

Time Served Prison Sentences in Victoria

February 2020

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A *time served prison sentence* is a sentence of imprisonment imposed on an offender where the length of imprisonment is equal to the amount of time that the offender has spent on remand in custody. This report analyses the proportion of prison sentences that were time served prison sentences in Victoria over the seven financial years to 30 June 2018. A time served prison sentence may be a prison sentence alone or it may be combined with a community correction order (CCO).

This report finds that time served prison sentences have increased from 5% to 20% of all prison sentences, and that each year about half were combined with a CCO. The increase in time served prison sentences, especially those that do not involve a CCO component, raises several issues that warrant further consideration, including:

- whether, in light of the principle of parsimony, a time served prison sentence (without a CCO) or a straight CCO is the less severe sentence;
- whether the increase in time served prison sentences may inappropriately encourage early guilty pleas;
- whether offenders sentenced to time served prison sentences have fewer opportunities to organise their transition from prison back into the community and to receive supervision and support services, both during their time on remand and following their release; and
- the extent to which a time served prison sentence (without a CCO) is capable of achieving the key sentencing purposes of rehabilitation or protection of the community.

Remand and bail in Victoria

Prisoners in Victoria can be either sentenced or unsentenced. A sentenced prisoner is someone who has pleaded guilty (or has been found guilty), has been sentenced to a term of imprisonment and is in custody serving that sentence. An unsentenced prisoner is held in custody pending the resolution of their criminal proceedings. They are innocent until proven guilty and as such are treated differently from sentenced prisoners.

During criminal proceedings, a person released on charge and summons is simply required to attend court as directed. A person released on bail is usually required to comply with additional conditions, such as abiding by a curfew, not associating with certain people or not residing at a certain address.¹

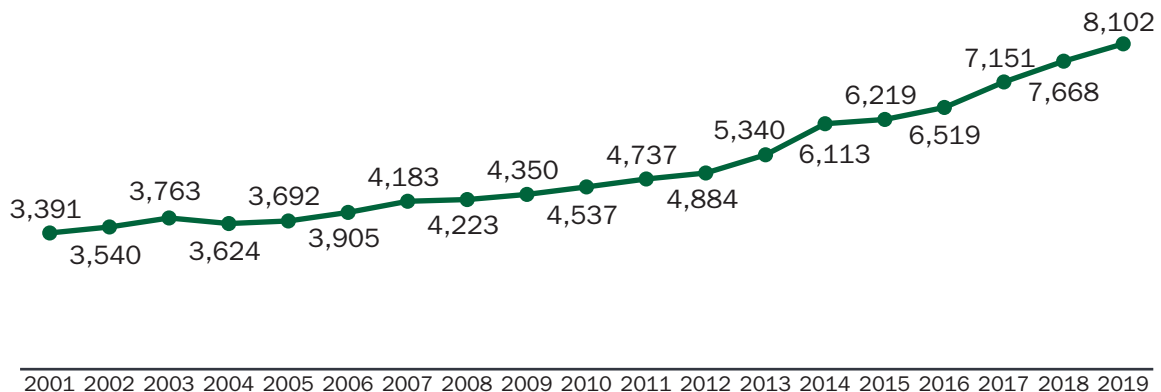
1. *Bail Act 1977* (Vic) s 5AAA.

In most cases, there is a presumption that a person charged with an offence will be granted bail.² There are, however, a number of reasons that a person may instead be held in remand as an unsentenced prisoner. There may be an unacceptable risk that the person will endanger the safety or welfare of the community, commit an offence while on bail, not attend court when required, or interfere with witnesses if released.³ Also, the offences charged may be so serious that the court can only grant the person bail if they can establish a compelling reason or exceptional circumstances.⁴

Victoria's growing prison population

Victoria's prison population has increased significantly in recent years. In 2001, 3,391 people were in Victorian prisons.⁵ By 30 June 2019, that number had more than doubled to 8,102 (Figure 1).⁶ Even accounting for population growth, this represents a near twofold increase, from 71 to 123 prisoners per 100,000 Victorians.⁷

Figure 1: Prison population in Victoria (sentenced and unsentenced prisoners), as at 30 June each year, 2001 to 2019



To accommodate this growing demand, several prisons have been built or expanded in recent years. The 2019–20 Victorian budget included more than \$1.8 billion to build new prison infrastructure, including 1,600 new beds.⁸

2. *Bail Act 1977* (Vic) s 4.

3. *Bail Act 1977* (Vic) s 4E(1)(a).

4. *Bail Act 1977* (Vic) s 4AA–4D.

5. Corrections Victoria, 'Monthly Time Series Prisoner and Offender Data' (corrections.vic.gov.au, 2019) <<https://www.corrections.vic.gov.au/publications-manuals-and-statistics/monthly-time-series-prisoner-and-offender-data>> at 6 January 2020.

6. *Ibid.* Figure 1 shows the number of offenders in custody on 30 June each year.

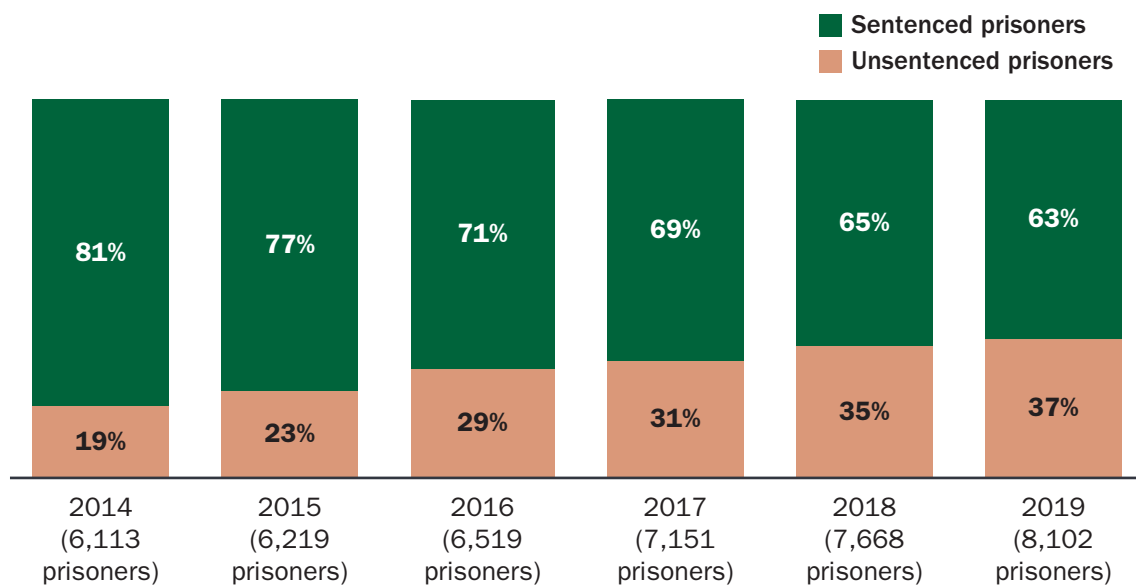
7. Australian Bureau of Statistics, 'Australian Demographic Statistics, June 2019', cat. no. 3101.0 (2019) <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3101.0Main+Features1Jun%202019?OpenDocument>> at 6 January 2020.

8. Minister for Corrections, 'A Stronger Prison System to Keep People Safe', Media Release (24 May 2019) <<https://www.premier.vic.gov.au/a-stronger-prison-system-to-keep-people-safe/>> at 6 January 2020.

Increasing number of unsentenced prisoners

A significant driver of the growth in Victoria's prison population has been the increasing number of unsentenced prisoners who are on remand awaiting trial, rather than being charged on summons or granted bail. The number of remandees in Victoria has more than doubled in the last six years, from 1,139 in 2014 to 2,973 in 2019.⁹ Remandees now constitute 37% of Victoria's prison population, compared with 19% five years earlier (Figure 2). This increase in the number of people held on remand has largely been driven by legislative reforms designed to tighten bail eligibility.¹⁰

Figure 2: Proportion of sentenced and unsentenced prisoners in Victoria, as at 30 June each year, 2014 to 2019



Increasing number of prison sentences

Increases in the number of remandees may not, however, represent the sole cause of Victoria's rising prison population. As illustrated in Figure 3 (page 4), there has also been an increase in the number of prison sentences imposed, especially since 2012.¹¹

9. Corrections Victoria (2019), above n 5. Numbers and percentages are taken from the monthly time series prisoner and offender data as at 30 June each year, with 2014 as the first year.

10. See for example, Marilyn McMahon, *No Bail, More Jail? Breaking the Nexus Between Community Protection and Escalating Pre-Trial Detention* (2019) 11–13.

11. Sentencing Advisory Council, 'Sentencing Outcomes in the Higher Courts' (sentencingcouncil.vic.gov.au, 2019) <<https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/sentencing-outcomes-higher-courts>> at 6 January 2020; Sentencing Advisory Council, 'Sentencing Outcomes in the Magistrates' Court' (sentencingcouncil.vic.gov.au, 2019) <<https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/sentencing-outcomes-magistrates-court>> at 6 January 2020.

Figure 3: Number of prison sentences imposed each year in Victoria, all adult courts, 2004–05 to 2017–18

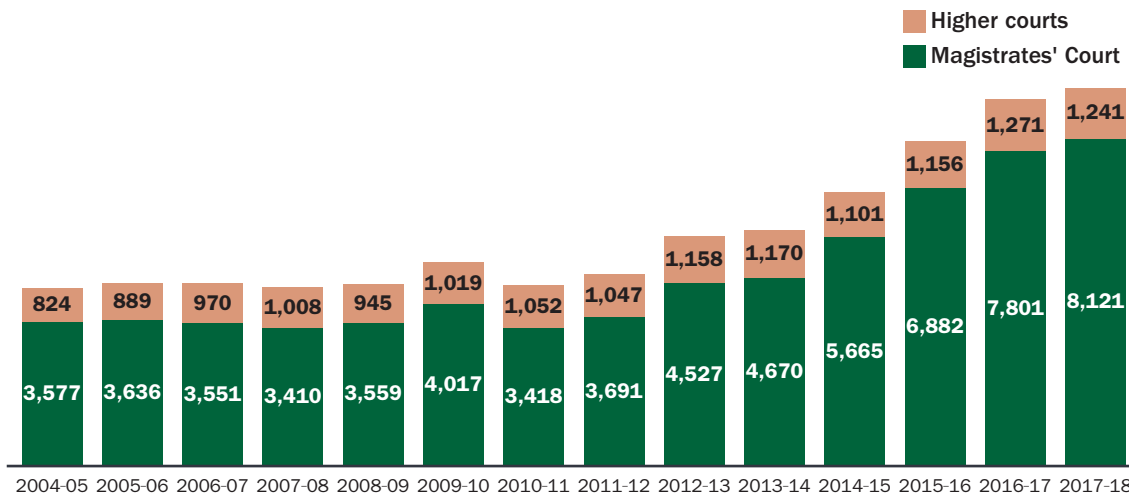
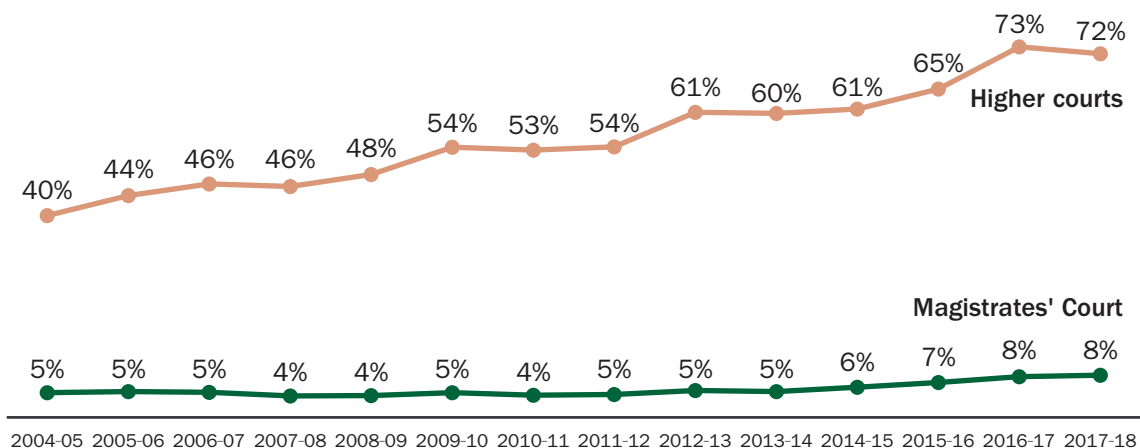


Figure 4 then illustrates the *proportion* of all cases that received a term of imprisonment in both the higher courts (the County and Supreme Courts) and the Magistrates’ Court.

The number of prison sentences imposed in the *higher courts* increased from 824 in 2004–05 to 1,241 in 2017–18. In that same timeframe, the number of cases finalised in the higher courts decreased from 2,058 to 1,721. This means that, proportionally, prison sentences increased from 40% to 72% of all outcomes each year in cases finalised in the higher courts.

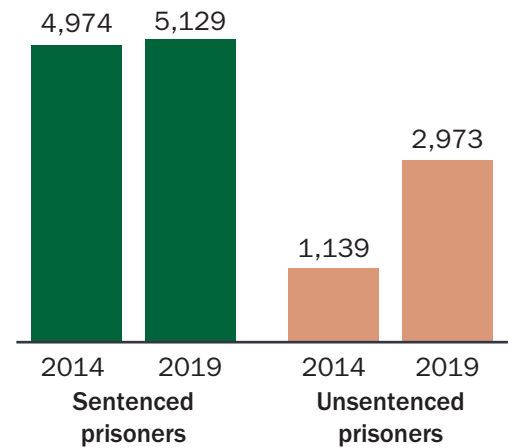
In that same 14-year period, the number of prison sentences imposed in the *Magistrates’ Court* more than doubled from 3,577 to 8,121 – that is, over 4,500 more prison sentences were imposed in 2017–18 than in 2004–05. The number of cases finalised in the Magistrates’ Court also increased, from 72,945 to 97,133 cases. The proportion of sentences imposed in the Magistrates’ Court that involved a term of imprisonment therefore increased from 5% to 8%.

Figure 4: Proportion of sentences imposed in Victoria each year that involved a term of imprisonment, all adult courts, 2004–05 to 2017–18



Notably, despite this significant increase in the number of prison sentences imposed in Victoria each year, comparatively few additional *sentenced* prisoners are in custody. As at 30 June 2014, there were 6,113 total prisoners in Victoria, and five years later there were 8,102 prisoners. Of the almost 2,000 additional prisoners, just 155 were sentenced prisoners while 1,834 were unsentenced prisoners (Figure 5). This means that sentenced prisoners account for less than 8% of the overall increase in Victoria's prison population in the last five years, while unsentenced prisoners account for over 92% of the increase.

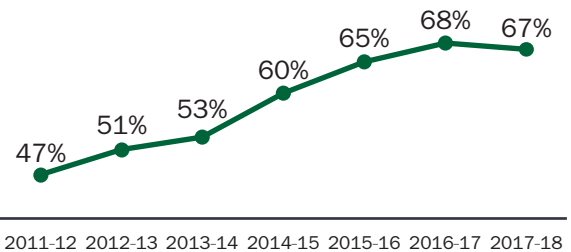
Figure 5: Number of sentenced and unsentenced prisoners in Victoria, as at 30 June 2014 and 30 June 2019



What proportion of people sentenced to imprisonment had spent time on remand?

Figure 6 shows the proportion of people in Victoria sentenced to prison in the seven years to 30 June 2018 who were remanded for at least one day.¹² That is, it indicates how many people who were sentenced to prison had spent at least some time on remand. In 2011–12, 47% of people sentenced to imprisonment had spent some time on remand. That proportion has since increased steadily, peaking at 68% in 2017. In the three years to 30 June 2018, two-thirds of people sentenced to imprisonment had spent some time on remand prior to being sentenced.

Figure 6: Proportion of all people sentenced to prison who had at least one day of pre-sentence detention declared by the sentencing court, all adult courts, 2011–12 to 2017–18



An important question arises about the proportion of people who are sentenced to *non-custodial* dispositions after being held on remand or have their charges withdrawn or dismissed. While remanding those people may have initially been appropriate (for example, they may have posed an unacceptable risk to community safety), it is possible that some of them may have been unduly punished. The data required to determine how many people held on remand go on to receive non-custodial dispositions is, however, not readily available,¹³ and the question is outside the scope of this report.

12. Data from Court Services Victoria was used to identify all cases in which a court declared that pre-sentence detention had been served. The proportion of all prison sentences that those cases account for each year was then identified.

13. Sentencing courts imposing non-custodial sentences do not declare pre-sentence detention and therefore do not record it. Recent research by the Crime Statistics Agency does, however, suggest that a significant proportion of women held on remand in 2018 received non-custodial dispositions (38%), including a CCO (20%), a fine (4%), charges not proven (9%) and other (6%): Crime Statistics Agency, *Characteristics and Offending of Women in Prison in Victoria, 2012–2018* (2019) 29–30.

How many prison sentences were time served prison sentences?

The key focus of this report is to ascertain how many offenders received a time served prison sentence after spending time on remand; that is, how many people spent time on remand and then received a prison sentence equal to that period.

Prison sentences imposed in Victoria over the seven years to 30 June 2018 were analysed to determine whether the duration of those offenders' prison sentences was less than, roughly equal to, or more than the amount of time they served on remand.¹⁴ It was possible to determine this because legislation requires Victorian courts to reckon any time spent in a custodial facility as time already served towards any custodial sentence imposed.¹⁵ Data relating to wholly or partially suspended sentences, which have now been phased out in Victoria, was excluded.¹⁶ The Council did, however, include *combined orders*, whereby a court imposes a short term of imprisonment combined with a CCO, and the CCO takes effect upon the offender's release.¹⁷ A prison sentence was considered to be a time served prison sentence if the length of the prison term imposed was two days more or less than the length of pre-sentence detention spent on remand prior to sentencing.¹⁸ The results of this analysis are illustrated in Figure 7 (page 7).

In 2011–12, there were 2,241 cases sentenced in Victorian courts in which the offender had spent time on remand before receiving a term of imprisonment (IMP). In 87% of those cases, the prison sentence imposed exceeded the amount of time that the offender had spent on remand (pre-sentence detention or PSD). In the remaining cases, the prison sentence was equal to (11%) or less than (2%) the amount of time that the offender had spent on remand. In the six years since then, there has been a numerical increase in all three categories:

- **Prison sentences of less duration than time served on remand (IMP < PSD).**
This category had the smallest number each year, though it increased numerically from 50 to 294, and proportionally from 2% to 5% of all cases in which an offender received a term of imprisonment after spending time on remand.

14. Data used for this analysis was provided by Court Services Victoria. Some people may have multiple ongoing cases for which they are remanded and are sentenced at any given time. This may mean that an order declaring pre-sentence detention could reflect a period of remand served for another set of proceedings.

15. *Sentencing Act 1991* (Vic) s 18(1).

16. *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic).

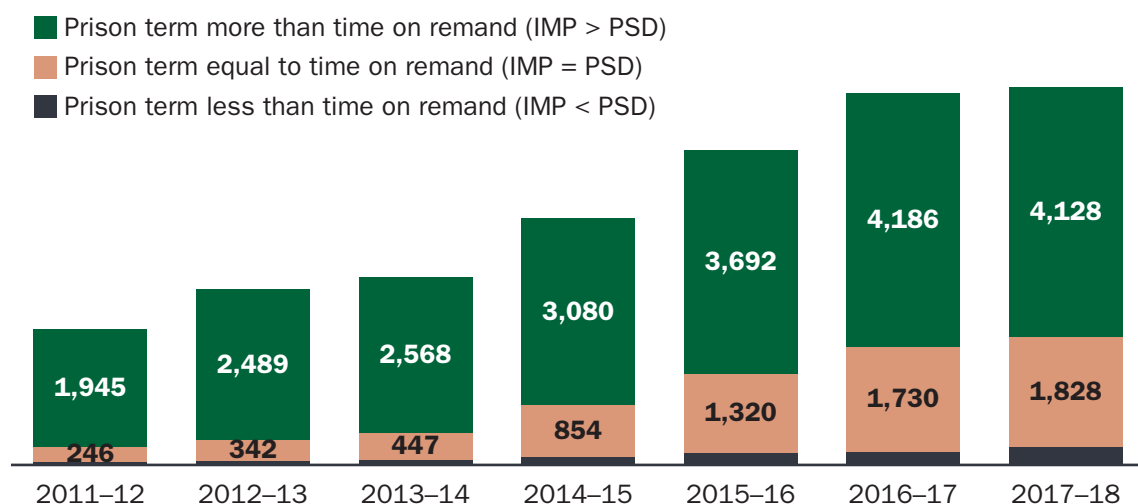
17. *Sentencing Act 1991* (Vic) s 44.

18. The two-day window allowed for administrative processing and the negligible possibility of calculation error. There were a small number of cases (72) in which the offender's time served on remand was not 'reckoned as served' despite the offender receiving a prison sentence; these were excluded from the analysis. As the Court of Appeal has said, where an offender was in custody for the offences being sentenced, there is 'no sound reason to order that pre-sentence detention not be reckoned as time served under the sentence the judge imposed': *Pang v The Queen* [2019] VSCA 56 (15 March 2019) [46]. The only explanations for not reckoning time served are that the offender had multiple proceedings afoot, which can complicate the assessment of pre-sentence detention, or that an error was made.

Despite the low numbers, this is a matter of concern: 1 in 20 people who were held on remand and received a prison sentence in 2017–18 spent more time on remand than the ultimate sentence imposed.

- **Prison sentences of greater duration than time served on remand (IMP > PSD).** This category had the largest number each year, increasing numerically from 1,945 to 4,128. However, this actually represents a proportional decrease from 87% to 66% of all cases in which an offender received imprisonment after spending time on remand.
- **Prison sentences equal to the amount of time spent on remand (IMP = PSD).** This category increased numerically from 246 to 1,828, and proportionally from 11% to 29% of all cases in which an offender received imprisonment after spending time on remand.

Figure 7: Prison terms imposed, according to whether they were more than, less than or equal to the length of pre-sentence detention for offenders sentenced to prison after spending time on remand, all adult courts, 2011–12 to 2017–18¹⁹



In summary, in the most recent year, nearly one in three offenders sentenced to imprisonment who had spent time on remand received a *time served prison sentence*, compared with just one in nine offenders six years prior.

Most of this increase is a result of time served prison sentences imposed in the Magistrates' Court rather than in the higher courts. Between 2013–14 and 2017–18, the higher courts imposed 15% of all prison sentences in Victoria but less than 5% of time served prison sentences. In that same timeframe, the Magistrates' Court imposed 85% of all prison sentences but more than 95% of time served prison sentences.

19. As a brief methodological note, the seven years of data in Figure 6 does not include 19 cases sentenced in the higher courts in which the offender received a life sentence of imprisonment, nor does it include 63 cases in which data on the amount of time spent on remand was missing or otherwise unavailable.

How many time served prison sentences were combined orders?

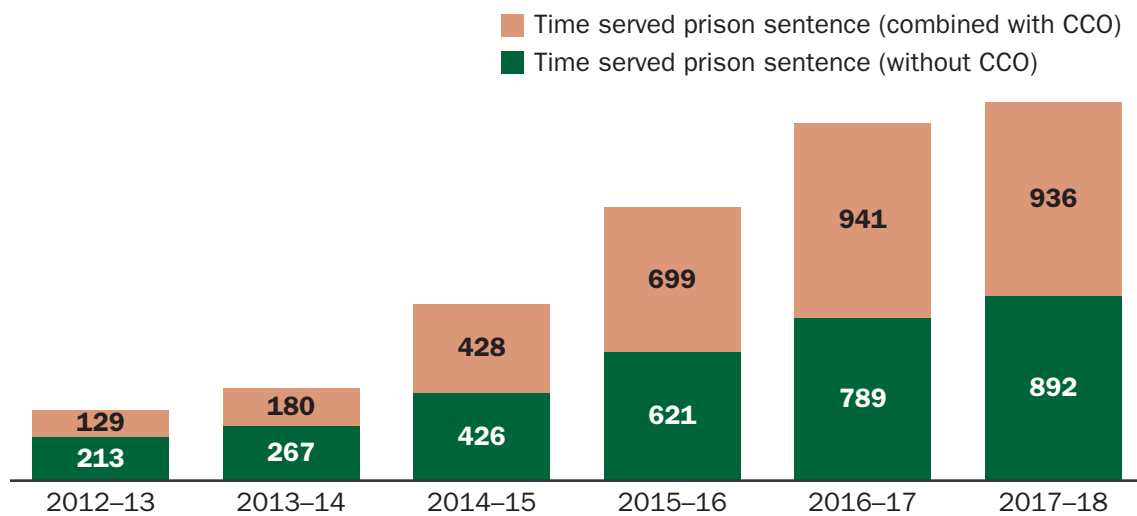
To some extent, this increase in the number of time served prison sentences has been driven by an increase in the number of *combined orders* imposed pursuant to section 44 of the *Sentencing Act 1991* (Vic) (a prison sentence combined with a CCO that is served upon release). The maximum *effective*²⁰ prison term that can be combined with a CCO has varied since CCOs were first introduced in 2012: initially the maximum term was three months, then two years in 2014 and then one year in 2017.²¹

Two questions arise in this context: What proportion of combined orders are time served prison sentences? And inversely, What proportion of time served prison sentences are combined orders? As to the first question, the Council has previously found that, of 356 combined orders imposed in the higher courts in 2015, nearly one-third (31%) of the prison terms in those cases were equal to the amount of time that the offender had served on remand.²² Somewhat similarly, in the six financial years to 30 June 2018,²³ 36% of all combined orders imposed in Victorian courts (3,313 of 9,137) involved a prison sentence equal to the amount of time spent on remand.²⁴

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20. There is a unique interaction between pre-sentence and post-sentence detention when courts impose a combined order pursuant to section 44 of the *Sentencing Act 1991* (Vic). The Court of Appeal has confirmed on a number of occasions that only *post-sentence* detention counts towards the calculation of the maximum permissible prison term in a combined order; *pre-sentence* detention does not count towards that maximum: *Younger v The Queen* [2017] VSCA 199 (11 August 2017) [65] ('an effective term of imprisonment longer than the maximum period allowed under s 44 could be imposed if the effect of any declared pre-sentence detention was that the term of imprisonment that remained to be served at the time of sentencing was less than the maximum period of imprisonment which s 44 permitted'). See also *Williams v The Queen* [2018] VSCA 171 (11 July 2018) [36]–[39]. This means that when a court imposes a combined sentence of time served plus a CCO, the prison term imposed and reckoned in that case may exceed what would otherwise have been permissible.
 21. *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic) s 21 (from January 2012); *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) s 18 (from September 2014); *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) s 12 (from March 2017).
 22. Sentencing Advisory Council, *Community Correction Orders: Third Monitoring Report (Post-Guideline Judgment)* (2016) 27–28. Time served prison sentences were not, however, the focus of that report, and the data was limited to higher court sentences. The current report, on the other hand, focuses directly on time served prison sentences, uses a longer reference period and includes data from all adult courts. The findings are, nevertheless, similar.
 23. Although the reference period for much of this report is the seven financial years to 2017–18, CCOs and combined orders came into effect in January 2012, such that the first full financial year of data is 2012–13.
 24. This counts combined orders imposed in cases in which the offender served some time on remand. The average proportion of combined orders involving time served prison sentences in those cases over that time period was 36%, but the proportion of combined orders involving time served prison sentences has varied slightly over the years, especially in the two most recent financial years of available data: 2012–13 (31%), 2013–14 (30%), 2014–15 (29%), 2015–16 (32%), 2016–17 (42%), 2017–18 (43%).

As to the second question, Figure 8 illustrates the proportion of time served prison sentences that were combined orders. In the six financial years to 30 June 2018, 51% of all time served prison sentences (3,313 of 6,521) were combined orders. That is, someone sentenced to a time served prison sentence was slightly more likely to receive a CCO in addition to that sentence than to solely receive a time served prison sentence. Indeed, it appears to have become commonplace for offenders who are sentenced after having spent time on remand to argue that the appropriate disposition in their case should be a time served prison sentence combined with a CCO.²⁵

Figure 8: Number of time served prison sentences each year, by whether the offender was also subject to a CCO upon release, all adult courts, 2012–13 to 2017–18



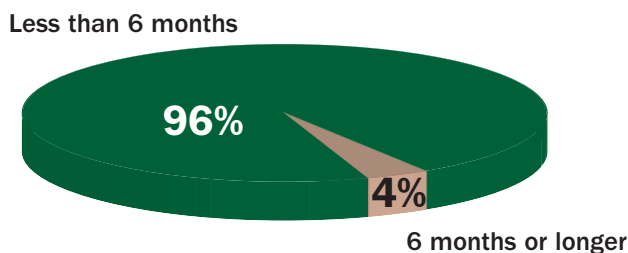
It also seems that legislative change affected the proportion of time served prison sentences that were combined with a CCO each year. When the maximum prison term that could be combined with a CCO was initially three months, combined orders represented 38% of all time served prison sentences in 2012–13. Subsequently, when the maximum prison term that could be combined with a CCO increased to two years in September 2014, combined orders increased to 53% of time served prison sentences in 2015–16. There was then only a marginal decrease (to 51%) in the proportion of time served prison sentences that were combined orders in 2017–18, after the maximum prison term that could be combined with a CCO was reduced to one year.

25. See for example, *Pang v The Queen* [2019] VSCA 56 (15 March 2019) [11]; *Director of Public Prosecutions (Vic) v Graoroski* [2018] VSCA 332 (7 December 2018) [21]; *Hach v The Queen* [2018] VSCA 196 (7 August 2018) [41]; *Gul v The Queen* [2016] VSCA 82 (28 April 2016) [26]; *Manariti v The Queen* [2015] VSCA 160 (23 June 2015) [10]; *Atanackovic v The Queen* [2015] VSCA 136 (5 June 2015) [6], [144].

Duration of time served prison sentences

This marginal decrease is not surprising given that almost all time served prison sentences were less than six months. Figure 9 illustrates the length of time served prison sentences during the reference period. As shown, 96% of time served prison sentences imposed between 2012–13 and 2017–18 were less than six months (6,261 of 6,521). The rate was almost equal in cases with a CCO (95.4%) and without a CCO (96.7%). Of the remaining 260 cases, 219 were between six and 12 months in duration, and 41 were longer than 12 months. In that same time period, the average length of a time served prison sentence was 58 days in the Magistrates' Court and 188 days in the higher courts. The longest time served prison sentence was 16 months (which was imposed with a CCO) in the Magistrates' Court and 33 months (which was imposed without a CCO) in the higher courts.

Figure 9: Length of time served prison sentences, all adult courts, 2012–13 to 2017–18



Issues for further consideration

The above analysis illustrates that time served prison sentences are increasingly common,²⁶ both with and without a CCO taking effect upon the prisoner's release from custody. This would seem to suggest that the increase in Victoria's remand population is having an indirect effect on sentencing outcomes. Offenders who *may* have otherwise received a non-custodial sentence might instead receive a time served prison sentence (with or without a CCO) because they have, in effect, already been punished for their offending. Practitioners and policy-makers may wish to consider several issues in light of this analysis:

- In applying the principle of parsimony, which is the less severe sentence: a time served prison sentence or a straight CCO?
- Could the increasing number of time served prison sentences be inappropriately encouraging people on remand to plead guilty?
- Are time served prison sentences reducing the opportunity for offenders to receive advance notice before transitioning back into the community, as well as support and supervision both during their time in prison and upon release?

26. A recent BOCSAR study found that the number of time served prison sentences in New South Wales had also increased, from 472 in 2013–14 to 781 in 2017–18. This represents a 65% increase. By comparison, the number of time served prison sentences in Victoria in the same timeframe increased from 447 to 1,828. This represents a 309% increase. The number of time served prison sentences in Victoria has therefore increased at five times the rate in New South Wales: Stephanie Ramsey and Jackie Fitzgerald, *Offenders Sentenced to Time Already Served in Custody*, Crime and Justice Statistics Bureau Brief Issue Paper no. 140 (2019).

Parsimony

The principle of parsimony is well established in both legislation and common law in Victoria. Parsimony ‘requires a sentencer to select the least severe sentencing option which is open to achieve the purpose or purposes of punishment in the instant case, and so achieve the ultimate aim of protecting society’.²⁷ In Victoria, the principle of parsimony is tied closely to the hierarchy of sentencing options provided for in the *Sentencing Act 1991* (Vic), so that a court may not impose a more severe sentence if a less severe sentence would suffice. As the Court of Appeal summarised in *Bell v The Queen*:

The principle of parsimony is enshrined in s 5(3) of the *Sentencing Act*, which provides that ‘[a] court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed’. Subsections (4)–(7) of s 5 expand upon that general principle. By constraining the discretion of sentencing courts to impose particular sanctions where another sanction would be of sufficient severity, those subsections create a loose hierarchy of sentencing options.²⁸

What this means is that a court may not impose a term of imprisonment longer than necessary, cannot impose a term of imprisonment (or a combined order) if a straight CCO would suffice, and cannot impose a CCO if a fine would suffice.

The time served prison sentence (without a CCO) is something of a paradox in the context of the principle of parsimony. On the one hand, a prison sentence is the most severe sentence available. Having a sentence of imprisonment on a person’s criminal record has consequences for their employment prospects and ongoing visa eligibility (where relevant), and it reduces their likelihood of receiving a less severe sentencing disposition if they are sentenced again in the future. In relation to the last issue, if an offender who spent time on remand receives a non-custodial sentence and falls to be sentenced again in another case, some or all of their time on remand may, if not equally then at least generally, be taken into account to reduce their sentence. This is known as *Renzella* dead time,²⁹ which the Court of Appeal has described as ‘a period which, viewed with the benefit of hindsight at the date of sentencing, should not have been served’, and therefore the person should be entitled to some credit for that time in any future sentencing exercise.³⁰ The Court of Appeal has cautioned, however, that days on remand may not be treated as ‘a bank balance’ that offenders can draw on.³¹ Because of the serious consequences of a prison sentence, legislation and case law are very clear that a ‘custodial sentence may only be imposed if the judge has concluded that the relevant sentencing purposes cannot be served by a non-custodial order’.³²

27. Judicial College of Victoria, ‘6.3 – Parsimony’, *Victorian Sentencing Manual*, 3rd ed. (Judicial College of Victoria, 2019—) <<https://www.judicialcollege.vic.edu.au/eManuals/VSM/14953.htm>> at 6 January 2020.

28. *Bell v The Queen* [2016] VSCA 203 (22 August 2016) [47].

29. *R v Renzella* (1997) 2 VR 88.

30. *Warwick v The Queen* [2010] VSCA 166 (23 June 2010) [17].

31. *R v Arts and Briggs* [1998] 2 VR 261; *R v Kotzmann* [1999] VSCA 27 (19 March 1999) [42].

32. *McGrath v The Queen* [2015] VSCA 176 (26 June 2015) [3].

On the other hand, there are certain advantages to receiving a time served prison sentence (without a CCO), such that offenders may consider this type of sentence to be the less intrusive or severe option. In particular, the alternative – a normally less severe sentence such as a CCO, or even a fine – would mean that the offender’s debt to society would not yet have been paid in full. Those less severe sentencing options would require offenders to still comply with certain obligations. For instance, in *Dice v The Queen*³³ the Court of Appeal stated that while a CCO ‘might have been adequate punishment’ at first instance, the offender had already spent four months in custody prior to a successful sentence appeal. The court therefore sentenced him instead to a time served prison sentence because there was ‘no point, at this stage, in considering a CCO in place of a term of imprisonment’.³⁴ Similarly, in the guideline judgment of *Boulton & Ors v The Queen*,³⁵ one of the appellants in that case, Fitzgerald, had been originally sentenced to a five-year CCO after having served 540 days on remand in pre-sentence detention. The Court of Appeal indicated that ‘[t]he real question on appeal ... was whether any further penalty was appropriate, given that – as at the date of sentence – Mr Fitzgerald had, in effect, already served a custodial sentence’.³⁶ The court concluded that, despite the CCO being legislatively less serious than a time served prison sentence, it constituted a ‘disproportionate punishment’ in light of the appellant’s 18 months of pre-sentence detention. The court therefore resented him to a time served prison sentence.³⁷ Viewed pragmatically then, a time served prison sentence was actually considered the more parsimonious option in both cases.

In effect therefore, there is case law supporting both arguments: in some circumstances, a time served prison sentence is more parsimonious than a CCO and vice versa. In theory, a sentencing court might be prohibited – by virtue of sections 5(3)–5(7) of the *Sentencing Act 1991* (Vic) – from imposing a time served prison sentence if the purposes of sentencing could be achieved by the imposition of a CCO or another less severe sentence. However, adhering to that principle in practice could in some cases result in an injustice. It may therefore simply be that the determination of parsimony in the context of time served prison sentences is something that must be assessed on a case-by-case basis.

33. *Dice v The Queen* [2017] VSCA 310 (23 October 2017).

34. *Dice v The Queen* [2017] VSCA 310 (23 October 2017) [28]–[29].

35. *Boulton & Ors v The Queen* [2014] VSCA 342 (22 December 2014).

36. *Boulton & Ors v The Queen* [2014] VSCA 342 (22 December 2014) [305].

37. *Boulton & Ors v The Queen* [2014] VSCA 342 (22 December 2014) [308].

Inappropriate encouragement of guilty pleas

A further potential implication of time served prison sentences could be the inappropriate encouragement of guilty pleas, also known as ‘structural coercion’.³⁸ Recent research in the United Kingdom draws attention to the number of people who, despite being factually innocent, plead guilty to alleged crimes in order to guarantee themselves access to ‘sentence reductions’ or ‘discounts’.³⁹ In Victoria, most accused in the higher courts tend to plead guilty: previous Council research shows that 72% of cases in the Supreme Court and 85% of cases in the County Court resolved by way of a guilty plea.⁴⁰ Data is not publicly available on the rate of guilty pleas in the Magistrates’ Court. There are numerous policy rationales to this sentencing discount. A guilty plea can demonstrate an offender’s insight into their offending, it can illustrate remorse, it can save victims and witnesses the ordeal of giving evidence and it offers a utilitarian benefit of improving the efficiency of the criminal justice system.⁴¹

In the present context, it is not the sentencing discount that might encourage remandees to plead guilty, but instead the possibility that they will be released if they receive a *time served prison sentence*.⁴² That is, remandees may find themselves weighing up whether to remain in custody and await trial to contest the charges,⁴³ or to plead guilty in the (increasingly realistic) hope of receiving a time served prison sentence and being released earlier. The temptation of early release may dissuade remandees from engaging in what could have been a legitimate defence of the allegations against them. Moreover, there may be unforeseen consequences of a time served prison sentence, such as eligibility (that may not have applied otherwise)

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38. See Asher Flynn and Arie Freiberg, *Plea Negotiations: Pragmatic Justice in an Imperfect World* (2018) 81, 188; Elsa Euvrard and Chloe Leclerc, ‘Pre-trial Detention and Guilty Pleas: Inducement or Coercion’ (2017) 19(5) *Punishment & Society* 525 (finding that ‘pre-trial detention can be a source of coercion, particularly if there are lengthy procedural delays and eventual sentences can be expected to be fairly short’).
39. Rebecca K. Helm, ‘Constrained Waiver of Trial Rights? Incentives to Plead Guilty and the Right to a Fair Trial’ (2019) 46(3) *Journal of Law and Society* 423; Rebecca K. Helm, ‘Conviction by Consent? Vulnerability, Autonomy and Conviction by Guilty Plea’ (2019) 83(2) *Journal of Criminal Law* 161. Sentencing discounts for early guilty pleas are well-established in Victoria: the *Sentencing Act 1991* (Vic) requires sentencing courts to have regard to whether and when the offender offered to plead guilty (s 5(2)(e)) and specify the sentence that would have been imposed had the offender not pleaded guilty (s 6AAA).
40. Sentencing Advisory Council, *Guilty Pleas in the Higher Courts: Rates, Timing and Discounts* (2015) 11, 14–15.
41. See *ibid* 2.
42. See Flynn and Freiberg (2018), above n 38, 65 (‘discussions on sentencing particularly in relation to CCOs, non-custodial or time served to play a major role in Victorian plea negotiations’), 167, 174, 224.
43. For example, the County Court website lists an indicative wait time of 12 months to trial for those on remand, that is, 12 months from when the case enters the County Court, not taking into account the committal phase of the proceedings in the Magistrates’ Court. In a recent annual report, however, the County Court indicated that the average time to trial for those on remand was actually seven months: County Court of Victoria, *Annual Report 2017–18* (2019) 19; County Court of Victoria, ‘Criminal Division’ (countycourt.vic.gov.au, 2019) <<https://www.countycourt.vic.gov.au/learn-about-court/court-divisions/criminal-division>> at 8 January 2020.

for a post-sentence supervision or detention order, which may only be imposed on offenders sentenced to a term of imprisonment for certain specified offences.⁴⁴ Of course, there are no easy answers to this conundrum; a fine balance must be struck between properly encouraging guilty pleas and doing so without placing such pressure on remandees that it effectively deprives them of a realistic choice about whether to exercise their fair trial rights.

An interesting issue for future research may be to examine the proportion of remandees who plead guilty and receive a time served prison sentence, compared with all other offenders who plead guilty and are sentenced to imprisonment. If the ‘time served prison sentence’ group has a higher rate of guilty pleas, this could suggest that the prospects of early release could be affecting a remandee’s decision to plead guilty or not.

Programs available while on remand

There are significant differences between the treatment of offenders who serve their entire prison sentence on remand and the treatment of those who serve at least part of their prison sentence after the court has imposed sentence. Remandees are usually held in different facilities, kept separate from convicted prisoners where practicable, permitted reduced restrictions and increased liberties (access to visitors, phone calls, legal resources, their own clothing and the opportunity to work), and offered distinct services and programs.⁴⁵ One issue with imposing time served prison sentences on offenders who have been held on remand for their entire sentence is a lack of access to targeted programs addressing any underlying issues that may have contributed to their offending.⁴⁶ Reduced access to programs necessarily arises for two reasons:

- it is difficult to reconcile the right to be presumed innocent while on remand for contested charges with the provision of targeted programs that assume a remandee has committed the alleged offending (though Corrections Victoria does offer nine remand program modules⁴⁷); and
- there is much less certainty about how long a remandee will remain in custody – they may be released without much notice if they are bailed or receive a time served prison sentence – making it difficult to plan for the provision of certain programs.⁴⁸

44. *Serious Offenders Act 2018* (Vic) ss 14, 62, Sch 1, Sch 2.

45. Corrections Victoria, ‘Remand’ (corrections.vic.gov.au, 2019) <<https://www.corrections.vic.gov.au/prisons/remand>> at 8 January 2020.

46. The Victorian Ombudsman has previously raised concerns about the limited opportunities that remandees have to access programs: Victorian Ombudsman, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria* (2015) 49–50.

47. These modules address, for example, adjusting to prison, taking stock and looking forward.

48. Corrections Victoria, ‘Transitional Programs’ (corrections.vic.gov.au, 2019) <<https://www.corrections.vic.gov.au/release/transitional-programs>> at 8 January 2020 (‘A large number of people exit the criminal justice system through direct court discharge, which poses a number of challenges to pre-release transition planning’).

Corrections Victoria is aware of these remandee-specific issues and provides some targeted services and programs to remandees. An example is case planning transition (CPT) assessment of all remandees soon after reception to provide targeted assistance and referrals for transitioning into custody,⁴⁹ though this does not overcome the difficulty of providing treatment programs that target the causes of their still alleged offending.

Post-release transition, support and supervision

Another consequence of imposing a time served prison sentence (without a CCO) is that offenders receive almost no post-release supervision or reintegration assistance.⁵⁰ In Victoria, offenders sentenced to prison, a combined order or a CCO can, upon release from custody, be supervised and assisted by either Corrections Victoria, which oversees CCOs, or the Adult Parole Board, which oversees parole if granted before the expiry of the offender's prison term. In contrast, offenders receiving a time served prison sentence (without a CCO) are released unsupervised and have less access to services or programs that attend a CCO or parole.⁵¹ Research has consistently shown that the immediate weeks and months following release from custody are when the person is most at risk of reoffending.⁵² Moreover, post-release supervision – especially coupled with therapeutic interventions such as mental health treatment, substance abuse treatment and/or housing assistance – is an effective way of mitigating that risk.⁵³ Time served prison sentences are therefore less capable than most other orders of achieving the sentencing purposes of rehabilitation and protecting the community from further offending. This is, however, true of any prison sentence without a post-release supervisory component: the offender may not be granted parole, the court may be prohibited from imposing a non-parole period if the offender is sentenced to less than one year in prison, or the court may exercise its discretion to not impose a non-parole period if the prison term is between one and less than two years.⁵⁴

49. Ibid.

50. Corrections Victoria provides some post-release programs that are not associated with a court order; however, these are limited to 'serious violent or sex offenders, Aboriginal or Torres Strait Islander prisoners, women prisoners and prisoners with high transitional needs': *ibid.* There is also a remand release assistance program with information about Centrelink, health and other services that people may find useful upon release, but this program is limited to providing information, not the services themselves.

51. In recognition of this gap in transitional support, as at September 2018 Corrections Victoria has been running a new program (ReStart) that provides three months of pre- and post-release support for remandees with complex reintegration needs: *ibid.*

52. Craig Jones et al., *Risk of Re-offending Among Parolees*, Crime and Justice Bulletin no. 91 (2006); Stuart Kinner, *The Post-Release Experience of Prisoners in Queensland*, Trends & Issues in Criminal Justice no. 325 (2006); Wai-Yin Wan et al., *Parole Supervision and Reoffending*, Trends & Issues in Criminal Justice no. 485 (2014).

53. Karen Gelb, Nigel Stobbs and Russell Hogg, *Community-Based Sentencing Orders and Parole: A Review of Literature and Evaluations Across Jurisdictions* (2019); Maria Borzycki and Eileen Baldry, *Promoting Integration: The Provision of Prisoner Post-Release Supervision*, Trends & Issues in Criminal Justice no. 262 (2003); Keith Lai, *Does Supervision After Release From Prison Reduce Re-offending* (2013).

54. *Sentencing Act 1991* (Vic) s 11 (on fixing non-parole periods).

Time served prison sentences do, though, differ from other short sentences in a significant way: the unplanned nature of the release. An offender sentenced to a time served prison sentence and released immediately from court, or at least within a day or two of sentence, has far less time and opportunity to make appropriate arrangements for release, such as housing, transport from prison, employment and support services. These arrangements are usually made with the help of correctional services and other agencies. This is particularly acute for offenders who are released from court without identification, property or money and who do not have friends or family supporting them in the courtroom.

The need for advance notice of release in order to make transitional arrangements is an important issue. It is, for example, why the *Corrections Regulations 2019* (Vic) state that the Governor must give a prisoner at least seven days' notice of their release date, provided the Governor receives sufficient notification.⁵⁵ The need for advance notice of release also prompted the government to amend the *Corrections Act 1986* (Vic) in 2019, to allow a sentenced prisoner to 'request to be released on the next working day after the day on which the person would otherwise be released'.⁵⁶ The explanatory memorandum to that amending Act states that, '[t]he purpose of the new section is that, in some cases ... the prisoner is unable to arrange transitional services for their release including accommodation'.⁵⁷

Future research could also examine the recidivism rate of people receiving a time served prison sentence combined with a CCO, compared with people receiving a time served prison sentence without a CCO. There is already a significant body of research analysing the effect of supervision, or lack thereof, on the recidivism rates of offenders released from prison.⁵⁸ However, this research usually compares people who receive parole with people who, for whatever reason, do not (ineligibility for parole, no application for parole, an unsuccessful application for parole). Offenders receiving time served prison sentences with or without a CCO may be useful subjects for similar research.

55. *Corrections Regulations 2019* (Vic) r 101.

56. *Corrections Act 1986* (Vic) s 6EA, as inserted by *Justice Legislation Amendment (Serious Offenders and Other Matters) Act 2019* (Vic) s 20. This came into effect on 20 November 2019.

57. Explanatory Memorandum, *Justice Legislation Amendment (Serious Offenders and Other Matters) Bill 2019* (Vic) 9–10.

58. See for example, Amy D. Miller, Melissa S. Jones and Cyrus Schleifer, 'The Overall and Gendered Effects of Postrelease Supervision on Recidivism: A Propensity Score Analysis' (2019) 46(7) *Criminal Justice and Behavior* 1020; Wai-Yin Wan et al. (2014), above n 52; Tom Ellis and Peter Marshall, 'Does Parole Work? A Post-Release Comparison of Reconviction Rates for Paroled and Non-Paroled Prisoners' (2000) 33(3) *Australian & New Zealand Journal of Criminology* 300.

Conclusion

This report has reviewed the number of *time served prison sentences* in Victoria, for which the duration of the prison sentence imposed was equal to the amount of time that the offender spent on remand. Key findings to emerge are that in the seven financial years to 30 June 2018:

- the overall number of **prison sentences** imposed in Victoria nearly doubled, from 4,738 in 2011–12 to 9,362 in 2017–18;
- the **number** of people sentenced to prison who had spent at least some time on remand nearly tripled from 2,241 to 6,250;
- the **proportion** of people sentenced to prison who had spent at least some time on remand increased from 47% to 67% – that is, two-thirds of people who received prison sentences in 2017–18 had spent time on remand prior to being sentenced; and
- the number of prison sentences equal in length to pre-sentence detention (**IMP = PSD**) increased from 246 to 1,828, such that *time served prison sentences* nearly tripled in proportion, from 11% to 29% of all prison sentences imposed on people who had spent time on remand.⁵⁹ In contrast, the proportion of cases in which the imprisonment term exceeded pre-sentence detention (**IMP > PSD**) dropped from 87% to 66%. Worryingly, the proportion of cases in which pre-sentence detention exceeded the prison sentence (**IMP < PSD**) increased from 2% to 5%.

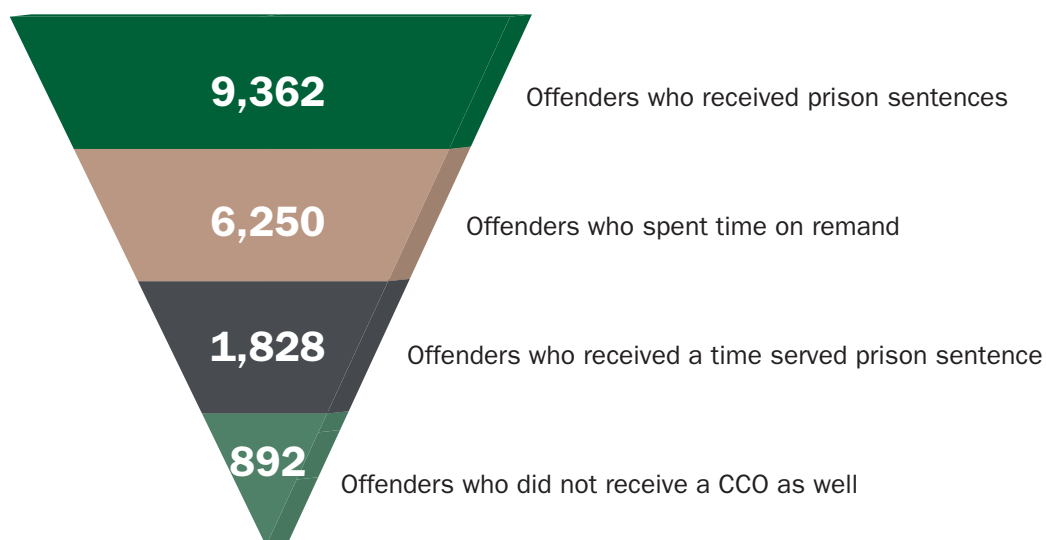
In addition, in the six most recent financial years during which CCOs and combined orders were available, the proportion of *time served prison sentences* that were combined orders (a time served prison sentence combined with a CCO) increased from 38% to 51%. This is most likely due to the increased maximum prison term that a court could combine with a CCO, from three months to one or two years.

Collectively, these findings mean that in 2017–18, 20% of *all* prison sentences imposed in Victoria were time served prison sentences imposed on people who had spent time on remand, and half of those sentences were not combined with a CCO (Figure 10, page 18).

This significant increase in time served prison sentences partly explains why there are comparatively few additional sentenced prisoners, despite many more prison sentences being imposed in Victoria each year. Instead, more than 92% of the nearly 2,000 additional prisoners in Victoria in the last five years were unsentenced prisoners held on remand.

59. In that same period, time served prison sentences quadrupled from 5% to 20% of *all* prison sentences, including those imposed on people who had not been held on remand prior to sentencing.

Figure 10: Number of prison sentences in 2017–18 according to whether people had spent time on remand, received a time served prison sentence and did not receive a CCO as part of a combined order



The increase in the number of *time served prison sentences* (both with and without a CCO) suggests that Victoria's increasing remand population is indirectly affecting sentencing outcomes. Time spent on remand seems to increase the likelihood that a court will ultimately impose a sentence of imprisonment. Sentencing courts are more frequently being put in the position of having to impose sentences on people who have, for all intents and purposes, already been punished. This may be, at least in part, due to increasing delays in the court process as a result of constrained resources and growing demand.

In turn, the increase in *time served prison sentences* causes complexities in how to apply the principle of parsimony and raises questions about whether remandees are inappropriately encouraged to plead guilty. This increase also reduces the opportunities for offenders to organise their transition back into the community and for corrective services to establish support and accountability mechanisms around offenders, both during their time in prison and when they are released.

More generally, contrary to community perceptions that courts are 'soft on crime',⁶⁰ the findings in this report suggest that criminal justice responses have become increasingly punitive in recent years: the overall number of people in prison has increased, the number and proportion of people sentenced to imprisonment have increased, the number and proportion of people held on remand have increased, and the number of time served prison sentences that either exceed or equal the ultimate prison sentence has increased.

60. See for example, Sentencing Advisory Council, *Public Opinion About Sentencing: A Research Overview* (2018).

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