

Combined Orders of Imprisonment with a Community Correction Order in Victoria

Contents

Aim and research questions	1
Prevalence of combined orders	3
Age and gender of people who received combined orders	4
Offence types in combined order cases	5
The imprisonment component of combined orders	7
The CCO component of combined orders	18
Concluding remarks	21
References	23



Authored by Paul McGorrery and Paul Schollum

Research assistant: Melanie Hull

Published by the Sentencing Advisory Council, Melbourne, Victoria, Australia

© Copyright State of Victoria, Sentencing Advisory Council, 2023

This publication is protected by the laws of copyright. No part may be reproduced by any process except in accordance with the provisions of the *Copyright Act 1968* (Cth).

ISBN 978-1-925071-74-0 (Online)

Authorised by the Sentencing Advisory Council,
Level 3, 333 Queen Street, Melbourne VIC 3000

Copiedited and typeset by Catherine Jeffreys AE

When sentencing someone for criminal offending, courts can select from a number of possible sentencing orders, such as imprisonment, a drug and alcohol treatment order, a community correction order (CCO), a fine, an adjourned undertaking, or a dismissal with or without conviction.¹ Courts can also often impose a combination of these sentencing orders if doing so would be appropriate in the circumstances of the case.² The focus of this report is a particular combination of sentencing orders imposed in the same case: imprisonment with a CCO (a *combined order*). A CCO is a sentencing order that an offender serves in the community while subject to various mandatory conditions as well as at least one optional condition.³ When courts impose a combined order, the offender commences their CCO on release from prison.

Aim and research questions

The aim of this report is to present a statistical profile of combined orders of imprisonment with a CCO in the 9 calendar years from 2012 to 2020.⁴ This is an important topic of study for a number of reasons.

First, as the data in this report illustrates, combined orders have become very common, and it is important to understand whether the CCO and/or the imprisonment components of combined orders are functionally different from straight CCOs⁵ or straight imprisonment⁶ and what the implications of any differences might be. Most of our previous examinations of CCOs have been where a CCO was the most serious penalty in the case.⁷

-
1. See *Sentencing Act 1991* (Vic) s 7.
 2. On the ability to impose multiple sentencing orders for a single offence, see *Sentencing Act 1991* (Vic) ss 43 (CCO and fine), 44 (CCO and imprisonment), 49 (fine and ‘any other sentence’). Courts also can, and often do, impose different sentencing orders for various offences in a case when there are multiple charges: see, for example, Sentencing Advisory Council, *Reforming Adjourned Undertakings: Consultation Paper* (2022) 13 (highlighting the number of cases where an adjourned undertaking was imposed alongside a fine, imprisonment, a community order or an ‘other’ sentence).
 3. The mandatory conditions of a CCO are to not reoffend, not leave Victoria without permission, report to a community corrections centre and notify Corrections Victoria of any change of address: *Sentencing Act 1991* (Vic) s 45. The optional conditions can include medical or substance abuse treatment, unpaid community work, a requirement to live at a particular address, a prohibition on living at a particular address, a prohibition on associating with certain people, a curfew, not consuming alcohol, judicial monitoring and/or electronic monitoring: *Sentencing Act 1991* (Vic) pt 3A div 4.
 4. That reference period was chosen because CCOs replaced a number of pre-existing sentencing options in January 2012: *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic).
 5. That is, a CCO that is not combined with imprisonment.
 6. That is, imprisonment that is not combined with a CCO.
 7. Sentencing Advisory Council, *Community Correction Orders: Monitoring Report* (2014); Sentencing Advisory Council, *Community Correction Orders in the Higher Courts: Imposition, Duration, and Conditions* (2014); Sentencing Advisory Council, *Community Correction Orders: Second Monitoring Report (Pre-Guideline Judgment)* (2015). As required by section 104AA of the *Corrections Act 1986* (Vic), we have also published five reports on serious offending committed by people while serving a CCO, as well

Second, examining combined orders helps to identify the true number of people who receive CCOs each year, and the workload that CCOs represent for Corrections Victoria, which is responsible for supervising, assisting and monitoring people subject to a CCO.⁸ Sentencing data is often presented using a counting rule based on the *principal sentence*, where only one sentence type is counted per case, that being the most severe sentence imposed according to Victoria's sentencing hierarchy.⁹ Because imprisonment is more severe than a CCO, that counting rule excludes CCOs in cases where imprisonment (or a suspended sentence of imprisonment) has also been imposed. One of the hypotheses we sought to test in this report – in light of the greater number of prison sentences imposed in recent years and an apparent concurrent decrease in CCOs¹⁰ – was whether these changes are due to an increase in combined orders that has obscured the true prevalence of CCOs.

Third, there has been a series of legislative reforms since the introduction of CCOs in 2012. In 2014, the maximum additional prison term (on top of time already spent on remand) that could be imposed as part of a combined order was increased from 3 months to 2 years.¹¹ And in 2017, the maximum additional prison term was reduced from 2 years to 1 year.¹² A time series analysis of the imprisonment lengths in combined orders can indicate whether those reforms have had their intended effect.

In that context, this report answers the following research questions about combined orders of imprisonment with a CCO from 2012 to 2020:

- Did the yearly prevalence of combined orders change, and to what extent have combined orders contributed to the apparent increase in prison sentences and decrease in CCOs?

as a report on contraventions of community correction orders: Sentencing Advisory Council, *Serious Offending by People Serving a Community Correction Order: 2016–17* (2018); Sentencing Advisory Council, *Serious Offending by People Serving a Community Correction Order: 2017–18* (2019); Sentencing Advisory Council, *Serious Offending by People Serving a Community Correction Order: 2018–19* (2020); Sentencing Advisory Council, *Serious Offending by People Serving a Community Correction Order: 2019–20* (2021); Sentencing Advisory Council, *Serious Offending by People Serving a Community Correction Order: 2020–21* (2022); Sentencing Advisory Council, *Contravention of Community Correction Orders* (2017). There was some discussion of the differences between straight CCOs and CCOs in combined orders ('combined order CCOs') in the Council's 2016 report on CCOs: Sentencing Advisory Council, *Community Correction Orders: Third Monitoring Report (Post-Guideline Judgment)* (2016) 23–28.

8. See, for example, Victorian Auditor-General, *Managing Community Correction Orders* (2017) 6.

9. *Sentencing Act 1991* (Vic) ss 5(4)–(7).

10. According to data on our website, CCOs were most prevalent in 2015–16 after the Court of Appeal's guideline judgment about their use (*Boulton & Ors v The Queen* [2014] VSCA 342). Since then they have decreased from 20.9% to 11.8% of outcomes in the Magistrates' Court, and from 10.5% to 6.2% of outcomes in the higher courts. See Sentencing Advisory Council, 'Sentencing Outcomes in the Magistrates' Court' (sentencingcouncil.vic.gov.au, 2023); Sentencing Advisory Council, 'Sentencing Outcomes in the Higher Courts' (sentencingcouncil.vic.gov.au, 2023).

11. *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) s 18(1).

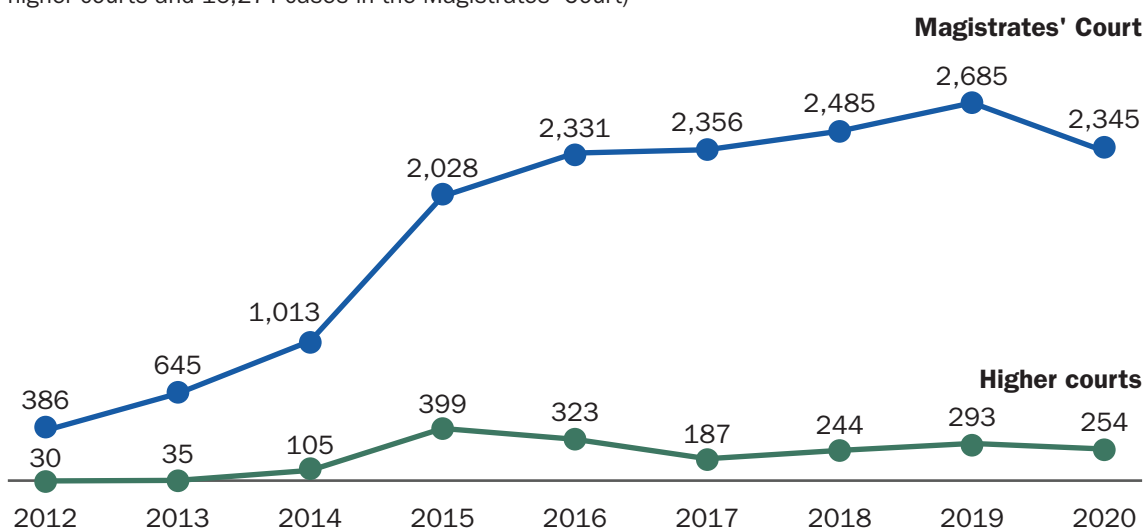
12. *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) s 12.

- What were the age and gender of people who received combined orders, and what were the principal offences¹³ in those cases?
- What were the imprisonment lengths in combined orders, and did those lengths change after the maximum additional prison term that could be part of a combined order changed in 2014 and 2017?
- Did the yearly proportion of combined orders that involved time served prison sentences¹⁴ change?
- What proportion of the total imprisonment length in combined orders was declared as pre-sentence detention (that is, how much was time already spent on remand and how much was time remaining to be served)?
- What conditions were attached to CCOs in combined orders, and did those conditions differ from the conditions in CCOs imposed in cases where imprisonment was not imposed?

Prevalence of combined orders

From 2012 to 2020, there were 18,144 combined orders imposed in Victoria: 16,274 in the Magistrates’ Court and 1,870 in the higher courts.¹⁵ In both jurisdictions, there has been a significant increase in the number of combined orders since 2012, especially in the Magistrates’ Court (Figure 1). The spike in 2015 in both jurisdictions

Figure 1: Number of cases in which combined orders were imposed, 2012 to 2020 (1,870 cases in the higher courts and 16,274 cases in the Magistrates’ Court)



13. The principal offence in a case is identified by the offence that received the most severe sentence in the case, or alternatively, if multiple offences received the same most severe sentence, by using the National Offence Index: Australian Bureau of Statistics, *National Offence Index* (abs.gov.au, 2018).

14. A *time served prison sentence* is a sentence equating almost exactly to the amount of time spent on remand prior to sentencing: see Sentencing Advisory Council, *Time Served Prison Sentences in Victoria* (2020) 1.

15. That is, the County and Supreme Courts of Victoria.

is most likely due to the increase in the maximum additional prison term (from 3 months to 2 years) in 2014 as well as courts responding with enthusiasm to the Court of Appeal's 2014 guideline judgment calling for increased use of CCOs.¹⁶ The drop in 2020 is very much due to the reduced number of cases finalised while court operations were affected by COVID-19.

The most common Magistrates' Court locations at which combined orders were imposed were Melbourne (3,156 combined orders), Dandenong (1,497 combined orders) and Sunshine (1,463 combined orders). These numbers are broadly consistent with the volume of cases dealt with at those court locations more generally.

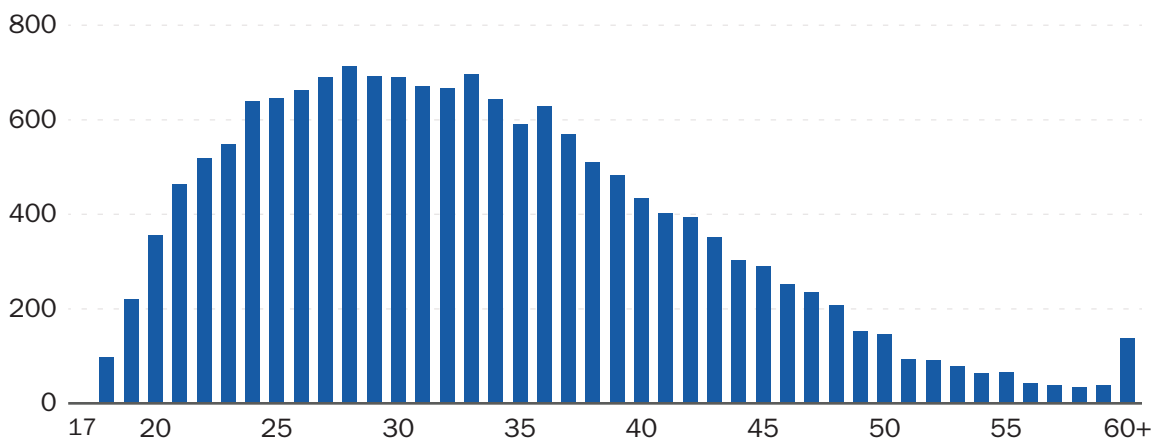
Age and gender of people who received combined orders

Of the 16,274 combined orders imposed in the Magistrates' Court, 90.1% were imposed on males (14,669 combined orders), and 9.9% were imposed on females (1,605 combined orders). These percentages were relatively consistent throughout the reference period, with males receiving between 88.7% and 91.2% of combined orders each year between 2012 and 2020.

90% of
combined orders
were imposed on
males

The age of offenders who received a combined order was available in 16,253 cases in the Magistrates' Court (age was not available in 21 cases). In these 16,253 cases, ages ranged from 17 (1 case) to 81 (1 case), with a median age of 32 (Figure 2).

Figure 2: Age of offenders who received combined orders in the Magistrates' Court, 2012 to 2020 (16,253 cases)



16. *Boulton & Ors v The Queen* [2014] VSCA 342.

The most common age was 28, accounting for 714 combined orders (4.4%). There was little variation in the age of offenders who received combined orders during the reference period, though there was a slight increase in the median age, from 31 to 32 for the first 6 years and then to 33 for the last three years.

The age and gender of offenders who received combined orders in the higher courts were much the same. About 88% were male (1,647 of 1,870 offenders), and the median age was 31, ranging from 18 (6 cases) to 74 (1 case), 83 (1 case) and 84 (1 case).

Offence types in combined order cases

An ANZSOC offence type¹⁷ was recorded for 16,180 combined order cases¹⁸ in the Magistrates' Court where a principal offence was identifiable. By far the most common offence type in these cases was assault and injury offences,¹⁹ accounting for more than one-third of combined order cases (35.6% or 5,763 cases). This was followed by drug-related offences²⁰ (12.0% or 1,947 cases), burglary offences²¹ (9.7% or 1,566 cases) and endangerment offences²² (7.6% or 1,225 cases). Figure 3 (page 6) shows the 20 most common principal offences in combined order cases in the Magistrates' Court. Six offences were noticeably more prominent than others: unlawful assault (10.7% of cases),²³ recklessly causing injury (9.8%),²⁴ burglary (7.6%),²⁵ trafficking in a non-commercial quantity of methylamphetamine (6.0%),²⁶ possessing a controlled weapon (4.4%)²⁷ and intentionally causing injury (3.7%).²⁸ Three of these are violent offences.

17. That is, the Australian Bureau of Statistics' Standard Offence Classification (ANZSOC): Australian Bureau of Statistics, *Australian and New Zealand Standard Offence Classification (ANZSOC)* (abs.gov.au, 2011).

18. In this report, a 'combined order case' is a case in which a combined order was imposed on the offender.

19. The most common assault and injury offence was unlawful assault (1,742 cases): *Summary Offences Act 1966* (Vic) s 23.

20. The most common drug-related offence was trafficking in a non-commercial quantity of methylamphetamine (976 cases): *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71AC.

21. The most common burglary offence was burglary (1,245 cases): *Crimes Act 1958* (Vic) s 76.

22. The most common endangerment offence was reckless conduct endangering serious injury (405 cases): *Crimes Act 1958* (Vic) s 23.

23. *Summary Offences Act 1966* (Vic) s 23.

24. *Crimes Act 1958* (Vic) s 18.

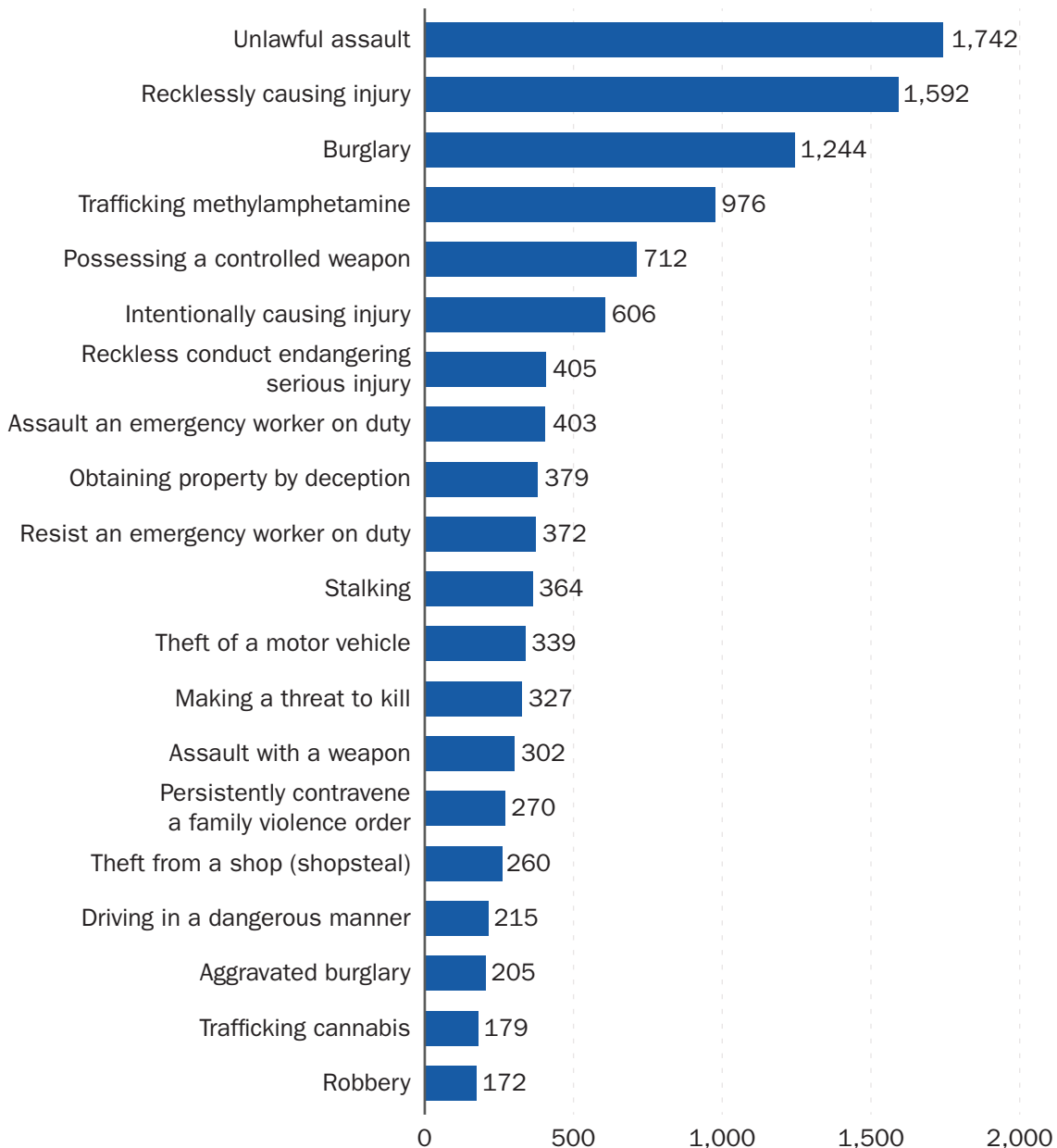
25. *Crimes Act 1958* (Vic) s 76.

26. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71AC.

27. *Control of Weapons Act 1990* (Vic) s 6(1).

28. *Crimes Act 1958* (Vic) s 18.

Figure 3: Most common principal offences in combined order cases in the Magistrates' Court, 2012 to 2020 (16,180 cases)



In the higher courts, an ANZSOC offence type was recorded for 1,869 combined order cases where a principal offence was identifiable.²⁹ The most common offence types were robbery offences³⁰ (23.0% or 429 cases), assault and injury offences³¹ (20.4% or 381 cases), drug-related offences (12.5% or 233 cases), burglary offences³² (9.9% or 185 cases) and sex offences³³ (9.1% or 170 cases).³⁴

29. There was one case where the principal offence was unknown.

30. The most common of these was armed robbery (287 cases): *Crimes Act 1958 (Vic)* s 75A.

31. The most common of these was intentionally causing injury (136 cases): *Crimes Act 1958 (Vic)* s 18.

32. The most common of these was aggravated burglary (123 cases): *Crimes Act 1958 (Vic)* s 77.

33. The most common of these was sexual penetration of a child aged under 16 (53 cases): *Crimes Act 1958 (Vic)* ss 49A, 49B (and repealed versions of the same offences).

34. The prevalence of these offence types in all cases in the higher courts was as follows: robbery offences (14.1%), acts intended to cause injury (14.8%), drug-related offences (16.9%), burglary

The five most common principal offences were all violent or robbery offences: armed robbery (287 cases), intentionally causing injury (136), recklessly causing serious injury (92), attempted armed robbery (61) and recklessly causing injury (59).

As to the prevalence of family violence offending in combined order cases (from 2016 to 2020),³⁵ 41.7% of combined orders were imposed in cases with a family violence indicator (5,093 of 12,202 cases). By way of comparison, just 15.2% of all cases in the Magistrates' Court in the same 5 years had a family violence indicator. Violent offending was especially common in combined order cases with a family violence indicator (59.7% of principal offences were assault and injury offences).

42% of combined orders were imposed in cases with a family violence indicator

The imprisonment component of combined orders

The analysis in this section focuses on the imprisonment component of combined orders. It assesses the extent to which the recent increase in prison sentences has been driven by an increase in combined orders (as opposed to straight imprisonment), the imprisonment lengths in combined orders, the rate of time served prison sentences in combined orders, and the proportion of imprisonment components of combined orders that were spent on remand as opposed to being served after sentencing.

How much of the recent increase in imprisonment is constituted by combined orders?

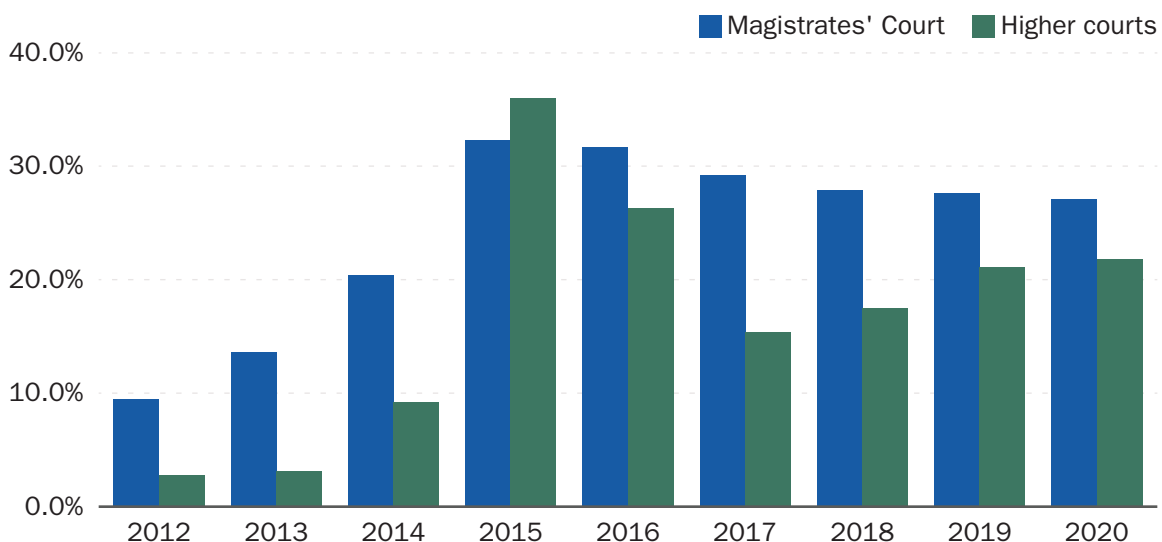
The total number of prison sentences imposed in the Magistrates' Court each year more than doubled between 2012 and 2020, from 4,069 to 8,640 (from 4.8% of all sentencing outcomes to 17.9%). There was also an increase in prison sentences imposed in the higher courts, albeit less pronounced, from 1,073 to 1,163 (from 55.6% of all sentencing outcomes to 74.6%).

offences (7.6%) and sex offences (18.4%). Therefore, relative to all sentenced cases in the higher courts, robbery offences and acts intended to cause injury comprise a particularly high proportion of combined order cases. Sex offences, on the other hand, are substantially less prevalent among combined order cases than among all cases.

35. In mid-2015, the Magistrates' Court began linking its database with Victorian Police's LEAP system to import the 'family violence indicator', which indicates that one or more offences in a case involved family violence: Sentencing Advisory Council, *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders: Discussion Paper* (2017) 34.

It seems that in both jurisdictions the increased use of combined orders played a significant role in that increase in prison sentences. As shown in Figure 4, in 2012 just 9.5% of all prison sentences imposed in the Magistrates' Court were combined orders (386 of 4,069 prison sentences), and the proportion was 2.8% in the higher courts (30 of 1,073 prison sentences). Combined orders as a proportion of prison sentences peaked in both jurisdictions in 2015 at just under one-third in the Magistrates' Court (32.3% or 2,028 of 6,283 prison sentences) and over one-third in the higher courts (36.0% or 399 of 1,109 prison sentences). These proportions have decreased slightly since then – to 27.1% in the Magistrates' Court and 21.8% in the higher courts in 2020 – but they are still much higher than in earlier years.

Figure 4: Combined orders as a proportion of cases in which imprisonment was imposed, 2012 to 2020 (62,776 cases in the Magistrates' Court and 10,854 cases in the higher courts)



What were the imprisonment lengths in combined orders?

Turning next to the imprisonment lengths in combined orders, we provide a brief review of legislative reforms to contextualise the data. When CCOs were first introduced in January 2012, the maximum additional prison term that could be imposed in a combined order (on top of time already spent on remand) was 3 months.³⁶ Less than 3 years later, that was increased to 2 years³⁷ in order '[t]o provide greater flexibility to the courts'.³⁸ And less than 3 years after that, it was reduced to 1 year.³⁹

36. Prior to CCOs coming into operation, courts could impose a combination of up to 3 months' imprisonment with what was previously known as a community-based order: *Sentencing Act 1991* (Vic) s 36(2) (repealed).

37. As amended by section 18(1) of the *Sentencing Amendment (Emergency Workers) Act 2014* (Vic).

38. Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2014, 2399 (Robert Clark, Attorney-General).

39. *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) s 12. There is one exception where courts may impose imprisonment of any length with a CCO, and that is when someone is being sentenced for one or more 'arson offences' as defined in clause 5 of Schedule 1 of the *Sentencing Act 1991* (Vic): see s 44(1A). See, for example, *Tannous v The Queen* [2017] VSCA 91.

The reduction in 2017 was because of a perception that the increase to 2 years had ‘led to an inappropriate use of community correction orders in serious cases’.⁴⁰

Relatedly, the Court of Appeal in 2016 said they were seeing ‘a spate of 23 month terms of imprisonment, combined with CCOs’,⁴¹ with some sentences crafted to avoid having to impose a non-parole period by not declaring some time on remand as pre-sentence detention.⁴² That occurred, they said, because of an awkward interplay between CCOs and non-parole periods in certain cases.

Courts are required to declare a non-parole period when imposing imprisonment of 2 years or more.⁴³ They are allowed to impose a CCO with imprisonment of 2 years or more via section 44 if enough time has been spent on remand.⁴⁴ But they are also prohibited from imposing a combined order and a non-parole period in the same case.⁴⁵ Taken together, these provisions would seem to suggest that courts that want to impose a combined order of imprisonment with a CCO are (in certain cases) simultaneously required to impose, but also prohibited from imposing, a non-parole period. The Supreme Court resolved the issue in 2020, clarifying that courts are ‘prohibited from fixing a non-parole period’ if they impose a combined order and the total imprisonment length is in excess of 2 years.⁴⁶

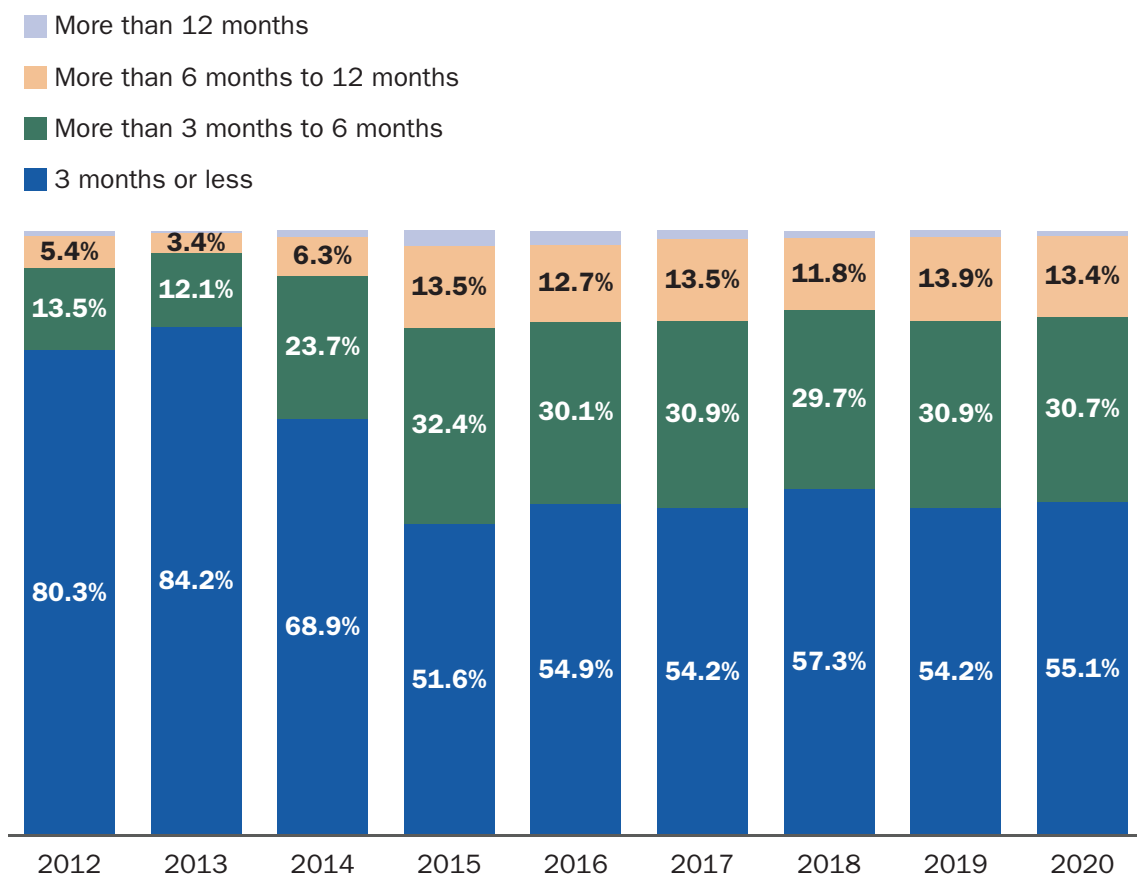


(imposing a 4-year prison sentence with a 4-year CCO to commence on release, and no non-parole period). While this carve-out for arson offences is not functionally limited to behaviour causing or risking bushfires, that appears to have been the intended target of this exception to the maximum duration of imprisonment: Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2014, 2399 (Robert Clark, Attorney-General).

40. Victoria, *Parliamentary Debates*, Legislative Assembly, 13 October 2016, 3861 (Martin Pakula, Attorney-General). Although not referenced in the second reading speech and not the apparent basis for the reduction, numerous calls were made by the Court of Appeal for the government to review the 2-year maximum duration of imprisonment in combined orders given the confusion it had caused between CCOs and parole: see *Dordevic v The Queen* [2016] VSCA 166, [33]; *DPP v Basic* [2016] VSCA 99, [35]; *DPP v Grech* [2016] VSCA 98, [75]; *Debono v The Queen* [2016] VSCA 16, [13]; *Deng-Mabior v The Queen* [2015] VSCA 179, [38].
41. *Dordevic v The Queen* [2016] VSCA 166, [33].
42. See *DPP v Hudgson* [2016] VSCA 254, [27]–[37]; *Pang v The Queen* [2019] VSCA 56, [63]–[64].
43. *Sentencing Act 1991* (Vic) s 11(1)(b).
44. Section 44 of the *Sentencing Act 1991* (Vic) places a limit on the imprisonment lengths in combined orders, but pre-sentence detention (time spent on remand) does not count towards that limit.
45. *Sentencing Act 1991* (Vic) s 11(2A).
46. *R v Dunn* [2020] VSC 708, [25]–[40].

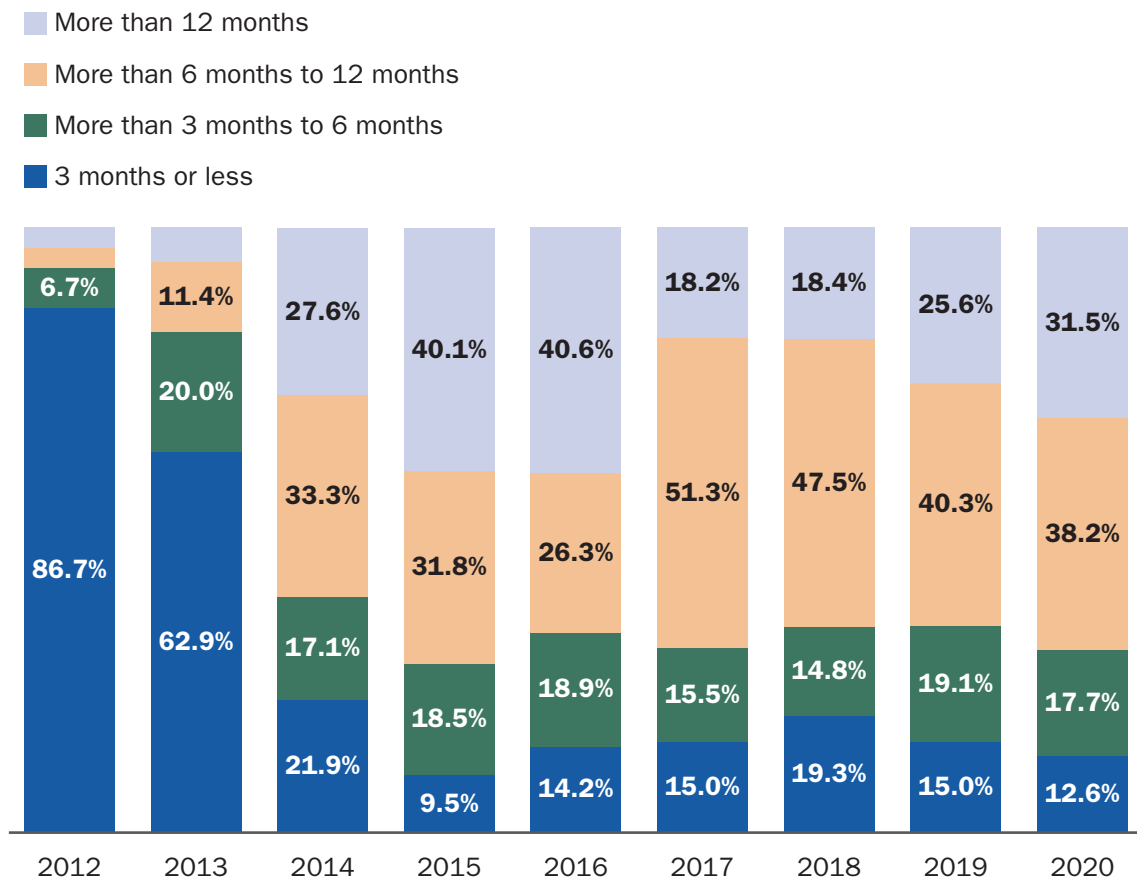
With that context in mind, Figure 5 shows the distribution of *total* imprisonment lengths (that is, time spent on remand plus remaining time to serve) in combined order cases in the Magistrates’ Court from 2012 to 2020. There was a clear change in 2014 and 2015, with imprisonment lengths in combined orders getting much longer. Whereas in 2013 just 15.8% of imprisonment lengths in combined order cases were longer than 3 months, by 2015 that percentage had tripled to 48.4%. This suggests that the increase in the maximum additional prison term in 2014 had the intended effect of enabling the imposition of combined orders in a much broader array of cases. The 2017 reform, however, of reducing the maximum additional prison term from 2 years to 1 year, does not seem to have had much effect in the Magistrates’ Court. This is most likely because even when 2-year imprisonment lengths were available in combined order cases, there were very few cases where an imprisonment length in excess of 12 months was imposed in the Magistrates’ Court as part of a combined order (1.4% of all combined order cases or 224 cases), with the longest being 4 years (1 case), 2.5 years (1 case) and 2 years (10 cases).

Figure 5: Proportion of combined order cases in the Magistrates’ Court, by imprisonment length, 2012 to 2020 (16,274 cases)



In comparison, it seems that *both* the 2014 reform and the 2017 reform had significant effects in the higher courts. While the majority of imprisonment components of combined orders were 3 months or less in 2012 (86.7%) and 2013 (62.9%), those had dropped to 21.9% in 2014 and 9.5% in 2015 (Figure 6). Instead, since 2014 the majority of imprisonment lengths in combined orders in the higher courts have been longer than 6 months. There were also 2 years – 2015 (40.1%) and 2016 (40.6%) – when imprisonment lengths in excess of 12 months were especially prevalent. These were the same 2 full years in which the maximum additional prison term that could be imposed in a combined order was 2 years rather than 1 year. In essence, the data suggests that both of the legislative reforms – extending the maximum additional prison term from 3 months to 2 years in 2014 and then reducing it to 1 year in 2017 – had their intended effects. As to the Court of Appeal’s observation in 2016 about a ‘spate’ of 23-month prison sentences,⁴⁷ there were indeed 17 such sentences in 2015 and another 14 in 2016, but only 4 or less every other year.

Figure 6: Proportion of combined order cases in the higher courts, by imprisonment length, 2012 to 2020 (1,869 cases)



47. *Dordevic v The Queen* [2016] VSCA 166, [33].

How many combined orders involved time served prison sentences?

In 2020, we released a report examining time served prison sentences, which involve an offender receiving a prison sentence identical to the amount of time that they have spent on remand. In that report, we found that time served prison sentences had quadrupled from 5% to 20% of all prison sentences in Victoria in the 6 years to 2017–18. We further observed that:⁴⁸

- there may be circumstances where the interests of justice require the court to impose a sentence that accounts for the time that the offender has spent on remand, even if the court would otherwise not have imposed a prison sentence if the offender had not been remanded in the first place;
- time served prison sentences can sometimes reflect the remand experience causing an inappropriate encouragement of guilty pleas, insofar as the offender may have had a plausible defence available to them but they pleaded guilty to facilitate their earlier release from custody;
- there are restrictions around the types of programs and services that can be provided to people who are held on remand compared to sentenced prisoners, because the latter have been found guilty and have a more fixed end point to their stay in prison (or point of eligibility for parole); and
- there are concerns around the availability of transition assistance for offenders who receive time served prison sentences, especially if their release after sentencing is not anticipated.

Building on that analysis, it is useful to specifically examine how many combined orders involved time served prison sentences. They may reflect cases where the court acknowledges the punitive experience of time spent on remand by imposing a time served prison sentence but also sees a need for some form of ongoing supervision or rehabilitation that could be facilitated by the additional imposition of a CCO.

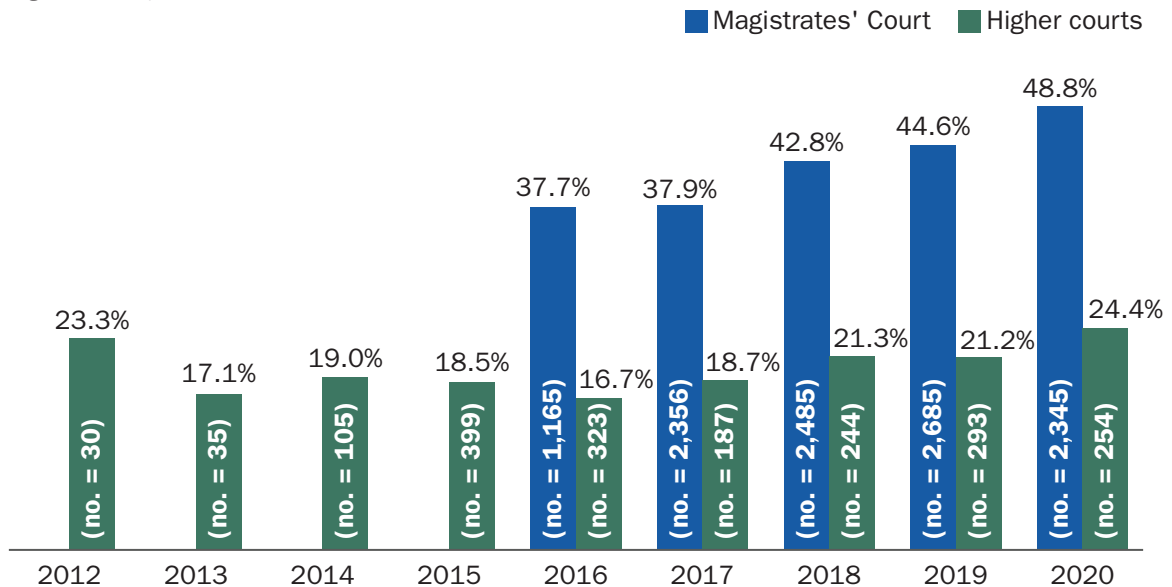
For the higher courts, we had data on pre-sentence detention for the entire reference period, but for the Magistrates' Court, we only had data on pre-sentence detention for the period 1 July 2016 onwards. The analysis for the Magistrates' Court in this section is therefore limited to a shorter reference period (4.5 years).

There were 11,036 combined orders imposed in the Magistrates' Court during that 4.5-year period and 1,870 in the higher courts during the whole 9-year reference period. Figure 7 (page 13) shows how many of those combined order cases involved time served prison sentences. To allow for calculation errors,

48. Sentencing Advisory Council (2020), above n 14.

we considered a sentence to be a time served prison sentence if the total effective sentence of imprisonment and pre-sentence detention were the same plus or minus 5 days (0.17 months). In the Magistrates’ Court, there was a clear increase in the proportion of combined order cases that involved time served prison sentences, from 37.7% to 48.8%. By 2020, about half of all combined order cases in the Magistrates’ Court involved time served prison sentences. Conversely, there was a less noticeable increase in time served prison sentences in the higher courts, though they did increase slightly from 16.7% in 2016 to 24.4% in 2020.

Figure 7: Proportion of combined order cases that involved time served prison sentences, 2012 to 2020 (11,036 combined order cases in the Magistrates’ Court and 1,870 combined order cases in the higher courts)



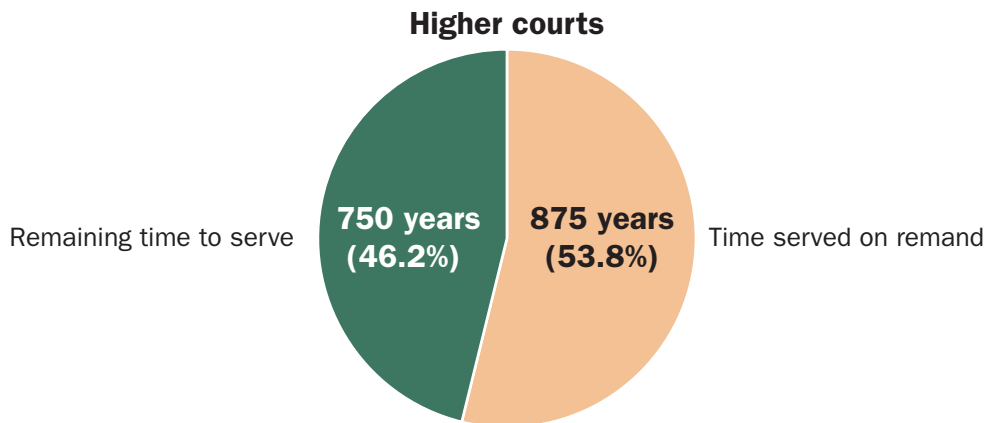
How much prison time in combined orders was pre-sentence detention?

When courts sentence someone to imprisonment, they are required to declare any time spent on remand in relation to the matter as pre-sentence detention (time already served).⁴⁹ In the higher courts, there were 1,870 combined orders imposed between 2012 and 2020. Of those, 1,527 offenders had at least some pre-sentence detention declared, meaning that they had spent some time on remand – and conversely, 18% of people who received combined orders in the higher courts had not spent time on remand prior to sentencing. Across the 1,870 cases, there was a total of

49. *Sentencing Act 1991 (Vic) s 18*. As the Court of Appeal recently observed, calculating pre-sentence detention is usually straightforward, but it can be complex ‘where an offender is sentenced for different offences at different times’: *Seiler v The King* [2023] VSCA 171, [26]–[27].

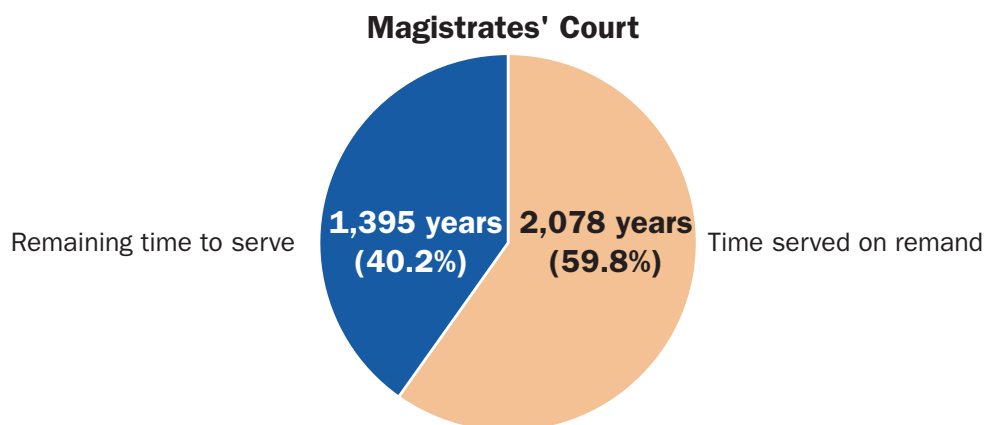
1,625 years of imprisonment imposed. There was also a total of 875 years declared as pre-sentence detention in those cases (Figure 8), meaning that just over half of sentenced prison terms in combined orders in the higher courts (53.8%) had already been served on remand prior to sentencing.

Figure 8: Overall total prison terms imposed in combined order cases in the higher courts, 2012 to 2020, by whether time was spent on remand or still to be served (1,870 cases)



The situation in the Magistrates' Court is very similar. There were 11,036 combined orders imposed in the Magistrates' Court between July 2016 and December 2020. Of those, 10,040 offenders had spent at least some time on remand. Conversely, this means that just 9% of offenders who received a combined order in the Magistrates' Court had not spent any time on remand prior to sentencing. Across the 11,036 cases, courts ordered 3,473 years of imprisonment. They also declared 2,078 years of pre-sentence detention, meaning that 59.8% of prison terms in combined orders in the Magistrates' Court had already been served prior to sentencing.

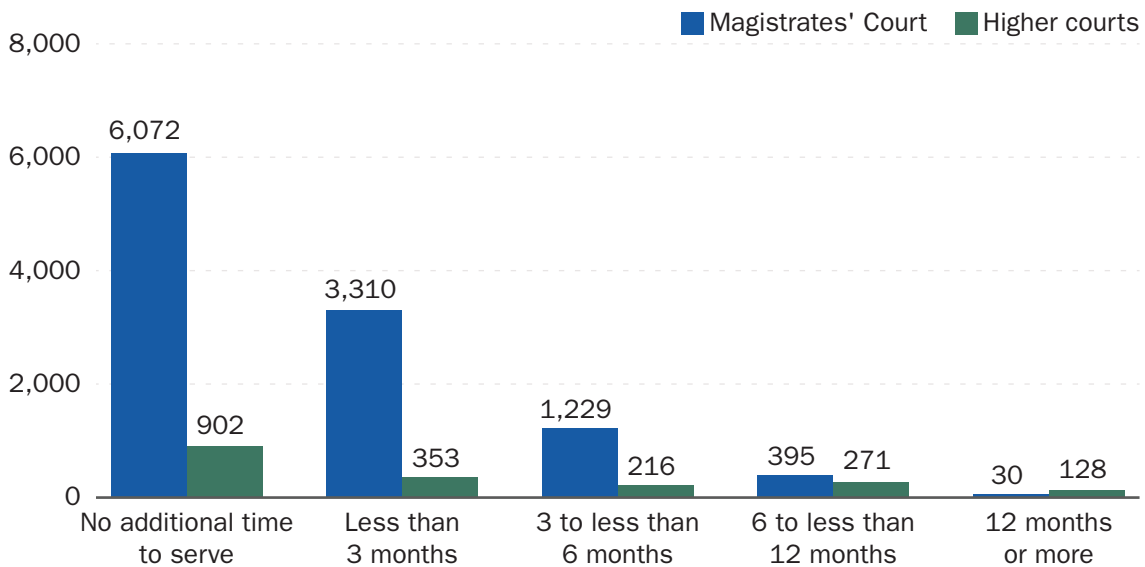
Figure 9: Overall total prison terms imposed in combined order cases in the Magistrates' Court, July 2016 to December 2020, by whether time was spent on remand or still to be served (11,036 cases)



How much prison time in combined orders was still to be served after sentencing?

Figure 10 shows how much additional time each offender was required to serve in the 11,036 combined order cases from July 2016 to December 2020 in the Magistrates’ Court and the 1,870 combined order cases from 2012 to 2020 in the higher courts. In the Magistrates’ Court, 55.0% of combined order cases involved no additional prison term (6,072 cases), and just 3.9% required an additional prison term of 6 months or more. In the higher courts, longer additional prison terms were more common. While almost half of combined order cases required no additional prison term after sentencing (48.2%), just over one-fifth required an additional prison term of 6 months or more (21.3%).

Figure 10: Lengths of additional prison terms still to be served after sentencing in combined order cases (11,036 cases in the Magistrates’ Court from July 2016 to December 2020 and 1,870 cases in the higher courts from 2012 to 2020)



A potential issue arises here – in particular, how much additional prison time a court can order when imprisonment and a CCO are imposed on separate offences in the same case. When courts impose imprisonment⁵⁰ and a CCO *together* on the same offence (or offences) in a case, section 44⁵¹ of the *Sentencing Act* clearly allows them to

50. This specifically does not include youth justice centre orders: *Scammell v The Queen* [2015] VSCA 206, [20]; *Bradshaw v The Queen* [2017] VSCA 273, [54]; *Guo v The Queen* [2020] VSCA 273, [30]–[31].

51. Section 44(1) of the *Sentencing Act 1991* (Vic) reads:

(1) Subject to any specific provision relating to the offence, when sentencing an offender in respect of one, or more than one, offence (other than an offence to which clause 5 of Schedule 1 applies), a court may make a community correction order in addition to imposing a sentence of imprisonment only if the sum of all the terms of imprisonment to be served (after deduction of any period of custody that under section 18 is reckoned to be a period of imprisonment or detention already served) is one year or less.

impose up to an additional 12 months' imprisonment (on top of time spent on remand⁵²) that the offender must serve before the CCO commences.⁵³ There are, though, many cases where courts impose imprisonment and a CCO separately on different offences in the case.⁵⁴ When this occurs, there are two plausible and competing interpretations of section 44 (see Table 1): if section 44 applies, courts can impose an additional 12 months' imprisonment; if it doesn't apply, section 38(2) restricts the maximum additional prison term to just 3 months.⁵⁵ The reason there are plausible and competing interpretations of section 44 is that the language of the provision alternates between charge-specific language ('the offence') and case-specific language ('when sentencing an offender' and 'the sum of all the terms of imprisonment'). If the focus of the provision is charge-specific, then section 44 does not apply when imprisonment and a CCO are imposed separately. But if the provision is case-specific, then section 44 does apply.

Table 1: Hypothetical case examples to illustrate the previous ambiguity about whether section 44 applies or not (prior to *Wright v The King* [2023] VSCA 243)

Case	Charge	Sentence	Does section 44 apply?	Maximum additional prison term
Case 1	Charge 1 Charge 2	Imprisonment with a CCO	Yes	12 months
Case 2	Charge 1 Charge 2	Imprisonment CCO	Unclear	If no, 3 months If yes, 12 months

52. Time spent on remand does not count towards this maximum: *Sentencing Act 1991* (Vic) s 44(1); *Younger v The Queen* [2017] VSCA 199, [64]; *Williams v The Queen* [2018] VSCA 171, [36]. As the Supreme Court observed in *R v Dunn* [2020] VSC 708, [12]:

it makes no difference how much time the offender has spent on remand before sentence. Instead, for the purposes of the applicable ceiling of imprisonment specified in the concluding words of s 44(1), what matters is whether the *future* period to be served (from the time of the imposition of sentence) is within that ceiling.

See, for example, *Cooke v The Queen* [2021] VSCA 70, [38], in which the offender received a combined order involving a 2.5-year prison term, 1.5 years of which were pre-sentence detention. See also *Luchian v The Queen* [2019] VSCA 145, [66].

53. See *Sentencing Act 1991* (Vic) s 44(3).

54. One of the consequences of imposing imprisonment and a CCO on separate offences is that if an offender breaches the CCO after release from prison and is to be resentenced, the court can only resentence the offender for the offences to which the CCO applied and must otherwise leave the prison sentences for the other offences untouched: *Sentencing Act 1991* (Vic) s 83AS(1)(c). For the four 'matters tell[ing] in favour of' this approach, see *Luu v The Queen* [2018] VSCA 92, [21].

55. Section 38(2) of the *Sentencing Act 1991* (Vic) provides that '[u]nless section 44(3) applies, a community correction order must commence on a date specified by the court that is not later than 3 months after the making of the order'.

Both potential interpretations of section 44 appear to have found operational purchase. In *DPP v Wright & Anor*, the County Court – and the Director of Public Prosecutions, who argued the point – concluded that section 44 *does not* apply in cases where imprisonment and a CCO are imposed separately, thereby limiting the maximum additional prison term that an offender can serve to 3 months.⁵⁶ That case involved a category 2 offence (home invasion), for which courts cannot impose a combined order.⁵⁷ The court concluded that imposing a prison sentence on the category 2 offence and a CCO on other offences was allowed (despite section 5(2H)) but would limit the maximum additional prison term to 3 months (because section 44 did not apply). On the other hand, there were also 277 cases in the 4.5 years to December 2020 in which the Magistrates’ Court imposed an additional prison term of 3.5 months⁵⁸ or more despite imposing imprisonment and a CCO on separate offences,⁵⁹ suggesting section 44 *did* apply in those cases.

Subsequently, the Court of Appeal delivered its judgment on appeal from the County Court decision in *Wright*.⁶⁰ In that new judgment, the Court of Appeal overturned the County Court’s reasoning. The Court of Appeal concluded that (a) the section 5(2H) limitation on combined orders for category 2 offences operates at the charge level, such that a court can nevertheless impose a CCO on other offences in the case, and also that (b) the section 44 lifting of the maximum additional prison time after sentencing from 3 months to 12 months has case-level application, regardless of whether there is a category 2 offence in the case (so long as there is also at least one offence on which to impose the CCO).⁶¹ In other words, in all cases where imprisonment and a CCO are imposed – whether together on the same charge, together on multiple charges or separately on different charges – section 44 operates to enable an additional 12 months’ imprisonment after sentencing.

56. *DPP v Wright & Anor* [2023] VCC 375, [108]. In that case, one of the offences was a category 2 offence (mandating imprisonment unless certain exceptions apply), and the court found itself prohibited from imposing ‘a sentence of imprisonment ... in addition to making a community correction order in accordance with section 44’ (*Sentencing Act 1991* (Vic) s 5(2H)) not just on the category 2 offence but in the case as a whole. We note that one plausible possibility does not seem to have been expressly considered in *Wright*, in particular, the imposition of a prison term for the category 2 offence, but the separate imposition of a combined order of imprisonment with a CCO on the other offences. This could be supported by the court’s reasoning in *Daniher*, that it would be unusual to ‘impose limitations on the sentencing discretion ... simply because [some charges] are on the same indictment as a category 2 offence’: *DPP v Daniher (a pseudonym)* [2020] VCC 945, [65]–[73].

57. *Sentencing Act 1991* (Vic) ss 5(2G), (2H), as amended by *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) ss 3–4.

58. An additional half-month was added for this analysis, to allow for the possibility of rounding errors.

59. In that 4.5-year period, there were 11,036 combined orders imposed in the Magistrates’ Court, and 21.2% of them involved the imprisonment and CCO being imposed on separate offences (2,337).

60. *Wright v The King* [2023] VSCA 243.

61. *Wright v The King* [2023] VSCA 243, [61]–[65].

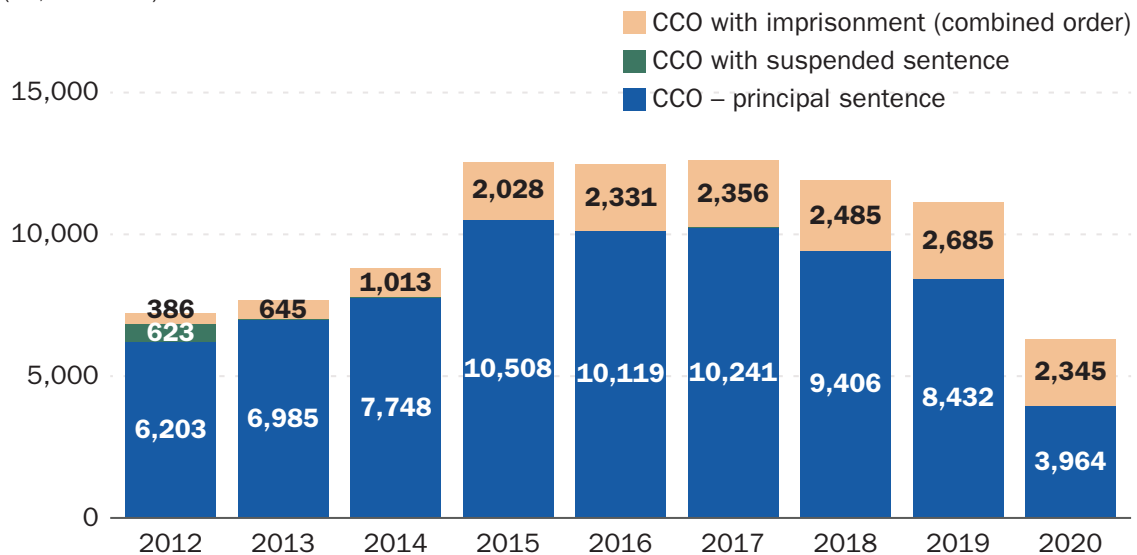
The CCO component of combined orders

Having examined the data relating to the imprisonment component of combined orders, we now present an analysis of data relating to the CCO component. This includes an examination of how many ‘hidden’ CCOs⁶² are imposed in combined orders each year and the conditions attached to CCOs in combined order cases.

Has there actually been a decrease in CCOs in recent years?

A count of principal sentences would suggest that there has been a 20% decline in the number of CCOs imposed in recent years, from a peak of 10,508 in 2015 to 8,432 in 2019 (the effect of COVID-19 on court operations means that 2020 is not a useful comparator). CCOs are not, however, always the principal sentence. In a combined order case, imprisonment is the principal sentence. Sometimes, too, wholly and partially suspended sentences of imprisonment (which have now been abolished) can also be imposed alongside a CCO, and they were especially back in 2012. Once those ‘hidden’ CCOs are accounted for, there was a more modest 11.5% decline in the number of CCOs imposed in the Magistrates’ Court in that same timeframe, from 12,560 in 2015 to 11,117 in 2019.

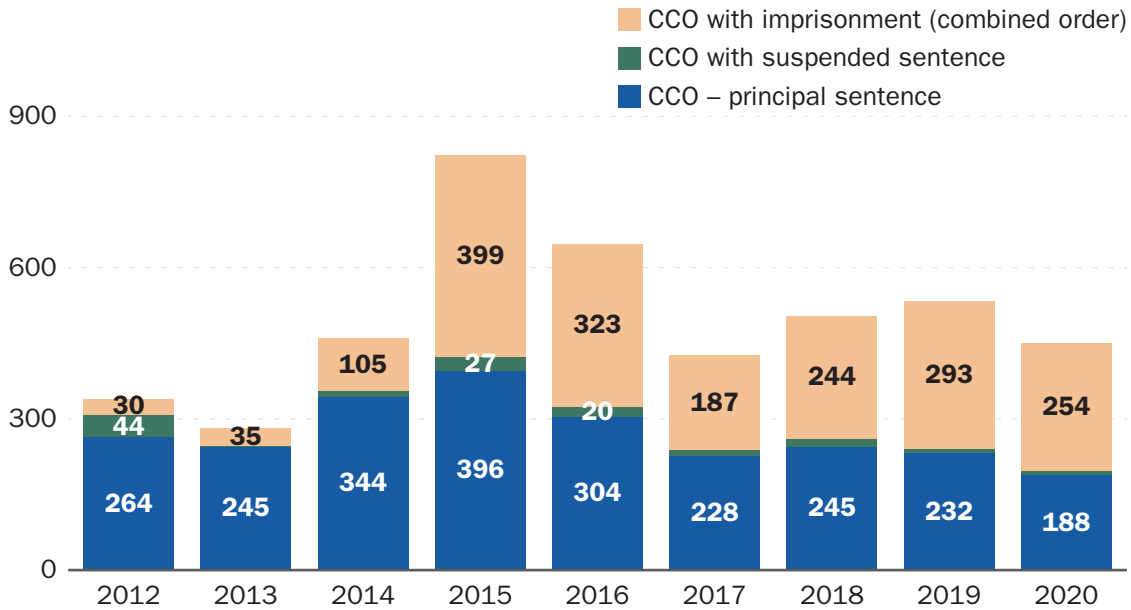
Figure 11: Number of straight CCOs and combined order CCOs in the Magistrates’ Court, 2012 to 2020 (90,617 CCOs)



The number of ‘hidden’ CCOs is even more stark in the higher courts (Figure 12, page 19). More than half (52.9%) of all CCOs in the higher courts between 2015 and 2020 were imposed alongside a more severe sentence (1,700 with imprisonment and 91 with a wholly or partially suspended sentence of imprisonment) and would not be represented in a count of principal sentences.

62. In this report, a ‘hidden’ CCO is a CCO that is not included in a count of principal sentences.

Figure 12: Number of straight CCOs and combined order CCOs in the higher courts, 2012 to 2020 (4,463 CCOs)



Taken together, these findings highlight the true prevalence of CCOs in Victoria. From January 2012 (when CCOs first came into effect) to December 2020 (the end of our reference period), there were 95,080 cases in Victoria in which a CCO was imposed.

Conditions of CCOs in combined orders

The *Sentencing Act* specifies a number of mandatory and optional conditions for CCOs.⁶³ One of the optional conditions is unpaid community work, which the Court of Appeal has described as ‘the punitive element’ of a community order, while also noting that all aspects of a CCO can be punitive when they curtail freedoms.⁶⁴ We sought to identify whether CCOs in combined orders have a lower rate of unpaid community work conditions. This could reflect the prison sentence in those cases being the primary ‘punitive element’ of the sentence⁶⁵ and priority being given to conditions of CCOs that are geared more towards rehabilitation and protection of the community (therapeutic and supervisory conditions) instead.⁶⁶

63. *Sentencing Act 1991* (Vic) ss 45–48LA.

64. *Boulton & Ors v The Queen* [2014] VSCA 342, [60].

65. See, for example, how the Court of Appeal described the punitive aspects of imprisonment in its guideline judgment in *Boulton & Ors v The Queen* [2014] VSCA 342, [104]–[106]:

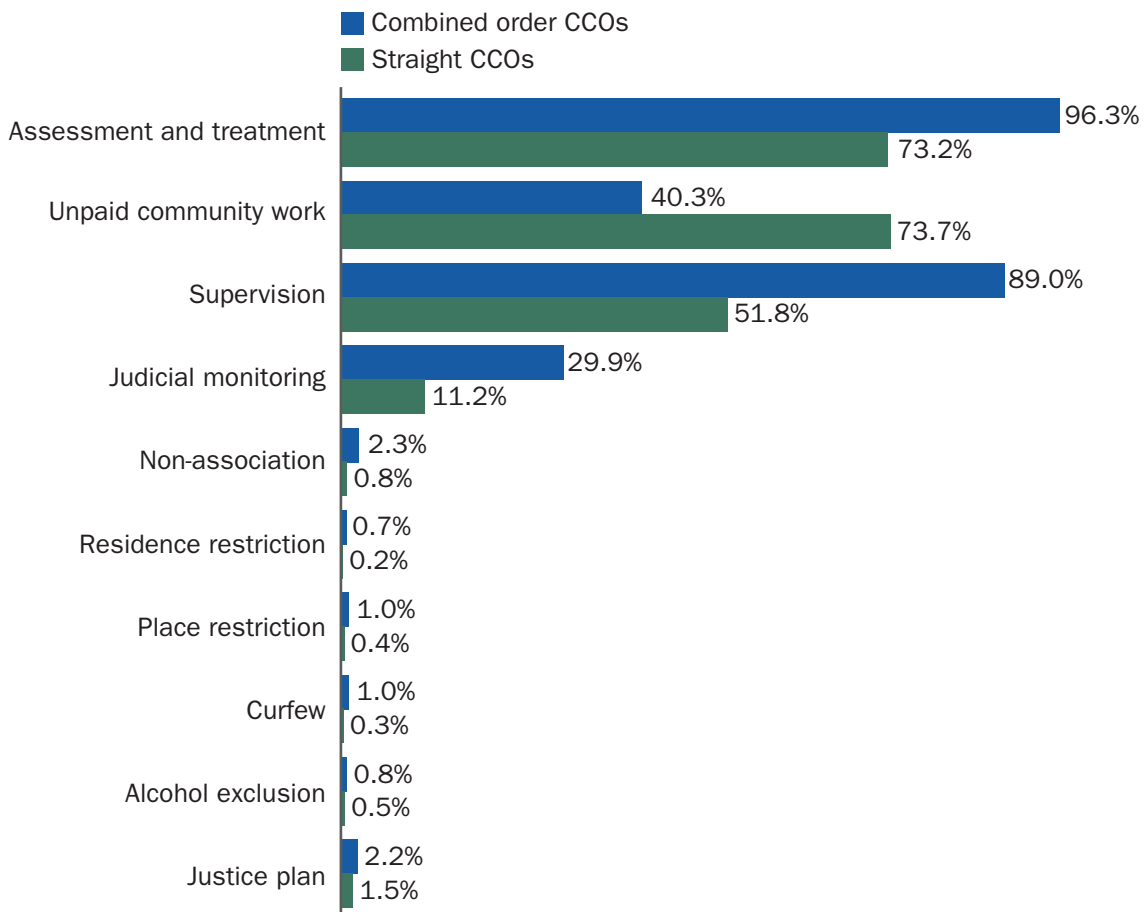
[I]mprisonment is uniquely punitive because of that feature which distinguishes it from all other forms of sanction, namely, the complete loss of liberty. But imprisonment has a number of other punitive features, apart from the loss of physical freedom. There is the loss of personal autonomy and of privacy, and the associated loss of control over choice of activities and choice of associates. The prisoner is subject to strict discipline, restriction of movement, forced association with other prisoners and — for a substantial part of each day — confinement in a small cell (in many instances, a cell shared with a cellmate not of the prisoner’s choosing). There is, moreover, exposure to the risks associated with the confinement of large numbers of people in a small space — violence, bullying, intimidation. On any view, this is severe punishment.

66. See, for example, *DPP v Gatherer* [2022] VCC 2190, [61] (‘this order will be a largely therapeutic one, I do not propose to attach a work condition’).

The data shows that there was indeed only *one* condition that was less common in combined order CCOs than in straight CCOs, and it was unpaid community work (40.3% of combined order CCOs compared to 73.7% of straight CCOs) (Figure 13). In contrast, combined order CCOs were more likely to involve every other kind of optional condition:

- assessment and treatment (96.3% in combined order CCOs compared to 73.2% in straight CCOs);
- Corrections supervision (89.0% compared to 51.8%);
- judicial monitoring (29.9% compared to 11.2%); and
- each of the less common optional conditions (non-association, residence restriction, place restriction, curfew, alcohol exclusion and justice plan).

Figure 13: Conditions in CCOs in the Magistrates' Court, 2012 to 2020 (16,274 combined order CCOs and 73,606 straight CCOs)



The higher rate of all other conditions among CCOs in combined orders could reflect the more complex risk and needs profile of offenders who receive combined orders. If their offending was serious enough to warrant a prison term, and/or they were remanded because they were deemed an unacceptable risk for bail, this could reflect a cohort that is more in need of rehabilitation and supervision than is the cohort of offenders who receive straight CCOs.⁶⁷

67. Sentencing Advisory Council (2016), above n 7, 28 ('people on remand are likely to be charged with more serious offences or to have more extensive criminal histories').

Concluding remarks

This report has presented a statistical profile of cases in which an offender received a combined order of imprisonment with a CCO. The key findings include:

- there has been a significant increase in the number of combined orders imposed, especially in the Magistrates' Court, with almost 3,000 combined orders imposed in 2019 (prior to COVID-19 affecting court operations);
- the vast majority of combined orders were imposed on males (90.1%), and the median age of people who received combined orders was 32;
- the most common offence type in combined order cases in the Magistrates' Court was an assault and injury offence (35.6%), such as unlawful assault and recklessly causing injury, and in the higher courts it was robbery offences (23.0%);
- 41.7% of combined orders in the Magistrates' Court were imposed in cases with a family violence indicator;
- the majority of prison terms in combined orders were spent on remand (59.8% in the Magistrates' Court and 53.8% in the higher courts);
- the offender still had to serve additional prison time of 6 months or more in 3.9% of combined order cases in the Magistrates' Court and 21.3% of combined order cases in the higher courts;
- a significant proportion of combined order cases involve time served prison sentences, especially in the Magistrates' Court (by 2020, 48.8% of combined order cases involved time served prison sentences in the Magistrates' Court and 24.4% in the higher courts);
- there were 95,080 CCOs imposed in Victoria from 2012 to 2020, and 18,144 (19.1%) were imposed as part of a combined order with imprisonment; and
- the conditions of combined order CCOs differ markedly from conditions of straight CCOs: unpaid community work was much more commonly imposed in straight CCOs (73.7% compared to 40.3%) whereas all other conditions were more common in combined order CCOs.

At the outset, we set out to examine the true prevalence of CCOs and whether it might be obscured by the oft-employed counting rule based on the principal sentence (which only counts the most serious sentence type in each case). Between 2015 and 2020, half of all CCOs in the higher courts (50.2%) and one-fifth of CCOs in the Magistrates' Court (21.3%) were imposed alongside imprisonment. In 2019 alone, this amounts to almost 3,000 'hidden' CCOs, which have significant resource implications for the justice system in facilitating and supervising these orders.

We also sought to determine whether there were substantive differences between combined order CCOs and straight CCOs. The differences in the conditions imposed

on these two groups were marked. While courts appropriately acknowledge that all conditions of CCOs can operate in a punitive fashion, it is the unpaid community work condition that clearly tends to fall away in CCOs in combined orders, and instead courts prioritise conditions that are geared towards facilitating the offender's rehabilitation once they leave prison: assessment and treatment, Corrections supervision and judicial monitoring. There are most likely a number of reasons for this. For one, the experience of incarceration possibly militates against the need for a community work condition to operate as a form of punishment. For another, people who are held on remand, or those who commit offending serious enough to warrant a prison term, are more likely to have complex needs that require an additional focus on rehabilitation and supervision in the conditions of their CCO.

We also sought to understand the effect of the 2014 and 2017 legislative reforms to CCOs, first increasing the maximum additional prison term after sentencing from 3 months to 2 years, and then reducing it from 2 years to 1 year. It seems both reforms had their intended effect. The number of combined orders did significantly increase in 2015, though this was likely also due to the Court of Appeal's 2014 guideline judgment in *Boulton*. There was also a significant increase in imprisonment lengths in combined orders, suggesting that the increased maximum additional prison term at least partly contributed to the increase in combined orders. Further, while the 2017 reform does not appear to have had much effect in the Magistrates' Court – where prison sentences in excess of 12 months are rare – the imprisonment component of combined orders in the higher courts became much shorter in 2017. In essence, both of those reforms appear to have achieved their intended effect of first expanding and then contracting the availability and use of combined orders.

References

Bibliography

- Australian Bureau of Statistics, *Australian and New Zealand Standard Offence Classification (ANZSOC)* (abs.gov.au, 2011) <<https://www.abs.gov.au/statistics/classifications/australian-and-new-zealand-standard-offence-classification-anzsoc>>.
- Australian Bureau of Statistics, *National Offence Index* (abs.gov.au, 2018) <<https://www.abs.gov.au/statistics/classifications/national-offence-index>>.
- Sentencing Advisory Council, *Community Correction Orders in the Higher Courts: Imposition, Duration, and Conditions* (Sentencing Advisory Council, 2014).
- Sentencing Advisory Council, *Community Correction Orders: Monitoring Report* (Sentencing Advisory Council, 2014).
- Sentencing Advisory Council, *Community Correction Orders: Second Monitoring Report (Pre-Guideline Judgment)* (Sentencing Advisory Council, 2015).
- Sentencing Advisory Council, *Community Correction Orders: Third Monitoring Report (Post-Guideline Judgment)* (Sentencing Advisory Council, 2016).
- Sentencing Advisory Council, *Contravention of Community Correction Orders* (Sentencing Advisory Council, 2017).
- Sentencing Advisory Council, *Reforming Adjourned Undertakings: Consultation Paper* (Sentencing Advisory Council, 2022).
- Sentencing Advisory Council, 'Sentencing Outcomes in the Higher Courts' (sentencingcouncil.vic.gov.au, 2023) <<https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/sentencing-outcomes-higher-courts>>.
- Sentencing Advisory Council, 'Sentencing Outcomes in the Magistrates' Court' (sentencingcouncil.vic.gov.au, 2023) <<https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/sentencing-outcomes-magistrates-court>>.
- Sentencing Advisory Council, *Serious Offending by People Serving a Community Correction Order: 2016–17* (Sentencing Advisory Council, 2018).
- Sentencing Advisory Council, *Serious Offending by People Serving a Community Correction Order: 2017–18* (Sentencing Advisory Council, 2019).
- Sentencing Advisory Council, *Serious Offending by People Serving a Community Correction Order: 2018–19* (Sentencing Advisory Council, 2020).
- Sentencing Advisory Council, *Serious Offending by People Serving a Community Correction Order: 2019–20* (Sentencing Advisory Council, 2021).
- Sentencing Advisory Council, *Serious Offending by People Serving a Community Correction Order: 2020–21* (Sentencing Advisory Council, 2022).
- Sentencing Advisory Council, *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders: Discussion Paper* (Sentencing Advisory Council, 2017).
- Sentencing Advisory Council, *Time Served Prison Sentences in Victoria* (Sentencing Advisory Council, 2020).
- Victorian Auditor-General, *Managing Community Correction Orders* (Victorian Auditor General's Office, 2017).

Cases

Boulton & Ors v The Queen [2014] VSCA 342

Bradshaw v The Queen [2017] VSCA 273

Cooke v The Queen [2021] VSCA 70

Debono v The Queen [2016] VSCA 16

Deng-Mabior v The Queen [2015] VSCA 179

Dordevic v The Queen [2016] VSCA 166

DPP v Basic [2016] VSCA 99

DPP v Daniher (a pseudonym) [2020] VCC 945

DPP v Gatherer [2022] VCC 2190

DPP v Grech [2016] VSCA 98

DPP v Hudgson [2016] VSCA 254

DPP v Wright & Anor [2023] VCC 375

Guo v The Queen [2020] VSCA 273

Luchian v The Queen [2019] VSCA 145

Luu v The Queen [2018] VSCA 92

Pang v The Queen [2019] VSCA 56

R v Dunn [2020] VSC 708

Scammell v The Queen [2015] VSCA 206

Seiler v The King [2023] VSCA 171

Tannous v The Queen [2017] VSCA 91

Williams v The Queen [2018] VSCA 171

Wright v The King [2023] VSCA 243

Younger v The Queen [2017] VSCA 199

Legislation

Control of Weapons Act 1990 (Vic)

Corrections Act 1986 (Vic)

Crimes Act 1958 (Vic)

Drugs, Poisons and Controlled Substances Act 1981 (Vic)

Sentencing Act 1991 (Vic)

Sentencing Amendment (Community Correction Reform) Act 2011 (Vic)

Sentencing Amendment (Emergency Workers) Act 2014 (Vic)

Sentencing (Community Correction Order) and Other Acts Amendment Act 2016 (Vic)

Summary Offences Act 1966 (Vic)

Quasi-legislative materials

Victoria, *Parliamentary Debates*, Legislative Assembly, 13 October 2016 (Martin Pakula, Attorney-General).

Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2014 (Robert Clark, Attorney-General).

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 (X) @SACvic