recent changes to the parole system.¹¹⁰ An additional factor may be the growth in the number of sentenced offenders who have served time in prison on remand.¹¹¹ As discussed above, time on remand is associated with an increased likelihood of an offender receiving a combined order compared with a principal CCO.

What did the combined order replace?

The increase in the use of imprisonment combined with a CCO prompts the question: What sentencing option has imprisonment combined with a CCO replaced? The Council's *Parole and Sentencing: Research Report* found that imprisonment combined with a CCO had, to a large extent in the higher courts, replaced imprisonment sentences of one to under two years that had a non-parole period fixed.¹¹² However, combining imprisonment with a CCO has also occurred for many imprisonment sentences of under one year, which are ineligible for a non-parole period. Therefore, imprisonment combined with a CCO replaced more than simply imprisonment sentences with a non-parole period.

The extent to which imprisonment combined with a CCO replaced other sentence types is examined in Figures 26 and 27. Figure 26 (page 37) shows the use of various orders in the Magistrates' Court, including imprisonment with and without a CCO and partially and wholly suspended sentences. While imprisonment sentences without a CCO remained steady, there was a clear increase in the use of imprisonment combined with a CCO, particularly in the December

110. For further discussion of the recent reforms to parole in Victoria and their likely impact on sentencing, see Sentencing Advisory Council (2016), above n 11, 14–16.

111. Australian Bureau of Statistics, *Corrective Services Australia*, cat. no. 4512.0 (2016) referring to the results of the December quarter of 2014.

112. Sentencing Advisory Council (2016), above n 11, 17–32.

Figure 26: Percentage of cases by selected sentence types, year, and quarter, Magistrates' Court

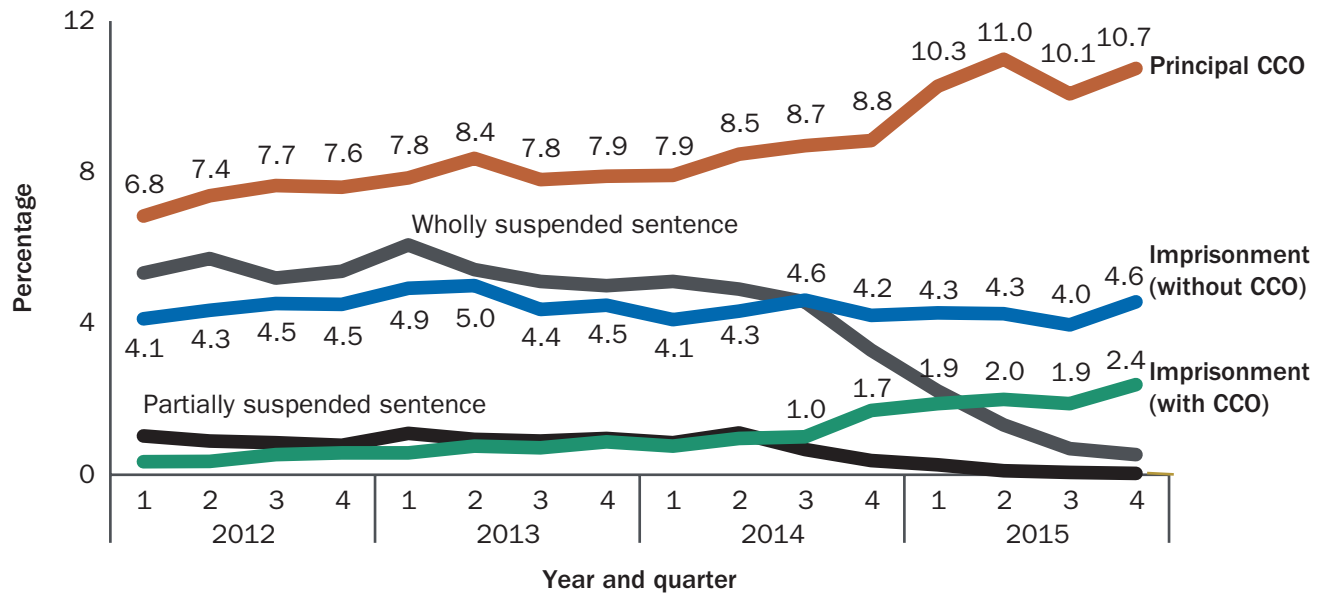


Figure 27: Percentage of cases by selected sentence types, year, and quarter, higher courts

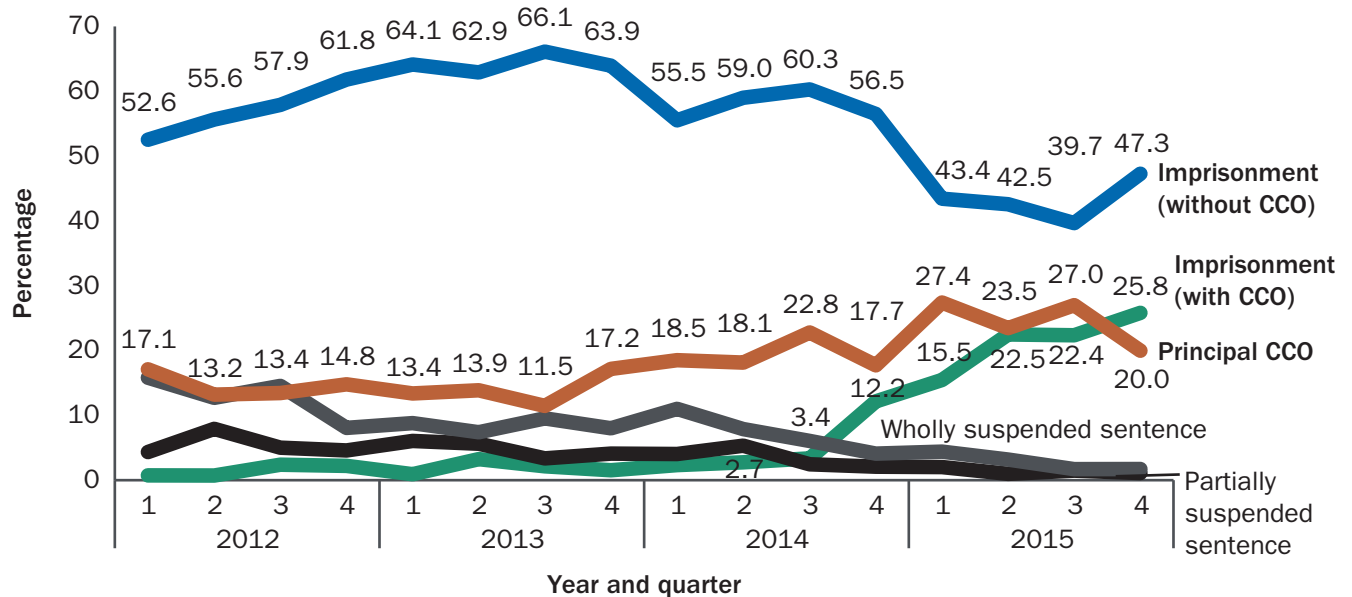
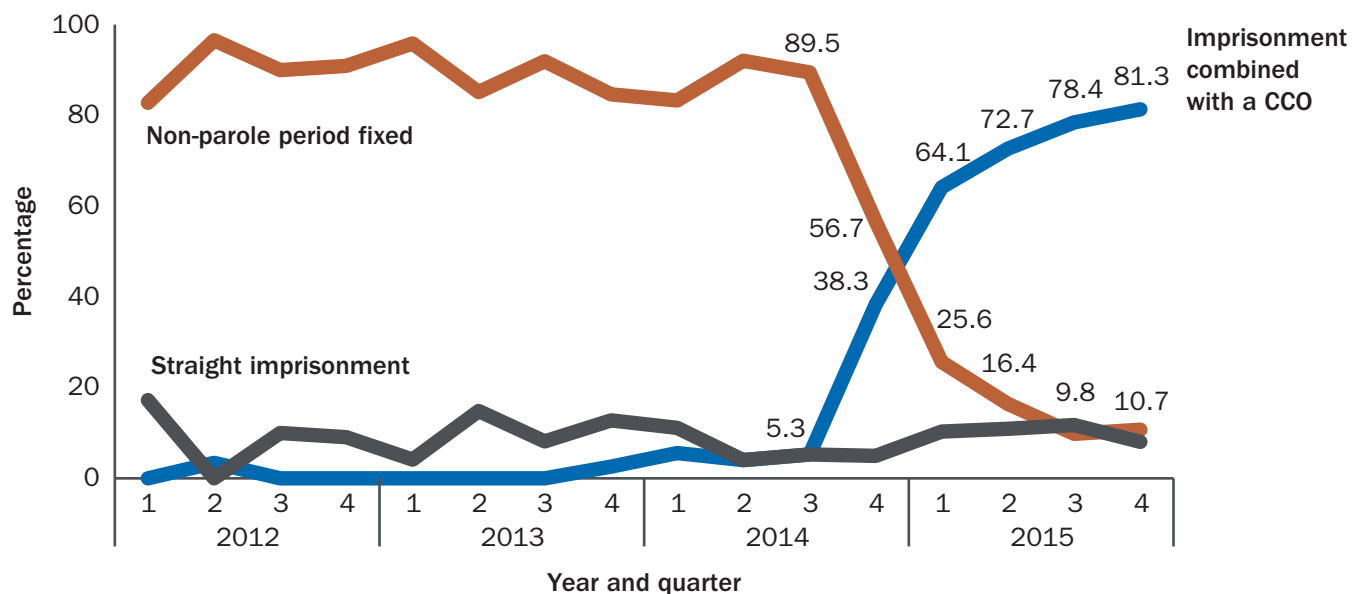


Figure 28: Percentage of total effective imprisonment sentences of one to under two years that included a non-parole period, a CCO, and neither, by quarter, higher courts, 2012 to 2015



quarter of 2014 (1.7%) and in the December quarter of 2015 (2.4%). The only orders to decrease over that time were wholly suspended sentences (4.6% to 0.5%) and partially suspended sentences (0.7% to 0.0%). Therefore, it is likely that, in the Magistrates' Court, imprisonment combined with a CCO was used to a lesser extent than principal CCOs to replace wholly and partially suspended sentences.

In the higher courts (see Figure 27, page 37), imprisonment combined with a CCO was used primarily in place of imprisonment sentences without a CCO. Between the September quarter of 2014 and the September quarter of 2015, the percentage of cases that received imprisonment combined with a CCO increased from 3.4% to 22.4%. Over the same period, the use of imprisonment without a CCO declined from 60.3% to 39.7%. Many of these imprisonment sentences without a CCO would have had a non-parole period fixed. As shown in Figure 28 (page 37), for imprisonment terms of one to under two years (with or without a CCO), there was a sharp decline in the use of non-parole periods between the September and December quarters of 2014 (from 89.5% to 56.7%), and further declines were observed throughout 2015.

In addition to replacing imprisonment sentences without a CCO, the combined order was used to replace both wholly and partially suspended sentences. As use of these sentences declined, the use of the combined order increased. Between the September quarter of 2014 and the December quarter of 2015, the use of wholly suspended sentences declined from 6.1% to 1.7% and the use of partially suspended sentences declined from 2.4% to 1.1%.

Thus, in both court levels, imprisonment combined with a CCO was used to replace wholly and partially suspended sentences. The combined order was also used to replace some imprisonment sentences for which a non-parole period could be fixed. If the term of imprisonment combined with a CCO was two years, a non-parole period would need to be fixed.¹¹³

What have been the effects of the combined order on other sentencing practices?

Given that courts have embraced the option of imposing a sentence of imprisonment combined with a CCO, a question arises as to whether the lengths of some imprisonment terms have declined such that the terms become eligible to be combined with a CCO. As stated above, a CCO may only be combined with an imprisonment sentence of two years or under.

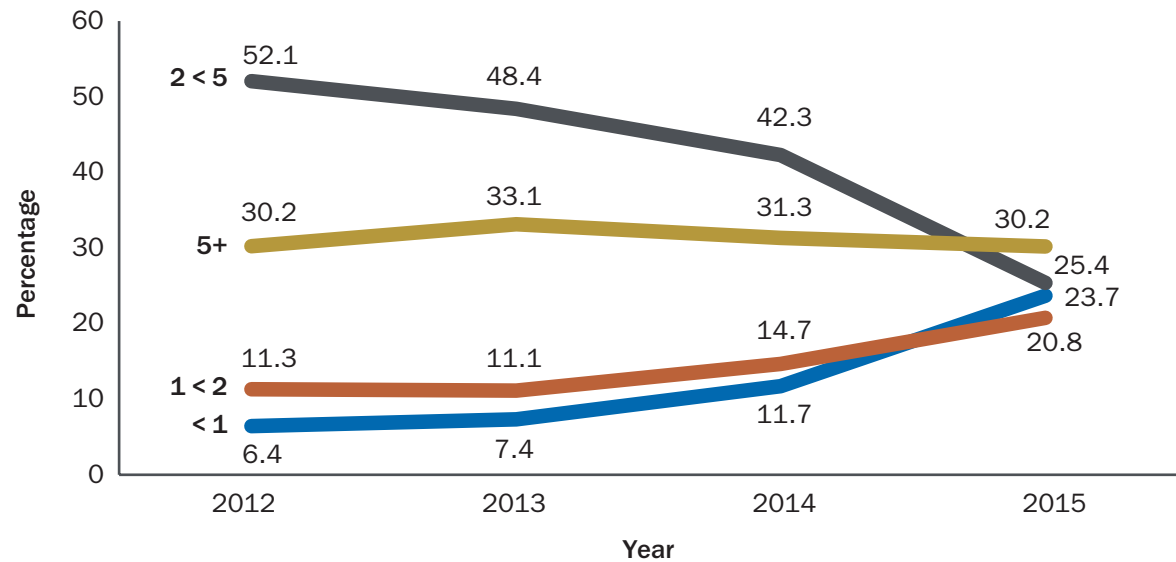
An examination of changes in the lengths of total effective sentences in the higher courts reveals a dramatic change in 2015, attributable to the rise in the use of imprisonment combined with a CCO as a sentencing disposition. As Figure 29 (page 39) shows, while the percentage of total effective terms of imprisonment of five years and over remained steady in the higher courts between 2012 and 2015, relatively short terms of under two years increased and terms of two to under five years declined. Therefore, relatively short terms of imprisonment came to be imposed more frequently.

This change is likely to be a result of two factors. First, imprisonment sentences that replaced suspended sentences were likely to have been relatively short and were often combined with a CCO. Second, the courts' uptake of imprisonment combined with a CCO, coupled with uncertainty caused by changes to the likelihood of an offender being released on parole, has resulted in the courts imposing imprisonment terms of under two years on cases that previously would have

113. *Sentencing Act 1991* (Vic) s 11(1)(b).

received more than two years and a non-parole period.¹¹⁴ These two factors, in turn, were influenced by a combination of the legislative change from September 2014 and the guideline judgment, which highlighted the increased flexibility of the CCO regime, taking into account the option of combining a CCO with a term of imprisonment of up to two years.¹¹⁵

Figure 29: Percentage of imprisonment sentences by total effective term and year, higher courts



114. Sentencing Advisory Council (2016), above n 11, 17–32.

115. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) [141].

Conclusion

This report has described some important changes in the use of the CCO in 2015 and has considered those changes against the sentencing outcomes observed since the introduction of the CCO in 2012. First, between 2014 and 2015 there were increases in the number of CCOs imposed and the percentage of cases that received a CCO. In the Magistrates' Court, the number of offenders who received a CCO as a principal sentence increased by 36%, and the percentage of offenders who received a CCO increased by two percentage points. Likewise, in the higher courts, the number of offenders who received a CCO as a principal sentence increased by 15%, while the percentage increased by five percentage points.

Second, the conditions and duration of CCOs imposed as principal sentences changed. In 2015, the duration of CCOs increased by 4 months in the higher courts and 0.3 months in the Magistrates' Court, as did the proportion of CCOs that had intensive conditions, such as unpaid community work and supervision, particularly in the Magistrates' Court.

Third, there were substantial increases in the use of imprisonment combined with a CCO. Between 2014 and 2015, the number of combined orders imposed in the Magistrates' Court increased by 100%, while the number in the higher courts increased by 370%.

Fourth, between 2014 and 2015, the average age of offenders who received a CCO increased by 8 months in the Magistrates' Court and 3 and a half years in the higher courts. The offence profile shifted slightly away from non-sexual violent offending towards non-violent offences.

There are a number of likely drivers of these changes to sentencing practices. A number of important legislative and contextual changes occurred in the period from 2012 to 2015. These include the abolition of suspended sentences, legislation encouraging the use of CCOs in place of suspended sentences,¹¹⁶ an apparent reluctance to fix a non-parole period, amendments to the *Bail Act 1997* (Vic), and the increase in the maximum term of imprisonment with which a CCO may be combined. In addition, the effect of the guideline judgment in *Boulton* was significant. All of these factors are likely to have had some effect on the use of CCOs and the findings of this report.

Through a careful examination of sentencing trends, the Council has made an attempt at disentangling the effect of these factors. The abolition of suspended sentences, combined with legislation that encouraged sentencing courts to use the CCO in place of suspended sentences, was the most influential factor on the increase in the number of CCOs imposed as a principal sentence across the reference period. The guideline judgment, referred to in many sentencing remarks during 2015, appeared to have an immediate effect, with CCOs replacing some imprisonment sentences in the higher courts. However, the effect was short-lived, and by the end of 2015 the trend had reversed. Nonetheless, this is only one measure of the guideline judgment's impact: the guideline judgment is likely to have influenced the sentencing of offenders in Victoria in ways that are not readily observed in the numbers of CCOs imposed over time. For example, the increased punitiveness of CCOs imposed in 2015 (evidenced by the conditions attached to, and the duration of, those orders) may be attributable to the guideline judgment.

While the influence of the guideline judgment was not sustained for CCOs imposed as principal sentences, the guideline judgment seemed to have played a greater role in the use of the CCO in combination with imprisonment. This practice increased shortly after the guideline judgment, over and above increases that occurred following the legislative change in September 2014 that

116. *Sentencing Act 1991* (Vic) s 36(2), inserted by *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) s 17.

increased the maximum imprisonment sentence that could be combined with a CCO from three months to two years. Use of the combined order, however, has also been influenced by the courts' preference for using a CCO in combination with imprisonment over fixing a non-parole period for an imprisonment sentence of two years or more.

The finding that the decline in suspended sentences has been largely responsible for the increase in the use of the CCO as a principal sentence has an important implication in relation to which sentences replaced suspended sentences. The relatively small increases found in the use of imprisonment between 2014 and 2015 (2.0 percentage points in the Magistrates' Court and 0.9 percentage points in the higher courts) suggest that imprisonment typically has not been the sentence used to replace suspended sentences. The primary replacement for suspended sentences has been the CCO. As a consequence, many offenders who were previously released upon sentence on the sole condition that they not reoffend (with the threat that their suspended sentence would be restored) are now subject to a range of conditions that both curtail their liberty and aim to facilitate their rehabilitation in the community.

A further important finding of this report is that the courts are much less inclined to use a number of the conditions that are available under the CCO regime. Conditions such as residence restrictions, electronic monitoring, and curfews continue to be used in a very small proportion of CCOs, if at all.

As discussed in *Boulton*, an important factor that will influence the readiness of courts to impose CCOs or combination sentences will be whether the orders are shown to be effective, and this in turn will depend on whether the orders are adequately resourced. The court has stated that:

Proper resourcing is essential to enable courts to attach conditions — both punitive and rehabilitative — in the knowledge that compliance with the conditions is likely to produce meaningful results. Otherwise, this new sentencing option will simply not realise its potential.¹¹⁷

The Council notes that, to that end, the government has recently allocated \$233 million (in additional funding) to Community Corrections Victoria to support the supervision of offenders.¹¹⁸ In addition, factors such as the rates of contravention of CCOs may influence the courts' use of the CCO into the future. It is therefore important for the Council to continue to monitor the use of the CCO, and the attendant judicial commentary, as it evolves.

117. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) [134].

118. State Government of Victoria, *Getting it Done: Victorian Budget 16/17: Service Delivery*, Budget Paper no. 3 (2016) 4, 97, 99, 101.

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Sentencing Advisory Council

Level 3

333 Queen Street

Melbourne VIC 3000

Telephone 1300 363 196

Facsimile 03 9908 8777

contact@sentencingcouncil.vic.gov.au

www.sentencingcouncil.vic.gov.au

Follow us on Twitter @SACvic