

# Parole and Sentencing Research Report

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# Parole and Sentencing Research Report

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# Abbreviations

- CBO** Community-based order
- CCO** Community correction order
- ICO** Intensive correction order

# Glossary

- Case** In this report, a collection of one or more proven charges against a person sentenced at the one hearing.
- Charge** In this report, a single proven allegation of an offence.
- Higher courts** In this report, the County Court of Victoria and the Supreme Court of Victoria.
- Median** The middle value in a set or a distribution of values. For example, in the following set of values:  
1, 2, 2, 3, 3, 4, 5, 5, 6, 6, 7  
4 is the median value. It represents a statistical midpoint where half of the values (1, 2, 2, 3, 3) are below the median and half of the values (5, 5, 6, 6, 7) are above the median. If a set has an even number of values, the two middle values (sometimes defined as the lower median and the upper median) are averaged to find the median.
- Reference period** The five-year period, from 2010–11 to 2014–15, examined in this report.
- Suspended sentence** A term of imprisonment that is suspended (that is, not activated) wholly or in part for a specified period (the 'operational period'), subject to the condition to be of good behaviour (that is, not reoffend). Suspended sentences have been abolished in the higher courts for all offences committed on or after 1 September 2013 and in the Magistrates' Court for all offences committed on or after 1 September 2014.
- Total effective sentence** The product of individual sentences (and orders for cumulation or concurrency of those sentences) imposed on a person on the same occasion. In a case involving a single charge, the total effective sentence is the sentence imposed for that charge. The total effective sentence is also known as the 'head sentence' and the 'total effective imprisonment term'.
- Total effective imprisonment term** See 'total effective sentence'.



# Executive summary

Parole is the conditional release of a prisoner serving a sentence of imprisonment. Parole allows prisoners to serve a portion of their sentence in the community for the period during which they are still under sentence.

A court determines the portion of a sentence that an offender may be allowed to serve on parole by fixing a non-parole period. A non-parole period is a component of some imprisonment sentences that represents the minimum term that an offender must serve before becoming eligible for release on parole.

An offender's eligibility for a non-parole period is determined by both the length of the sentence imposed on the offender and the discretion of the sentencing court. An offender sentenced to imprisonment for under one year cannot have a non-parole period. An offender sentenced to imprisonment for one year to less than two years may have a non-parole period imposed by the court, at the court's discretion. An offender sentenced to imprisonment for two years or more must have a non-parole period imposed by the court, unless the circumstances of the offender or the case are such that it is inappropriate (for example, when, for the most serious offending, the court imposes a life sentence without fixing a non-parole period).

Over the last five years, there has been considerable analysis and review of the parole system in Victoria and the introduction of substantial reforms regarding the way in which the parole system is administered. However, there have been no substantive changes to the law regarding how a court imposes a non-parole period at the time of sentencing.

Nevertheless, the reforms to parole administration have taken place during a period of significant changes to the sentencing landscape in Victoria, including the introduction of new sentencing orders such as community correction orders (CCOs), and the abolition of others such as suspended sentences. Further, the length of the imprisonment term that a court may combine with a CCO has been extended, with the maximum term of imprisonment for such an order increasing from three months to two years.

In light of these changes, this report seeks to answer the following questions:

- How did the courts' use of non-parole periods change between 2010–11 and 2014–15?
- What factors influenced the length of non-parole periods imposed by the courts between 2010–11 and 2014–15?

## Use of non-parole periods

The Sentencing Advisory Council's ('the Council's') data analysis shows that the courts' use of non-parole periods over the reference period underwent substantial change. In the higher courts, the proportion of all imprisonment sentences that included a non-parole period declined from 94.6% in 2010–11 to 69.2% in 2014–15, with three-quarters of the decline occurring in 2014–15 and one-quarter in 2012–13. In the Magistrates' Court, the proportion of all imprisonment sentences that included a non-parole period declined from 21.6% in 2010–11 to 9.9% in 2014–15. Virtually all of this decline occurred in 2013–14 and 2014–15.

Increases in the use of short terms of imprisonment help explain these reductions in the use of non-parole periods. Over the reference period, there was an increase in the proportion of imprisonment sentences with terms that could not have a non-parole period imposed (a non-parole period may

not be imposed for a term of under one year). The proportion of imprisonment sentences that were under one year increased between 2010–11 and 2014–15, from 5.3% to 21.3% in the higher courts and from 74.6% to 86.4% in the Magistrates' Court.

While there were declines in the use of non-parole periods for all imprisonment sentences, there were also declines in the use of non-parole periods for terms of imprisonment that fell within the discretionary range for the imposition of a non-parole period (that is, where the term of imprisonment for the case was one year to less than two years). Between the September quarter of 2014 and the June quarter of 2015, the proportion of imprisonment terms of one year to less than two years that had a non-parole period declined from 94.1% to 20.9% in the higher courts and from 81.0% to 66.7% in the Magistrates' Court.

The timing of the start of the decline (September 2014) coincided with legislation increasing the term of imprisonment that may be combined with a CCO from three months to two years. This legislation in effect permitted the use of the CCO as an alternative to parole. The courts embraced this use, with the CCO taking the place of non-parole periods for many terms of imprisonment of one year to less than two years. Between the September quarter of 2014 and the June quarter of 2015, the proportion of imprisonment sentences of one year to less than two years that were combined with a CCO increased from 0.0% to 72.1% in the higher courts and 0.0% to 12.0% in the Magistrates' Court.

This emphatic move, particularly in the higher courts, towards the CCO instead of parole was influenced by contextual factors relating to sentencing and parole, including:

- the phase-out of suspended sentences and the consequential rise in short terms of imprisonment;
- the uncertainty of an offender being granted parole in light of changes to the administration of parole;
- the influence of the guideline judgment in late 2014 on the use of CCOs; and
- the abolition of partially suspended sentences, which were previously used in cases where the offender had spent a substantial period of time on remand prior to sentencing.

## Factors influencing the length of non-parole periods

This report identifies the length of the total effective sentence as the key factor influencing the length of the non-parole period. Other factors, such as age and gender, have an observed but minor influence. Younger offenders (under 25 years) receive shorter non-parole periods than older offenders, as do female offenders compared with males.

An examination of non-parole periods based on select offence types shows that there are minor differences between the selected offences, with obtaining a financial advantage by deception receiving shorter non-parole periods than other offences (such as aggravated burglary) when comparing cases that received the same total effective sentence.

# 1. Non-parole periods and the focus of this report

- 1.1 The purpose of this report is to examine recent trends in the use of non-parole periods by Victorian criminal courts. A non-parole period is a component of some imprisonment sentences that represents the minimum term an offender must serve in prison before becoming eligible for release on parole. The Council considers the use of the non-parole period as an important area of research because of recent legislative reforms to sentencing and the administration of parole.
- 1.2 This report identifies a number of major changes in the courts' use of non-parole periods and considers both the antecedents and the implications of these changes. It also examines the influence of different factors that may affect the setting of non-parole periods.
- 1.3 The report focuses on sentencing over the five-year period from July 2010 to June 2015, and examines separately the practices of Victoria's major court divisions – the higher courts (Supreme and County Courts) and the Magistrates' Court – due to the differences in their criminal jurisdictions.

## Summary of recent reforms to parole and sentencing

- 1.4 In recent years, there has been a number of legislative and administrative reforms in relation to parole. These reforms have followed a series of inquiries into the parole system, which included the Council's own 2012 *Review of the Victorian Adult Parole System: Report*.<sup>1</sup> Most recently, a 2013 report into the parole system in Victoria by former High Court Justice Ian Callinan AC ('Callinan Report') proposed a series of measures for reform.<sup>2</sup> These measures, which since have largely been adopted, make it more difficult for offenders to receive parole, and increase the restrictions placed on offenders who serve parole.
- 1.5 The Callinan Report and earlier reports examined the adult parole system as a whole, or aspects of the administration of parole, rather than presenting an analysis of sentencing data on the imposition of non-parole periods.
- 1.6 The reforms to parole have taken place alongside a number of changes to sentencing law that have significantly altered the sentencing landscape in Victoria. These changes include:
  - the introduction of community correction orders (CCOs);<sup>3</sup>
  - the abolition of suspended sentences<sup>4</sup> (including the abolition of the ability for a court to combine a CCO with a suspended sentence);<sup>5</sup>
  - the Court of Appeal's guideline judgment on the use of CCOs;<sup>6</sup> and
  - the recent increase in the maximum term for a sentence of imprisonment when combined with a CCO.<sup>7</sup>

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1. Sentencing Advisory Council, *Review of the Victorian Adult Parole System: Report* (2012). This report sets out a package of recommendations that sought to retain the strengths of the existing parole system while enhancing decision-making guidance for the Adult Parole Board and improving the transparency, consistency, and accuracy of its processes and decisions. The recommendations also aimed to ensure that there was adequate inter-agency coordination and information-sharing around the management of parolees.

2. Ian Callinan, *Review of the Parole System in Victoria* (2013).

3. CCOs commenced on 16 January 2012: *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic).

4. Suspended sentences were progressively phased out between 1 May 2011 and 1 September 2014: *Sentencing Amendment Act 2010* (Vic); *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic).

5. Combining a wholly or partially suspended sentence with a CCO was abolished from 1 September 2014: *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic).

- 1.7 The evidence to date suggests that each of these changes has, to a greater or lesser degree, altered current sentencing practices; in particular, there have been substantial changes to the imposition of terms of imprisonment combined with CCOs, and consequently, changes to the imposition of non-parole periods for imprisonment sentences.

## Research questions

- 1.8 The Council's data analysis seeks to answer two key questions. The first is: How did the courts' use of non-parole periods change between 2010–11 and 2014–15?
- 1.9 The Council measures the use of non-parole periods in two ways: non-parole period status (that is, the initial court decision to set a non-parole period) and non-parole period length (that is, the court decision on the length of the non-parole period when imposed). In addressing this question, the Council considers practices in the higher courts and the Magistrates' Court.
- 1.10 The second question focuses on the higher courts jurisdiction only and asks: What factors influenced the length of non-parole periods imposed by the courts between 2010–11 and 2014–15?
- 1.11 The focus on the higher courts is due to the substantially larger variation in length of non-parole periods in these jurisdictions than in the Magistrates' Court. Greater variation allows for a more robust analysis of factors.

## Data used for this analysis

- 1.12 The data used for this analysis have been sourced from Court Services Victoria as part of ongoing data provision arrangements between individual courts and the Council. Data for the higher courts are maintained in Court Services Victoria's higher courts sentencing database, which contains information gathered from conviction returns about all cases sentenced in the Supreme and County Courts of Victoria since July 2000.
- 1.13 Data for the Magistrates' Court are from the Courtlink system. The Council receives extracts from the Courtlink system on a quarterly basis from Court Services Victoria. The Council's database, created from these extracts, contains information on all cases sentenced in the Magistrates' Court of Victoria since July 2004.
- 1.14 In this report, all analyses utilise data that have not been adjusted for appeals. The source data from the Magistrates' Court and the higher courts do not contain adjustments to sentence as a result of appeals. The effect of appeals, however, on broad sentencing trends (the focus of this report) is likely to be negligible.
- 1.15 A subset of sentencing data available to the Council has been used for this analysis. The Council has excluded cases based on a number of criteria, including where:
- the principal proven charge constitutes a Commonwealth offence;
  - the non-parole period imposed relates to another case (as indicated by its relationship with the total effective imprisonment term); and
  - the case is missing a total effective sentence length (this occurred for a small proportion of Magistrates' Court imprisonment cases).

6. *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014).

7. This reform came into effect on 29 September 2014: *Sentencing Amendment (Emergency Workers) Act 2014* (Vic).

## 2. Sentencing and parole in Victoria

### What is parole?

- 2.1 Parole is the conditional release of a prisoner serving a sentence of imprisonment. Parole allows prisoners to serve a portion of their sentence in the community for the period during which they are still under sentence.
- 2.2 While on parole, the offender is subject to conditions specified in the order granting parole, including supervision, reporting requirements, treatment programs, and conditions relating to place of residence. The offender must formally acknowledge the conditions and agree to comply with them for the duration of the order.<sup>8</sup> Failure to comply can result in the cancellation of the offender's parole and the offender returning to prison.<sup>9</sup>
- 2.3 Parole is available to offenders in both the youth and the adult systems. When ordering youth detention, however, a court cannot impose a non-parole period.<sup>10</sup> Consequently, this report focuses on the adult jurisdiction, in which a non-parole period may be imposed as part of an offender's sentence, that is, where a sentence of imprisonment is imposed in the Supreme, County, or Magistrates' Court.

### Who decides parole?

- 2.4 In Victoria, both the courts and the Adult Parole Board have roles in determining whether an offender will serve a portion of a sentence of imprisonment on parole.
- 2.5 The sentencing court's role is to decide whether to impose a non-parole period for a sentence of imprisonment and the length of that period. This determines if and when an offender is eligible for release on parole.
- 2.6 Release on parole is not automatic.<sup>11</sup> The Victorian Adult Parole Board's role is to make determinations regarding whether to release a prisoner on parole at any stage following the expiration of the non-parole period. Prisoners have a certain amount of agency around their application for parole. Further, consideration of parole (upon a prisoner becoming eligible for parole) is not automatic, and a prisoner must apply.<sup>12</sup>

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8. The mandatory and other conditions that can be attached to an order are set out in the *Corrections Regulations 2009* (Vic) regs 83A, 83B. Regulation 84 requires offenders being released on parole to sign a declaration under Form 2 of Schedule 4 of the *Corrections Regulations 2009* (Vic) declaring that the terms and conditions have been explained to them and acknowledging that they must comply with the order.

9. Sentencing Advisory Council (2012), above n 1, 2.

10. This includes where an adult offender aged under 21 is sentenced to youth detention under the 'dual track' system: *Sentencing Act 1991* (Vic) s 32.

11. This can be contrasted with other jurisdictions where release on parole is automatic at the expiration of non-parole periods for sentences of particular lengths, for example, New South Wales (sentences of three years or less) and South Australia (sentences of less than five years except for sentences imposed for sexual offences, offences involving personal violence or arson or serious firearm offences, or offenders who committed offences on parole or who have had parole cancelled for breaching conditions): *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50; *Correctional Services Act 1982* (SA) s 66.

12. As a consequence of one of the measures recommended in the Callinan Report, since 1 March 2015, the Adult Parole Board has considered parole only if the prisoner applies for parole (unless the prisoner is already under consideration at that date): Adult Parole Board, *Parole Manual – Adult Parole Board of Victoria (Fifth Edition)* (2015) 16.

## Separation of judicial and administrative roles

- 2.7 Parole is therefore a product of both judicial and administrative decision-making; however, there is a clear delineation between the two, such that a 'sentencer cannot direct the parole authority to release an offender on parole, nor can the authority compel an eligible offender to accept an offer of release'.<sup>13</sup>
- 2.8 Further, a parole board cannot order parole before the non-parole period has elapsed, nor discharge an offender from a sentence earlier than the date of completion for the sentence while the offender is under parole.<sup>14</sup> In formulating a sentence, a court cannot have regard to parole board policies and cannot speculate about future possible decisions of a parole board to grant or cancel parole.
- 2.9 The clear separation between the powers of the court and those of the parole board is evident from the majority judgment of the High Court in *Power v The Queen*:<sup>15</sup>
- To interfere with [a] sentence is not within the authority of the paroling authority. Its authority is to release the prisoner conditionally from confinement in accordance with the sentence imposed upon him. The sentence stands and during its term the prisoner is simply released upon conditional parole. Indeed, we think it is a misnomer to refer to a minimum sentence and a maximum sentence. In truth there is but one sentence, that imposed by the trial judge, which cannot be altered by the paroling authority.<sup>16</sup>
- 2.10 A fundamental tenet of parole is that the offender on parole is still deemed to be under the original custodial sentence until the 'parole period so elapses or until the prisoner is otherwise discharged from the prison sentence'.<sup>17</sup> However, once the parole period has elapsed, the prisoner has served the sentence and is wholly discharged.
- 2.11 Corrections Victoria is responsible for supervising offenders in the parole system. Community Correctional Services staff monitor compliance with conditions, facilitate access to and deliver programs, and report to the Adult Parole Board on an offender's progress.
- 2.12 This report considers parole in relation to sentences imposed by the courts, rather than the administration of those sentences by Corrections Victoria. The key research questions in this report seek to examine trends regarding the way in which sentences involving parole are imposed, rather than examining questions relating to the administration of parole, such as the amount of time offenders spend in custody after the expiry of their non-parole period, or the rate at which offenders breach parole.

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13. Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (3rd ed., 2014) 852.

14. *Ibid.*

15. *Power v The Queen* (1974) 131 CLR 623.

16. *Power v The Queen* (1974) 131 CLR 623, 628–629.

17. *Corrections Act 1986* (Vic) s 76.

## Fixing of non-parole periods by Victorian courts

### Sentences attracting a non-parole period

- 2.13 When a court sentences an adult offender to a sentence of imprisonment, the requirements regarding the fixing of a non-parole period differ according to the length of the sentence.
- 2.14 Section 11 of the *Sentencing Act 1991* (Vic) sets out the requirements in relation to fixing a non-parole period for sentences of imprisonment:
- if the sentence is two years or more, or the sentence is life imprisonment, the court *must* impose a non-parole period (unless the nature of the offence or the history of the offender is such that the fixing of a non-parole period is inappropriate); and
  - if the sentence is less than two years but not less than one year, the court *may* impose a non-parole period.<sup>18</sup>
- 2.15 As a result, there is no discretion for a court to impose a non-parole period if the sentence is less than one year's imprisonment.
- 2.16 A community correction order (CCO) may be combined with a term of imprisonment not exceeding two years.<sup>19</sup> Consequently, a sentence of exactly two years' imprisonment combined with a CCO will attract the requirement to impose a non-parole period.
- 2.17 When the court imposes multiple sentences of imprisonment on an offender, the non-parole period is a single aggregate period.<sup>20</sup>
- 2.18 Any non-parole period must be at least six months less than the total effective sentence of imprisonment.<sup>21</sup>

**Table 1: Imprisonment sentence lengths and the court's ability to impose a non-parole period**

Length of imprisonment sentence	Can a court impose a non-parole period?
Less than one year	No, a court cannot fix a non-parole period
One year to less than two years	Yes, a court <i>may</i> fix a non-parole period at the discretion of the court
Two years or more (including life imprisonment)	Yes, a court <i>must</i> fix a non-parole period, unless the nature of the offence or the history of the offender is such that it is inappropriate

18. *Sentencing Act 1991* (Vic) ss 11(1)–(2).

19. *Sentencing Act 1991* (Vic) s 44(1). This is subject to one exception under section 44(1A), which allows a court to attach a CCO in addition to a sentence of imprisonment of any length for serious arson offences contained in clause 5 of Schedule 1.

20. *Sentencing Act 1991* (Vic) s 11(4).

21. *Sentencing Act 1991* (Vic) s 11(3).

## Offenders already under imprisonment sentence

- 2.19 If an offender is already subject to a sentence of imprisonment with a non-parole period and, before the non-parole period ends, the offender receives a further sentence of imprisonment that incorporates a non-parole period, the court must fix a new single non-parole period in respect of all sentences.<sup>22</sup>
- 2.20 The new single non-parole period must not allow the release of the prisoner on parole earlier than under the original sentence.<sup>23</sup> This situation arises, for example, when a court must sentence an offender for an offence committed while on parole.
- 2.21 If the parole board cancels parole, the prisoner will be subject to the period of the original sentence remaining at the time of parole cancellation ('parole sentence') and a possible further sentence of imprisonment imposed by a court for the further offending ('new sentence'). In such a case, the court adds the parole sentence to the new sentence of imprisonment and fixes a new single non-parole period.

## Request by offender for no non-parole period

- 2.22 It is possible for an offender to request a court to not fix a non-parole period and to impose a 'straight sentence' of imprisonment, in effect to 'deny the prisoner eligibility for parole'.<sup>24</sup> The apparent rationale for this is that 'the prisoner considers the chance of being released on parole as slim – or, if released, the prospects of seeing the period through without the parole order being cancelled as small'.<sup>25</sup> In the latter case, the cancellation of parole renders the offender liable to serve the entire remaining parole sentence in prison, thereby extending the overall period during which an offender may be subject to a sentence.
- 2.23 A further reason may be the hope that if the court agrees to the request, it might impose a shorter head sentence than the head sentence required if the court fixes a non-parole period.
- 2.24 The mere fact of an offender making such a request, however, does not remove the court's duty to determine whether it should fix a non-parole period.<sup>26</sup>

## Purposes of fixing a non-parole period

- 2.25 The non-parole period is 'a minimum period of imprisonment to be served because the sentencing judge considers that the crime committed calls for such detention'.<sup>27</sup> It 'serves initially to demarcate both the minimum period that must be spent in custody and the longest possible term of parole supervision under the sentence'.<sup>28</sup>
- 2.26 A non-parole period is part of the sentence and does not constitute a separate sentence, but rather is a mere 'direction' regarding how long offenders must be confined under the sentence before they can be considered for parole.<sup>29</sup>

22. *Sentencing Act 1991* (Vic) s 14(1). These 'multi-case' offenders are not analysed in this report.

23. *Sentencing Act 1991* (Vic) s 14(2).

24. Freiberg (2014), above n 13, 868.

25. *Ibid*, citing as an example *R v Zarb* (1996) 88 A Crim R 55.

26. *Ibid*, citing as an example *R v Gouraff* (1979) 1 A Crim R 367, 371.

27. *Power v The Queen* (1974) 131 CLR 623, 628.

28. Freiberg (2014), above n 13, 852.

29. *Ibid* 854–855.



2.27 In *Power v The Queen*,<sup>30</sup> the High Court acknowledged that the purpose of parole is ‘to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom’. However, the court stressed that this is only to occur:

when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence.<sup>31</sup>

2.28 In *Bugmy v The Queen*,<sup>32</sup> the High Court further elaborated on the approach to setting a non-parole period. The majority adopted the view that:

[the] minimum term is the period before the expiration of which release of that offender would, in the estimation of the sentencing judge, be in violation of justice according to law, notwithstanding the mitigation of punishment which mercy to the offender and benefit to the public may justify.<sup>33</sup>

2.29 In other words, although the purpose of release on parole is to promote the offender’s rehabilitation, rehabilitation is not the only consideration when the courts fix a non-parole period. The setting of a non-parole period may serve purposes other than rehabilitation, including community protection and deterrence.<sup>34</sup> Therefore:

a more serious offence will warrant a greater non-parole period due to its deterrent effect upon others and the need to give close attention to the danger which the offender presents to the community.<sup>35</sup>

2.30 The courts have also emphasised that, although the fixing of a non-parole period confers a benefit on the offender, it serves the interests of the community because the rehabilitation of the offender is in the community’s interest.<sup>36</sup>

2.31 Further, in determining the non-parole period, the sentencing judge:

is required to reconsider all or most of the matters that were taken into account in determining the head sentence, [but] he or she is not bound to discreetly refer to such matters in considering the non-parole period, nor is it essential that he or she gives reasons for fixing the non-parole period unless the sentence is of an unusual duration such as would invite appellate scrutiny.<sup>37</sup>

## Parole board policies and the irrelevance of executive actions

2.32 As a general principle, the release policies of a parole board (and other executive decisions) are irrelevant to the fixing of a head sentence or a non-parole period by a sentencing court.<sup>38</sup> Further, the attitude of a parole board to granting or declining parole or further parole is not relevant to an appeal against sentence.<sup>39</sup>

2.33 Section 5(2AA) of the *Sentencing Act 1991* (Vic) states that, in sentencing an offender, a court must not have regard to:

any possibility or likelihood that the length of time actually spent in custody by the offender will be affected by executive action of any kind.<sup>40</sup>

30. *Power v The Queen* (1974) 131 CLR 623.

31. *Power v The Queen* (1974) 131 CLR 623, 629.

32. *Bugmy v The Queen* (1990) 169 CLR 525.

33. *Bugmy v The Queen* (1990) 169 CLR 525, 538, adopting the words of Jenkinson J in *R v Morgan and Morgan* (1980) 7 A Crim R 146, 154.

34. *Bugmy v The Queen* (1990) 169 CLR 525, 530–531; *R v Morgan and Morgan* (1980) 7 A Crim R 146, 155.

35. *R v Hillsley* (1992) 105 ALR 560, 572.

36. See, for example, *R v Morgan and Morgan* (1980) 7 A Crim R 146, 154–155; *Bugmy v The Queen* (1990) 169 CLR 525, 531; *R v Krasnov* [1995] VSC 198 (21 September 1995) [22].

37. *Romero v The Queen* (2011) 32 VR 486, 492 [24].

38. Freiberg (2014), above n 13, 863, citing *R v Bruce* [1971] VR 656; *R v Poulton* [1974] VR 716; *R v Zarb* (1996) 88 A Crim R 55.

39. *R v Poulton* [1974] VR 716.

40. *Sentencing Act 1991* (Vic) s 5(2AA)(a).

- 2.34 The *Sentencing and Other Acts (Amendment) Act 1997* (Vic) introduced this provision, along with other amendments regarding the presumption of cumulation when an offender faces multiple sentences of imprisonment as a result of offending committed while on parole. The explanatory notes accompanying this provision specify that executive action includes ‘any action which the Adult Parole Board might take in respect of a sentence’,<sup>41</sup> for example, release on parole or cancellation of parole.
- 2.35 As a consequence, a court should not assume that the offender will be on parole rather than in prison during all or any of the period between the expiration of the non-parole period and the end of the sentence. Nor should the court assume that an offender will not, or will be unlikely to, be released on parole because the offender has low prospects of rehabilitation or because he or she may refuse to participate in programs required for consideration for release on parole.<sup>42</sup>
- 2.36 The provision is primarily aimed at preventing a court from increasing or decreasing the length of a custodial sentence in anticipation that the offender will or will not be released on parole. The provision is not intended to curtail the court’s consideration of the sentencing options available to it, nor is it intended to influence the selection of a sentence of imprisonment with a non-parole period over another sentencing disposition<sup>43</sup> such as a CCO. The key issue is that the total effective sentence remains appropriate having regard to the offence, irrespective of whether the offender is ultimately released on parole.<sup>44</sup>

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41. Explanatory Memorandum, *Sentencing and Other Acts (Amendment) Bill 1997* (Vic) s 5(2AA), inserted by clause 5.

42. Freiberg (2014), above n 13, 864, citing *R v Douglas* [1959] VR 182; *Wray v The Queen* [2007] NSWCCA 162 (21 June 2007).

43. *R v Ngo* [1999] 3 VR 265, 282–283.

44. *R v Nunno* [2008] VSCA 31 (29 February 2008) [79], citing *R v PJB* (2007) 17 VR 300, 302–303.

## 3. Reforms to sentencing and parole

- 3.1 A number of recent reforms to sentencing law in Victoria are likely to have influenced the imposition of sentences of imprisonment and, consequently, the imposition of non-parole periods.

### Sentencing reforms

#### Community correction orders, imprisonment, and parole

- 3.2 The community correction order (CCO) was introduced as a sentencing option on 16 January 2012. A CCO permits a broader range of rehabilitative, supervisory, monitoring, and offender behaviour conditions than the range of conditions under the earlier community sentences it replaced, such as the community-based order (CBO) and the intensive correction order (ICO).
- 3.3 CCO conditions allow for treatment and rehabilitation in relation to health, education, or employment; supervision and management by community corrections officers; and/or court monitoring of CCO compliance.
- 3.4 The Magistrates' Court may impose a CCO for a maximum period of two years on a single charge.<sup>45</sup> The County and Supreme Courts may impose a CCO for the maximum period of imprisonment available for the offence or a maximum period of two years, whichever is greater.<sup>46</sup>
- 3.5 Parliament intended CCOs to replace not only existing community sentences, including CBOs and ICOs, but also suspended sentences.<sup>47</sup> CCOs were established in the context of the phase-out of suspended sentences, with the aim of providing 'a transparent sentence that can be understood by everyone in the community'.<sup>48</sup>
- 3.6 On 29 September 2014, the *Sentencing Act 1991* (Vic) was amended to expressly state that a CCO may be 'an appropriate sentence' where the court would have previously imposed a wholly suspended sentence.<sup>49</sup>

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

46. *Sentencing Act 1991* (Vic) s 38(1)(b).

47. Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 2011, 3292 (Robert Clark, Attorney-General).

48. Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 2011, 3292 (Robert Clark, Attorney-General).

49. *Sentencing Act 1991* (Vic) s 36(2).

### Guideline judgment

- 3.7 CCOs were the subject of an application by the Director of Public Prosecutions for a guideline judgment under section 6AB(1) of the *Sentencing Act 1991* (Vic) following three appeals where offenders were sentenced to a lengthy CCO.
- 3.8 The Victorian Court of Appeal handed down its guideline judgment on CCOs on 22 December 2014 in *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* ('*Boulton*').<sup>50</sup> The judgment contains the court's reasons for concluding that:
- the case was an appropriate one for a guideline judgment; and
  - a CCO can serve all of the purposes of sentencing<sup>51</sup> even in quite serious cases.

### Sentencing purposes of community correction orders and parole

- 3.9 The Court of Appeal has stated that the 'overarching principles' that should govern the CCO regime are proportionality and suitability.<sup>52</sup>
- 3.10 On the issue of the purposes of sentencing, the court held that CCOs reflect punitive and rehabilitative sentencing purposes. In the specific context of combining a CCO with a sentence of imprisonment, the court rejected the Director of Public Prosecution's submission of a 'split-level approach to a combination sentence – prison for punishment, CCO for rehabilitation' on the basis that this tended to 'reinforce traditional views of sentencing options'. This would be contrary to the legislative intention behind CCOs:
- By effectively inviting the sentencing court to ignore the punitive effect of a CCO, this approach would likely result in prison continuing to be viewed as the only real option for offending of any seriousness. This is precisely the view which the introduction of the CCOs was intended to change.<sup>53</sup>
- 3.11 Rather, the court stated that all of the purposes of sentencing may be achieved by a CCO, standing alone or in combination with a sentence of imprisonment. The court considered that a CCO following a term of imprisonment is similar to a sentence of imprisonment with a non-parole period, in that it can achieve community protection and specific deterrence, in addition to rehabilitation.<sup>54</sup>

### Choosing between a community correction order, a non-parole period, or both in combination with a sentence of imprisonment

- 3.12 When introduced on 16 January 2012, the CCO could be combined with a sentence of imprisonment, but only if the term of the imprisonment sentence did not exceed three months.<sup>55</sup> As such, parliament initially did not intend that the CCO would be used as an alternative to parole, which can only be set by the courts for imprisonment sentences of 12 months or more.
- 3.13 Nearly two years after the introduction of the CCO, parliament amended legislation that, in effect, has permitted the use of the CCO as an alternative to parole. The *Sentencing Amendment (Emergency Workers) Act 2014* (Vic), which came into effect on 29 September 2014, allowed the court to combine imprisonment of up to two years with a CCO. This created an overlap between the period of imprisonment for which the courts have discretion to impose a

50. *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014).

51. In *Boulton*, the court uses the term 'purposes of punishment'. The Council has adopted the broader term 'purposes of sentencing' to encompass just punishment as one of the purposes of a sentence, alongside the other purposes expressed in section 5(1) of the *Sentencing Act 1991* (Vic).

52. *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [63].

53. *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [139].

54. *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [113]–[115], [141].

55. *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic) s 21.

non-parole period (terms of one year to less than two years) and the period of imprisonment with which a CCO may be combined (up to two years). It therefore gave the courts the option of fixing a date on which an offender is to be released from prison onto a CCO and a date on which an offender may be considered for release on parole.

- 3.14 The new options for the courts raise a number of conceptual and practical issues about the joining of sentences of imprisonment with CCOs and the fixing of non-parole periods. Adopting a submission made by Victoria Legal Aid, the Court of Appeal noted that the effectiveness of a CCO is likely to depend on a court's ability to assess the suitability of the offender for a CCO and the conditions that should be attached to address the offender's particular needs and circumstances. The longer the time between the making of the order and the commencement of the CCO, the less able the court is to make such assessments.
- 3.15 The Court of Appeal has indicated that:
- in the case of a short term of imprisonment (less than 12 months), there should ordinarily be little difficulty assessing suitability – therefore, it would be appropriate to combine the sentence with a CCO; and
  - in the case of a longer term of imprisonment (12 months or more), there may be considerable difficulties in assessing suitability – therefore, in some circumstances it would be more beneficial to fix a non-parole period rather than attach a CCO.<sup>56</sup>
- 3.16 In the latter case, a non-parole period will be more appropriate because:
- The Adult Parole Board will then be able to assess, as the expiry of the non-parole period approaches, the offender's rehabilitative prospects, having regard to how he/she has fared in custody, and will be able to tailor parole conditions to the offender's needs as they then appear to be.<sup>57</sup>
- 3.17 The court further noted that there are significant conceptual and practical difficulties in combining non-parole periods with CCOs and that the court should 'ordinarily treat them as alternatives'.<sup>58</sup> That is, a court should:
- impose a sentence of imprisonment combined with a CCO; or
  - impose a sentence of imprisonment and fix a non-parole period; but not
  - impose a sentence of imprisonment, fix a non-parole period, and combine this with a CCO.
- 3.18 In weighing up whether a non-parole period or a CCO is more suitable, the court considered that the following matters should be taken into account:
- the proximity of conditional release to the date of sentencing;
  - the extent to which the intended purpose for imposing conditional freedom is capable of being achieved; and
  - the extent to which the possibility of release on parole operates as an incentive.<sup>59</sup>
- 3.19 There is another practical issue raised by the increase to two years in the maximum term of imprisonment that may be combined with a CCO: it allows courts to impose a CCO on imprisonment sentences that must include a non-parole period. As discussed at [2.14], a court is required to fix a non-parole period for imprisonment sentences of two years or more (unless the nature of the offence or the history of the offender is such that the fixing of a non-parole period is inappropriate).

56. *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [196]–[198].

57. *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [198].

58. *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [199].

59. *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [199]–[200].

- 3.20 At the same time, the court may combine a CCO with an imprisonment sentence of up to two years. Thus, where a court wishes to combine a CCO with a two-year imprisonment sentence, the court must also set a non-parole period.
- 3.21 While terms of imprisonment of two years combined with a CCO are rare, the courts have had to grapple with combining a CCO with a non-parole period. Between September 2014 and June 2015, 18 cases sentenced in the higher courts received a term of imprisonment of two years combined with a CCO, while three of these cases also received a non-parole period. The issue was highlighted in the recent case of *Baldwin v The Queen*,<sup>60</sup> in which a two-year term of imprisonment combined with a CCO was successfully appealed, partly on the basis that the sentencing judge failed to fix a non-parole period.
- 3.22 The court in *Boulton* identified the conceptual and practical difficulties in combining non-parole periods with CCOs;<sup>61</sup> however, a court is required to fix a non-parole period for any imprisonment sentence of two years or more. In light of this, consideration should perhaps be given to amending the *Sentencing Act 1991* (Vic) to provide that a court is not required to fix a non-parole period where it has imposed a sentence of imprisonment combined with a CCO.

### Abolition of suspended sentences

- 3.23 The abolition of suspended sentences is of relevance to the use of imprisonment, non-parole periods, and CCOs.
- 3.24 From 1 September 2014, Victorian courts can no longer impose suspended sentences. The *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic) progressively phased out this sentencing option in 2013 and 2014.
- 3.25 The abolition of suspended sentences only applies to offences committed on or after the commencement of the abolition provision.
- 3.26 This means that the County Court and the Supreme Court may still impose suspended sentences for offences (other than serious or significant offences) committed before 1 September 2013. Similarly, the County Court and the Supreme Court may impose a suspended sentence for a serious offence or a significant offence where the offence was committed before 1 May 2011.
- 3.27 Table 2 sets out the timeline for the progressive abolition of suspended sentences.
- 3.28 The removal of suspended sentences may result in more offenders being subject to sentences of imprisonment and therefore may increase the pool of offenders who contribute to the prison population and are subject to a period on parole, depending on the length of the sentence.<sup>62</sup>
- 3.29 In the course of monitoring the use of CCOs, the Council has examined the extent to which CCOs, imprisonment, and imprisonment combined with CCOs have been used in place of not just the abolished ICOs and CBOs but also suspended sentences of imprisonment, while they were in the process of being phased out.

60. *Baldwin v The Queen* [2015] VSCA 299 (18 November 2015).

61. *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014).

62. Victorian Ombudsman, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria: Discussion Paper* (2014) 6.

**Table 2: Progressive abolition of suspended sentences in the Victorian higher courts<sup>63</sup>**

<b>Commencement date</b>	<b>Effect</b>	<b>Application</b>	<b>Enacting legislation</b>
1 September 2014	Suspended sentences abolished for all offences in all jurisdictions	Offences committed on or after 1 September 2014	<i>Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013</i> (Vic)
1 September 2013	Suspended sentences abolished in the County and Supreme Courts	Offences committed on or after 1 September 2013	<i>Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013</i> (Vic)
1 May 2011	Suspended sentences abolished for 'serious' and 'significant' offences	Offences committed on or after 1 May 2011	<i>Sentencing Amendment Act 2010</i> (Vic)
1 November 2006	Wholly suspended sentences only available for serious offences where both 'exceptional circumstances' and 'interests of justice' tests are met	Offences committed on or after 1 November 2006	<i>Sentencing (Suspended Sentences) Act 2006</i> (Vic)

- 3.30 The Council's 2014 report, *Community Correction Orders: Monitoring Report*, found that in the 18 months following the introduction of CCOs in January 2012, the use of suspended sentences in the higher courts declined steadily, due primarily to the abolition of suspended sentences for 'serious' and 'significant' offences committed on or after 1 May 2011. While CCOs and imprisonment initially replaced suspended sentences in equal measure, in the first half of 2013, imprisonment predominantly replaced suspended sentences.<sup>64</sup>
- 3.31 Unlike in the higher courts, in the Magistrates' Court there was little change in the use of suspended sentences between January 2012 and June 2013. This is likely to be due to the timing of the abolition of suspended sentences in the Magistrates' Court (in September 2014).
- 3.32 The Council's 2015 report, *Community Correction Orders: Second Monitoring Report (Pre-Guideline Judgment)*, found that in both the higher courts and the Magistrates' Court, substantial declines in the use of suspended sentences occurred in the September and December quarters of 2014. The first decline was offset primarily by CCOs while the second decline was offset by imprisonment sentences combined with a CCO.<sup>65</sup>
- 3.33 Of particular relevance to this report is the finding that suspended sentences are, to some extent, being replaced by imprisonment sentences and imprisonment sentences combined with a CCO, as the report examines the use of non-parole periods as part of imprisonment sentences.

63. Adapted from Judicial College of Victoria, '12.15 – Suspended Sentences', *Sentencing Manual* (Judicial College of Victoria, 2015) <<http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm>>.

64. Sentencing Advisory Council, *Community Correction Orders: Monitoring Report* (2014) 46–47.

65. Sentencing Advisory Council, *Community Correction Orders: Second Monitoring Report (Pre-Guideline Judgment)* (2015) 12.

## Parole reforms

### Parole reviews

- 3.34 In recent years, the parole system has been the focus of much political, community, and media debate and has consequently come under 'intense scrutiny ... following a number of murders committed by offenders on parole'.<sup>66</sup>
- 3.35 A number of reviews have been completed including:
- a 2011 review by Professor James Ogloff and the Office of Correctional Services Review of 11 offenders alleged to have committed, or convicted of committing, murder while under the supervision of Community Correctional Services;<sup>67</sup>
  - a 2012 report by the Sentencing Advisory Council 'to ensure that the parole system best serves the Victorian community, including promoting public safety and reducing re-offending';<sup>68</sup> and
  - a 2013 review of Victoria's parole system by former High Court Justice Ian Callinan AC designed to 'ensure that the Board continues to operate effectively and is able to respond to current reforms and shifting demands'.<sup>69</sup>

### Common themes

- 3.36 While each of the above reviews has its own particular focus, they all arose within the context of growing concerns about the operation of the parole system with regard to community safety. Of particular concern has been the capacity of the parole system (including the Adult Parole Board, Corrections Victoria, and Victoria Police) to respond to cases involving high-risk offenders or where serious offences have been committed on parole.
- 3.37 The common themes that have run through each of the reviews are:
- a lack of systems and processes for adequate information-sharing between the key agencies;
  - an unreliable tool for assessing risk (the Victorian Intervention Screening Assessment Tool or VISAT) and a failure to match assessed risk levels with actual supervision on parole;
  - an under-resourced and under-qualified Community Correctional Services to case manage parolees, particularly high-risk parolees;
  - an under-resourced Adult Parole Board and the need for modernisation of its operating and data management system;
  - a situation where parole was not operating in practice as intended by the original parole order (i.e. breaches of parole and lack of availability of parole programs not being reported back to the Adult Parole Board, high-risk parolees being downgraded to less intensive supervision);
  - a need for a clear and transparent statement of the criteria guiding decision-making regarding parole, reflecting the importance of community safety and listing the relevant factors taken into account; and
  - a need for changes to the approach to responding to breaches of parole, particularly where breaches consist of further offending on parole.

66. Freiberg (2014), above n 13, x.

67. James Ogloff and Office of Correctional Services Review (OCSR), *Review of Parolee Reoffending by Way of Murder* (2013).

68. Sentencing Advisory Council (2012), above n 1.

69. Callinan (2013), above n 2.



- 3.38 Following these reviews and the intense scrutiny of the adult parole system in Victoria, there have been significant legislative and operational changes to the adult parole system in Victoria, together with a shift in general approach and practices, many of which commenced before the formal changes came into operation.
- 3.39 Corrections Victoria has documented its response to Professor Ogloff and the Office of Corrective Services Review's recommendations, the majority of which have been implemented, along with outcomes from the other internal reviews.<sup>70</sup>
- 3.40 An earlier version of the Adult Parole Board's Members' Manual indicates that a number of the Council's recommendations have been fully implemented and that in 2013 the remainder were in the process of implementation.<sup>71</sup>
- 3.41 Similarly, the most recent version of the Members' Manual refers to the measure proposed by Ian Callinan AC for the promotion of transparency and accountability in the operation of the Adult Parole Board.<sup>72</sup>

### Legislative reforms to parole

- 3.42 Alongside a large number of administrative reforms, a number of key legislative reforms to parole have implemented the measures proposed in the Callinan Report, including:
- automatic cancellation of parole for particular offenders for offending on parole and the introduction of an electronic monitoring condition for grant of parole;<sup>73</sup>
  - increased reporting requirements for the Adult Parole Board in relation to serious violent or sexual offences committed on parole, changes to the composition of the Adult Parole Board, notice requirements for victims on the Victims Register, and a legislative provision that safety and protection of the community are paramount in all parole decisions;<sup>74</sup>
  - a new offence of breach of parole and new arrest and detention powers for Victoria Police in relation to parolees who are suspected of breaching conditions;<sup>75</sup> and
  - a two-tiered decision-making process for serious violent or sexual offenders and a requirement for prisoners who have had parole cancelled to serve at least half of their remaining non-parole period before a further grant of parole.<sup>76</sup>
- 3.43 While these legislative reforms touch on the management and operation of parole, they are not concerned with the imposition of a non-parole period at the sentencing stage. Nevertheless, when deciding between different sentencing orders, it is likely that a court will have regard to the reforms that have occurred in relation to parole, and this may influence the determination of an appropriate sentence within the constraints discussed at [2.32]–[2.36].

70. Corrections Victoria, *Consolidated Response to Reviews of Offenders Charged with Murder* (2013). State Coroner Judge Gray revised and redacted the version published 22 August 2013.

71. Adult Parole Board of Victoria, *Parole Manual – Adult Parole Board of Victoria (Fourth Edition)* (2013) 6.

72. Adult Parole Board of Victoria (2015), above n 12, 5.

73. *Justice Legislation Amendment (Cancellation of Parole and Other Matters) Act 2013* (Vic); commenced 20 May 2013.

74. *Corrections Amendment (Parole Reform) Act 2013* (Vic); commenced 20 November 2013.

75. *Corrections Amendment (Breach of Parole) Act 2013* (Vic); commenced 1 July 2014.

76. *Corrections Amendment (Further Parole Reform) Act 2014* (Vic); commenced 1 July 2014.

3.44 The practices of the Adult Parole Board in relation to granting parole changed markedly in 2013. Between 2012–13 and 2013–14, the number of parole orders that were granted by the Adult Parole Board declined by 36%, while over the same period, the number of parole orders that were denied increased by 96.2%.<sup>77</sup> The following year, 2014–15, saw a similar number of parole orders granted and denied.<sup>78</sup>

### Minimum non-parole periods for baseline offence cases

3.45 The only recent amendment to the *Sentencing Act 1991* (Vic) that touches on the way in which a court may impose a non-parole period relates to the baseline sentencing scheme.

3.46 The *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic) declared the following seven offences to be baseline offences:

- murder;
- incest with a child, step-child, or lineal descendant (aged under 18);
- incest with the child, step-child, or lineal descendant (aged under 18) of a de facto spouse;
- sexual penetration with a child under 12;
- persistent sexual abuse of a child under 16;
- culpable driving causing death; and
- trafficking in a large commercial quantity of drugs.

3.47 Further, the *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic) amended the *Sentencing Act 1991* (Vic) to provide that, when a court imposes a sentence of imprisonment for a case that includes a baseline offence, it must fix a non-parole period that is:

- 30 years, if the sentence for the case is life imprisonment;
- 70% of the sentence for the case, if that sentence is 20 years or more; or
- 60% of the sentence for the case, if that sentence is less than 20 years.<sup>79</sup>

3.48 The recent Court of Appeal case *DPP v Walters*<sup>80</sup> has held that the provisions of the baseline sentencing scheme are 'incapable of being given any practical operation';<sup>81</sup> however, there is uncertainty as to whether the provisions may still apply in relation to the imposition of a minimum proportion of the total effective sentence as the non-parole period.

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77. Adult Parole Board of Victoria, *Annual Report 2013–2014* (2014) 7.

78. Adult Parole Board of Victoria, *Annual Report 2014–2015* (2015) 11.

79. *Sentencing Act 1991* (Vic) s 11A.

80. *DPP v Walters (a pseudonym)* [2015] VSCA 303 (17 November 2015).

81. *DPP v Walters (a pseudonym)* [2015] VSCA 303 (17 November 2015) [9].

## 4. Changes in the courts' use of non-parole periods

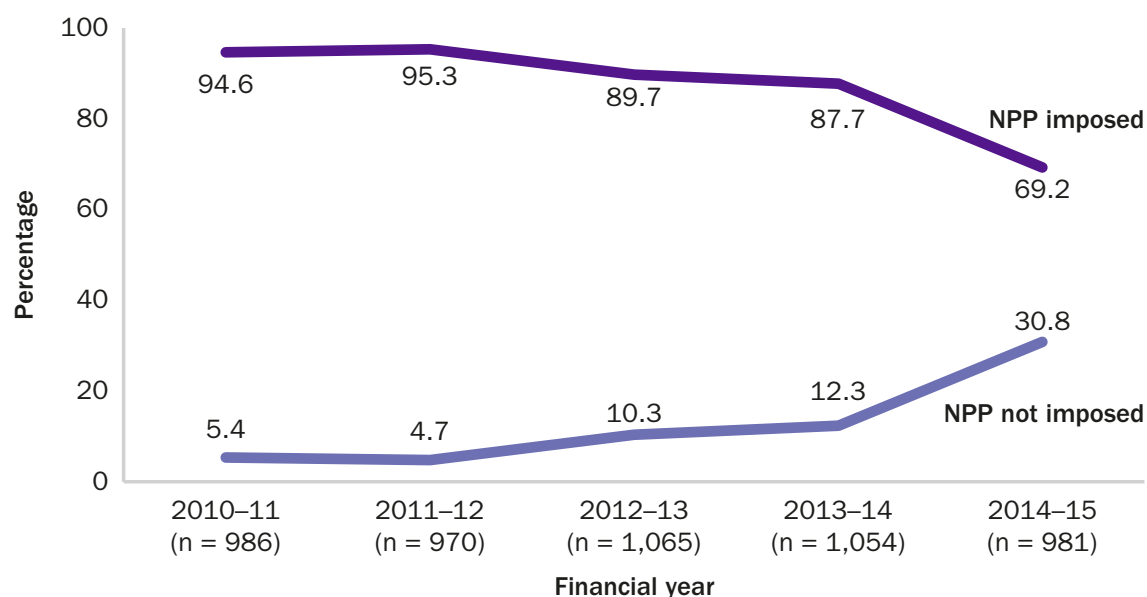
4.1 This chapter addresses the first research question in this report (see [1.8]): How did the courts' use of non-parole periods change between 2010–11 and 2014–15? The sentencing practices of the higher courts (the Supreme and County Courts) are examined first, followed by the sentencing practices in the Magistrates' Court, before a discussion of the possible factors that have contributed to the identified changes and a consideration of the implications of the changes.

### The higher courts

4.2 Approximately 60% of all offenders sentenced in the higher courts receive a sentence of imprisonment, and the majority of these offenders receive a non-parole period. Of the 5,056 cases that received imprisonment between July 2010 and June 2015, 4,415 or 87.3% received a non-parole period as part of the sentence. This is to be expected given that the median length of total effective imprisonment terms imposed in the higher courts is greater than two years (three years and four months) and that there is a legislative requirement that a sentence of imprisonment of two years or more receives a non-parole period (see [2.13]–[2.18]).

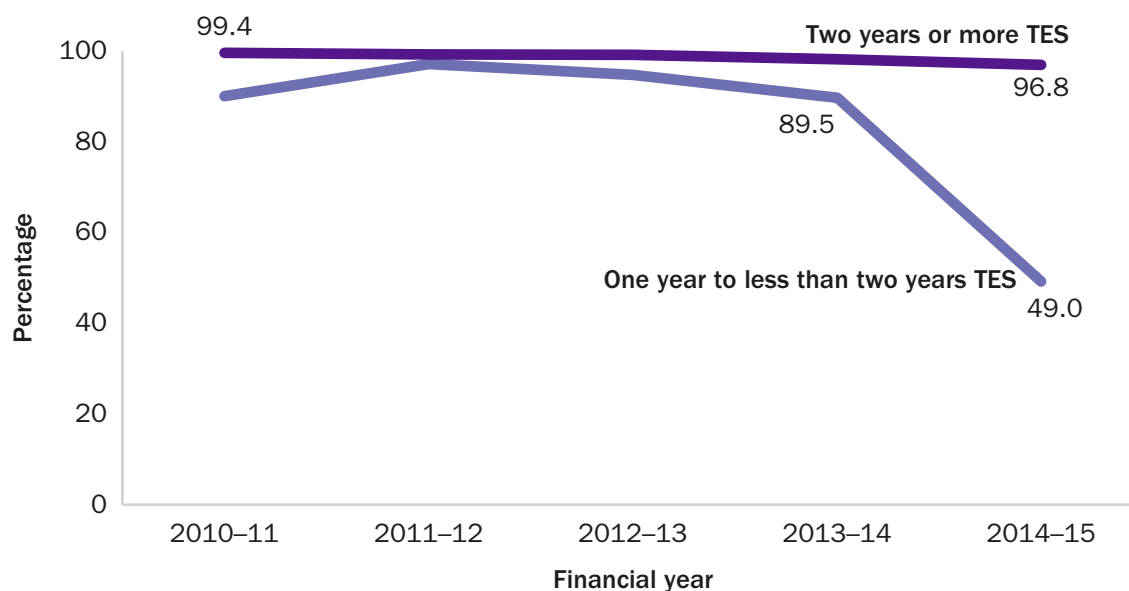
4.3 Of significance, however, is the marked reduction in the proportion of imprisonment cases that receive a non-parole period. Figure 1 shows that, between 2010–11 and 2014–15, the proportion of imprisonment cases in the higher courts that received a non-parole period declined from 94.6% to 69.2% (25.4 percentage points). Most of this decrease occurred between 2013–14 and 2014–15 (18.5 percentage points) while there was also a clear, though much smaller, decline between 2011–12 and 2012–13 (5.6 percentage points).

**Figure 1: Percentage of cases that received imprisonment by non-parole period status and financial year, higher courts, 2010–11 to 2014–15**



- 4.4 As discussed at [2.13]–[2.18], a court cannot impose a non-parole period for cases with a total effective imprisonment term of under one year; however, it has discretion to impose a non-parole period for sentences of imprisonment of one year to less than two years, and it must impose a non-parole period on sentences of imprisonment of two years or more.<sup>82</sup> Consequently any changes in sentencing practices affecting the imposition of non-parole periods are most likely to be seen in cases with total effective imprisonment terms within the discretionary range of one year to less than two years.
- 4.5 Figure 2 shows the proportion of imprisonment cases with a total effective sentence of either one year to less than two years, or two years or more, that received a non-parole period.
- 4.6 The proportion of cases with a total effective sentence of two years or more receiving a non-parole period has remained relatively constant over the reference period. There has been a marked reduction, however, in the proportion of cases with a total effective imprisonment term of one year to less than two years receiving a non-parole period. The reduction was particularly marked between 2013–14 and 2014–15, declining from approximately 90% of the ‘discretionary’ cases to less than 50%. The rate at which non-parole periods are imposed for this sub-group of imprisonment sentences is lower than the rate for all imprisonment sentences (nearly 70%) because the majority of imprisonment sentences imposed in the higher courts exceed two years and therefore must have a non-parole period.

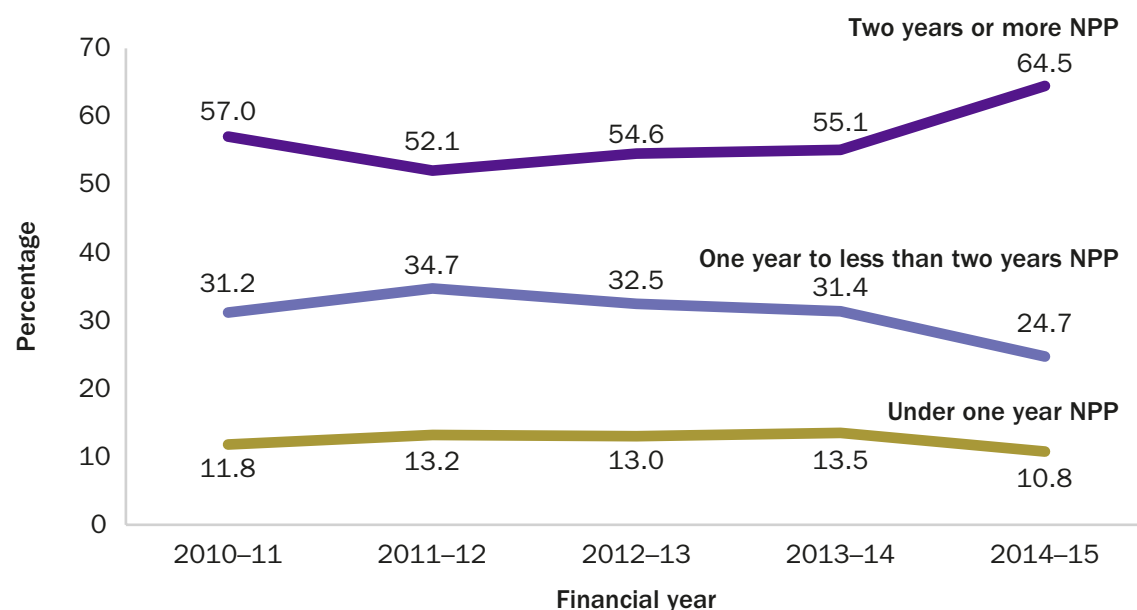
**Figure 2: Percentage of cases that received a non-parole period by total effective imprisonment term category and financial year, higher courts, 2010–11 to 2014–15**



82. This is unless the court considers that the nature of the offence or the past history of the offender make the fixing of a non-parole period inappropriate: *Sentencing Act 1991* (Vic) s 11(1).

- 4.7 Along with the downward shift in the use of non-parole periods during the 2014–15 financial year, there was also a decline in the length of non-parole periods. Prior to 2014–15, the median length of non-parole periods over the reference period was remarkably consistent, at four years for each year between 2010–11 and 2013–14. However, in the most recent year of data, the median non-parole period increased to four years and six months.
- 4.8 The increase in the length of non-parole periods is likely to be an artefact of the decline in the use of non-parole periods for terms of imprisonment of one year to less than two years. Non-parole periods for these imprisonment sentences are inevitably at the lowest end of the non-parole period spectrum. If the use of non-parole periods for these sentences declines, the result is an overall shift upwards in the length of non-parole periods.
- 4.9 Figure 3 presents the proportion of non-parole periods according to the length of the non-parole period. Due to the requirement that non-parole periods must be at least six months less than the total effective sentence, the total effective term for non-parole periods of less than two years must have been at least two years and six months. Between 2013–14 and 2014–15, the proportion of non-parole periods of less than two years declined from 44.9% to 35.5%. This is most likely to be a result of the decline in use of non-parole periods for relatively short imprisonment sentences.

**Figure 3: Percentage of cases that received a non-parole period by length of non-parole period (grouped) and financial year, higher courts, 2010–11 to 2014–15**



## The Magistrates' Court

- 4.10 As with the higher courts, the Magistrates' Court cannot impose a non-parole period for cases with a total effective imprisonment term of under one year. It has discretion to impose a non-parole period for sentences of imprisonment of one year to less than two years, and it must impose a non-parole period on sentences of imprisonment of two years or more.<sup>83</sup>
- 4.11 In contrast with the higher courts, in the Magistrates' Court the maximum term of imprisonment that a magistrate can impose for a single charge is two years. The maximum aggregate sentence that a magistrate can order in a case with multiple charges is five years.<sup>84</sup>
- 4.12 Also, in the Magistrates' Court, a community correction order (CCO) cannot exceed:
- two years in respect of a case with one charge;
  - four years in respect of a case with two charges; or
  - five years in respect of a case with three or more charges.<sup>85</sup>
- 4.13 If a magistrate orders an offender to serve a combined sentence involving a term of imprisonment and a CCO, different maximum terms apply. In such a case, the length of the term of imprisonment for all charges cannot exceed two years.
- 4.14 Further, for these combined sentences, the overall sentence (that is, the sum total length of the term of imprisonment and the length of the CCO) must not exceed five years.<sup>86</sup>
- 4.15 The sentencing profile of the Magistrates' Court is very different from that of the higher courts. Over the five-year period from July 2010 to June 2015, the percentage of cases that received imprisonment was lower (5% compared with 60% in the higher courts) and, for those cases that received imprisonment, the median term was substantially lower at three months, compared with three years and four months in the higher courts. These differences in sentencing are due to the jurisdictional limit of the Magistrates' Court<sup>87</sup> and the nature of offending that is sentenced in that jurisdiction compared with the higher courts.
- 4.16 The majority of imprisonment sentences imposed in the Magistrates' Court are ineligible for a non-parole period because they are for a term of less than one year. In the five-year period, 79.1% of imprisonment sentences fell into this category. The implication for the use of non-parole periods is that the proportion of all imprisonment cases that do not receive a non-parole period is substantially higher than the proportion of cases that do.

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83. This is unless the court considers that the nature of the offence or the past history of the offender make the fixing of a non-parole period inappropriate: *Sentencing Act 1991 (Vic)* s 11(1).

84. *Sentencing Act 1991 (Vic)* ss 113A, 113B.

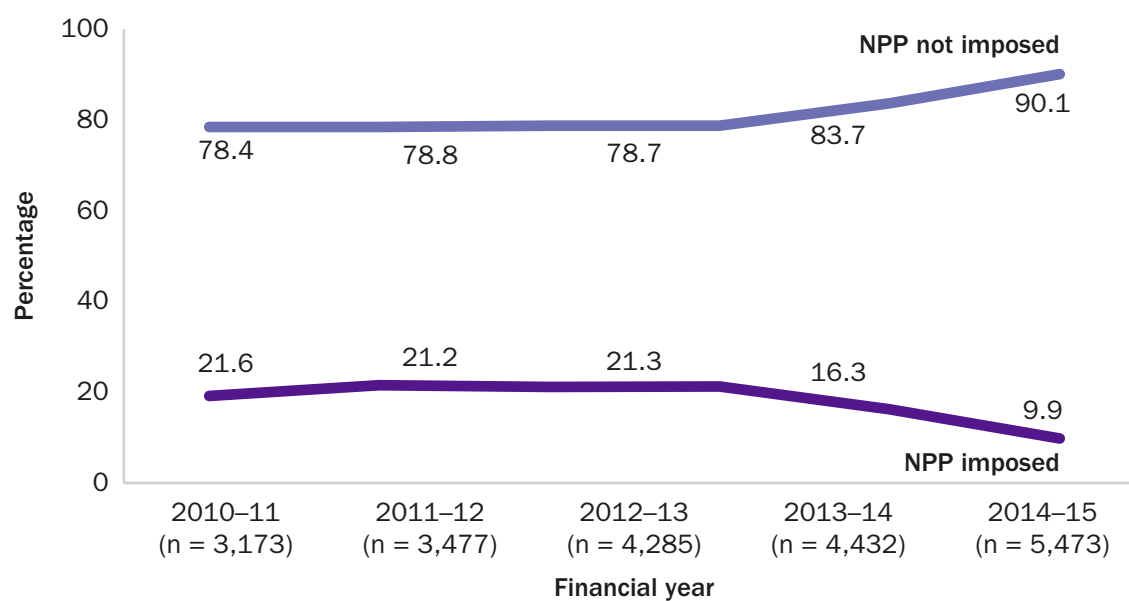
85. *Sentencing Act 1991 (Vic)* s 38.

86. This means that an offender sentenced in the Magistrates' Court for two charges committed at the same time (assuming, for example, a five-year maximum penalty for the offences that constitute those charges) would face a maximum combined sentence of two years' imprisonment followed by a maximum three-year CCO: *Sentencing Act 1991 (Vic)* s 44(1B).

87. The maximum term of imprisonment that a magistrate can impose for a single charge is two years; the maximum aggregate sentence of imprisonment that a magistrate can order in a case with multiple charges is five years: *Sentencing Act 1991 (Vic)* ss 113A, 113B.

- 4.17 Figure 4 shows the percentage of all imprisonment sentences that received a non-parole period across the reference period.
- 4.18 Consistent with expectations, the proportion of imprisonment cases with a non-parole period is substantially lower than the proportion without a non-parole period. For example, in 2012–13, 21.3% of imprisonment sentences in the Magistrates' Court included a non-parole period while 78.7% did not. The non-parole period rate in the Magistrates' Court is also considerably lower than that in the higher courts, with 89.7% of imprisonment sentences in the higher courts receiving a non-parole period in 2012–13 compared with 21.3% in the Magistrates' Court.
- 4.19 Of note, however, is the shift in sentencing practices since 2012–13, showing a marked decline in the imposition of non-parole periods (from 21.6% to 9.9% of all imprisonment cases) and a corresponding increase in imprisonment sentences without a non-parole period (from 78.4% to 90.1%). As in the higher courts, there has been a shift away from non-parole periods in the Magistrates' Court. However, the shift commenced earlier in the Magistrates' Court (2013–14) than in the higher courts (2014–15).

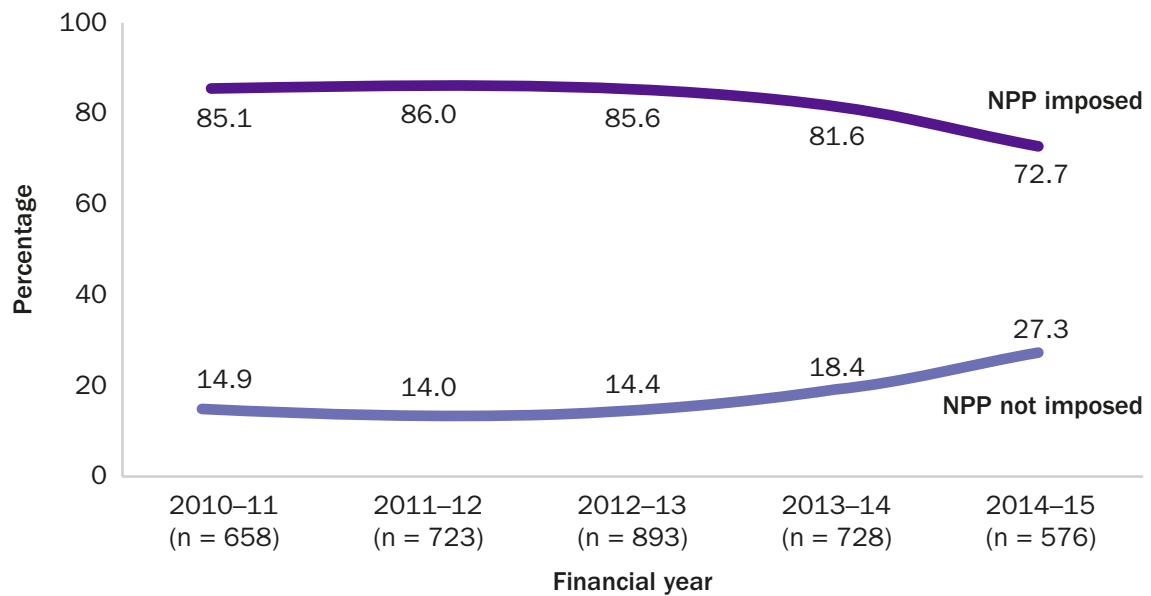
**Figure 4: Percentage of cases that received imprisonment by non-parole period status and financial year, Magistrates' Court, 2010–11 to 2014–15**



4.20 The analysis now turns to the use of non-parole periods in the Magistrates' Court for cases in which a non-parole period is discretionary. Figure 5 presents the proportion of cases that received a term of imprisonment within the discretionary range for the imposition of a non-parole period (one year to less than two years), indicating whether or not the case received a non-parole period.

4.21 Over the reference period, the proportion of imprisonment cases in the discretionary range that received a non-parole period declined from 85.1% in 2010–11 to 72.7% in 2014–15. As in the higher courts, the largest annual decline occurred between 2013–14 and 2014–15 (8.9 percentage points). However, the magnitude of the decline was not nearly as large in the Magistrates' Court as it was in the higher courts, where it fell by just over 40 percentage points (from 89.5% to 49.0%).

**Figure 5: Percentage of cases that received a total effective imprisonment term of one year to less than two years, by non-parole period status and financial year, Magistrates' Court, 2010–11 to 2014–15**





## Factors influencing changes in the use of non-parole periods

4.22 The decline in the use of non-parole periods occurred during a time of reforms, some of which had tangible effects on sentencing practices. These reforms included the phased abolition of suspended sentences and the increase in the maximum term of imprisonment that can be combined with a CCO. To what extent did these reforms influence the declines in the use of non-parole periods in the higher courts and in the Magistrates' Court?

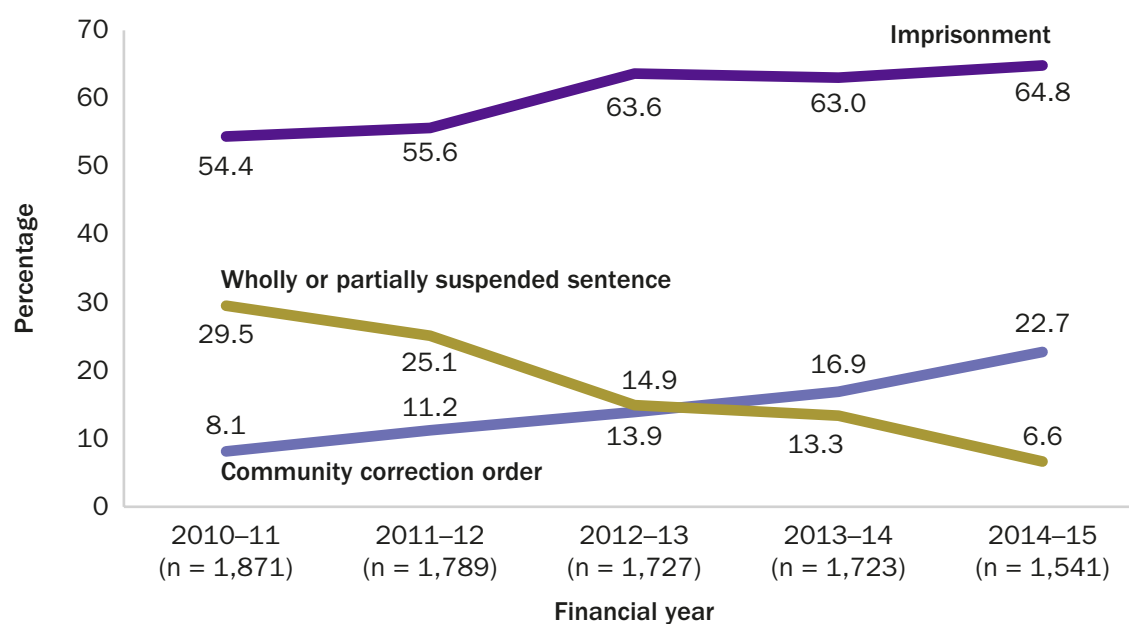
### Abolition of suspended sentences

#### Higher courts

4.23 The substantial reduction in the use of non-parole periods in the higher courts in 2012–13 (use declined from 95.3% to 89.7%; see Figure 1) was likely to be due to the abolition of suspended sentences for serious and significant offences committed between 1 May 2011 and 31 August 2013 and its effect on imprisonment sentences. Figure 6 shows that, while the use of suspended sentences declined over the five-year period, a particularly substantial annual decline occurred in 2012–13: the percentage of all sentences that were wholly or partially suspended terms of imprisonment declined from 25.1% in 2011–12 to 14.9%.

4.24 Due to the relatively serious nature of the offences for which suspended sentences were first abolished,<sup>88</sup> it is likely that suspended sentences for these offences were generally replaced by imprisonment rather than non-custodial sanctions. Indeed, between 2011–12 and 2012–13, there was a substantial increase in the use of imprisonment (from 55.6% to 63.6%) and a much smaller increase in the use of community sentences (from 11.2% to 13.9%).

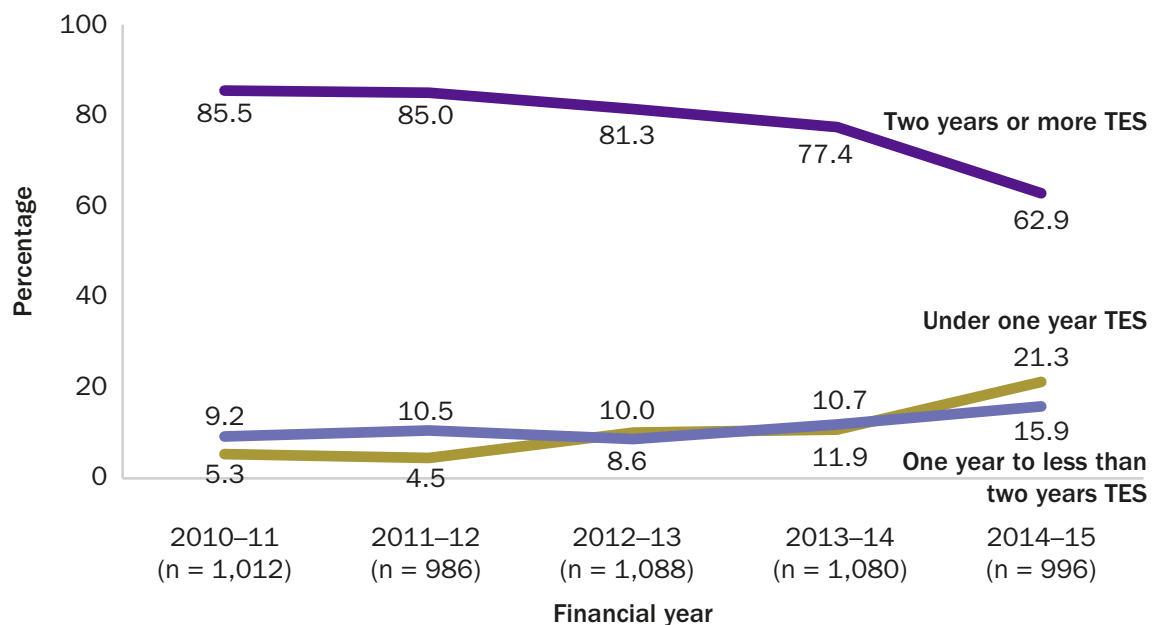
**Figure 6: Percentage of cases by principal sentence category and financial year, higher courts, 2010–11 to 2014–15**



88. Suspended sentences were first abolished for all 'serious' and 'significant' offences (as then defined in the *Sentencing Act 1991* (Vic)) committed on or after 1 May 2011. See [3.23]–[3.33].

- 4.25 Given that suspended sentences of imprisonment were generally replaced by imprisonment sentences in 2012–13, it is likely that the terms of the imprisonment sentences were relatively short. Figure 7 tracks the proportions of total effective imprisonment terms falling into three categories: under one year, one year to less than two years, and two years or more. In 2012–13, the percentage of imprisonment sentences that were under one year increased to 10.0% from just 4.5% in the previous year. This supports the contention that relatively short terms of imprisonment have replaced suspended sentences for serious and significant offences.
- 4.26 In turn, the increase in relatively short terms of imprisonment in 2012–13 is likely to have had an effect on the use of non-parole periods in that year. It is for terms of imprisonment of less than two years that non-parole periods are either optional (one year to less than two years) or unable to be imposed (under one year). Therefore, growth in the proportion of imprisonment cases in these categories is likely to have produced the reduction in the overall use of non-parole periods in 2012–13.
- 4.27 Unlike the 2012–13 decline, the 2014–15 decline in the use of non-parole periods in the higher courts is likely to be due primarily to something other than the abolition of suspended sentences. While the final phase-out of suspended sentences occurred for offences committed on or after 1 September 2013, it is likely that these suspended sentences were generally replaced by CCOs rather than imprisonment due to the less serious nature of the offences. As Figure 6 shows, the substantial decline in the use of suspended sentences in 2014–15 occurred alongside only a slight rise in the use of imprisonment but a substantial increase in the use of CCOs.

**Figure 7: Percentage of cases that received imprisonment by total effective imprisonment term category and financial year, higher courts, 2010–11 to 2014–15**

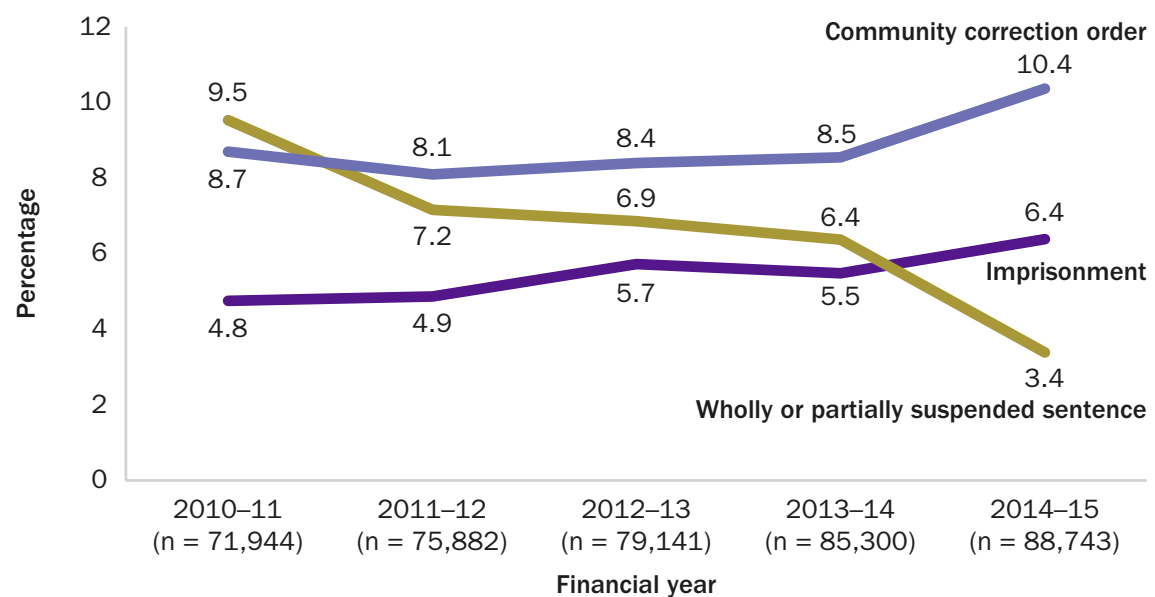


### Magistrates' Court

4.28 The abolition of suspended sentences is likely to have had a similar effect on imprisonment sentences (and therefore non-parole periods) in the Magistrates' Court as in the higher courts. Suspended sentences were abolished in the Magistrates' Court for offences committed on or after 1 September 2014 and therefore are relevant to the decline in the use of non-parole periods in 2014–15.

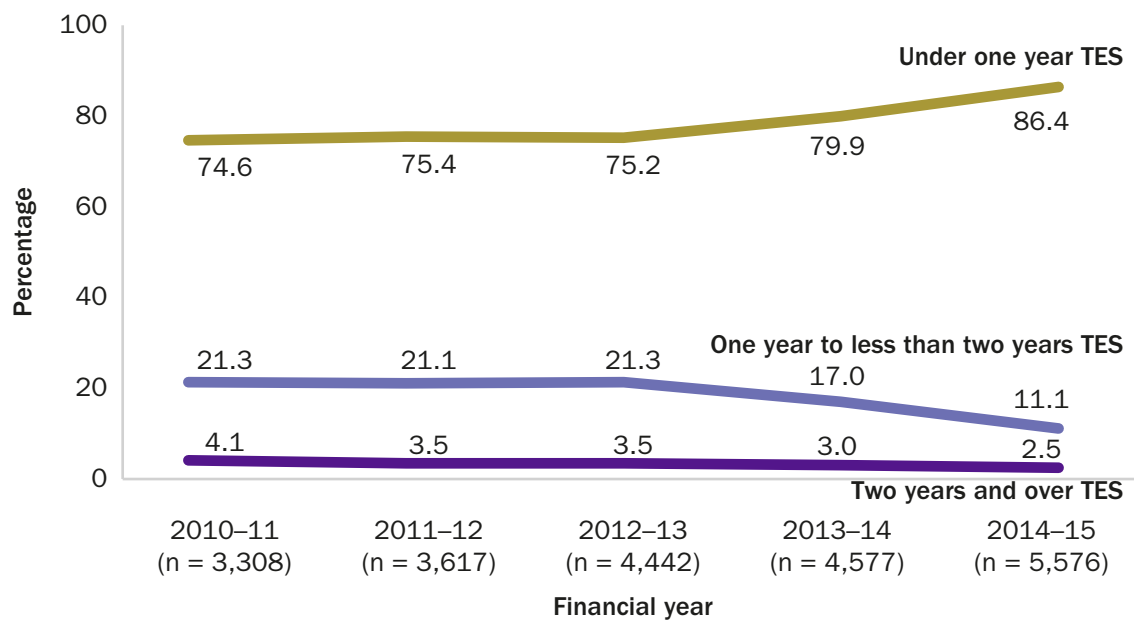
4.29 As Figure 8 shows, the proportion of cases receiving a wholly or partially suspended sentence declined from 6.4% in 2013–14 to 3.4% in 2014–15. This represents a decline of 3.0 percentage points. The only increases in the use of particular sentence types over the same period were for CCOs (1.9 percentage points) and imprisonment (0.9 percentage points). Therefore, suspended sentences were replaced by a combination of CCOs and imprisonment. As the increase in the use of CCOs was 1.9 percentage points and the increase in imprisonment was 0.9 percentage points, the Council estimates that approximately 40% of suspended sentences were replaced by imprisonment and 60% were replaced by CCOs. Where imprisonment sentences replaced suspended sentences in the Magistrates' Court, were those imprisonment sentences relatively short?

**Figure 8:** Percentage of all cases by selected principal sentences and financial year, Magistrates' Court, 2010–11 to 2014–15



- 4.30 Figure 9 presents the proportion of imprisonment sentences that fell within different sentence length groups. The increase in imprisonment sentences of under one year began in 2013–14 and continued in 2014–15, the same two years during which the decreases in the use of non-parole periods occurred. While the 2014–15 increase is likely to have been driven, at least in part, by the replacement of suspended sentences with short terms of imprisonment, the increase in 2013–14 cannot have been driven by this factor, as suspended sentences had not yet been abolished in the Magistrates' Court.
- 4.31 A key factor in the 2013–14 increase in short terms of imprisonment is likely to be the introduction of CCOs and, in particular, courts initially having the ability to combine a very short term of imprisonment (up to three months) with a CCO. The practice of combining a CCO with imprisonment in the Magistrates' Court was common when CCOs were introduced. Based on data published previously by the Council, between January 2012 and June 2013, 10.4% of all imprisonment sentences imposed in the Magistrates' Court were combined with a CCO.<sup>89</sup>
- 4.32 In summary, the declines in the use of non-parole periods in the Magistrates' Court in 2013–14 and 2014–15 were both driven, at least in part, by increases in short terms of imprisonment, which in turn were driven by the abolition of suspended sentences, and the ability of the courts to combine a CCO with a very short term of imprisonment.

**Figure 9: Percentage of cases that received imprisonment by total effective imprisonment term category and financial year, Magistrates' Court, 2010–11 to 2014–15**



89. This percentage was calculated from data in Sentencing Advisory Council (2015), above n 65, 18, Table 3.

### Imprisonment of two years combined with a community correction order

- 4.33 As discussed at [3.12], at the time of its commencement in 2012, the CCO could be combined with a sentence of imprisonment not exceeding three months.
- 4.34 The expansion of the courts' ability to combine imprisonment with a CCO occurred early in the 2014–15 financial year. As discussed at [3.13], in September 2014 the maximum term of imprisonment that could be combined with a CCO increased from three months to two years.<sup>90</sup> Consequently, a sentencing option that in general had previously been only available for relatively less serious offending became available for relatively more serious offending for which a longer term of imprisonment is appropriate.
- 4.35 Contemporaneous with this reform were amendments to the *Sentencing Act 1991 (Vic)* to specifically state that a court may consider a CCO an appropriate order for offending that previously might have received a wholly suspended sentence.<sup>91</sup> Prior to abolition, in order to impose a suspended sentence, the court had first to determine that a custodial sentence was warranted, and then determine that the circumstances of the case merited suspension of that custodial sentence.
- 4.36 The availability of the CCO for imprisonment sentences of up to two years meant that the courts gained the option of combining imprisonment with a CCO for terms of imprisonment where a non-parole period was optional (one year to less than two years). It is important to investigate whether this reform had an effect on the decline in the use of non-parole periods in 2014–15.

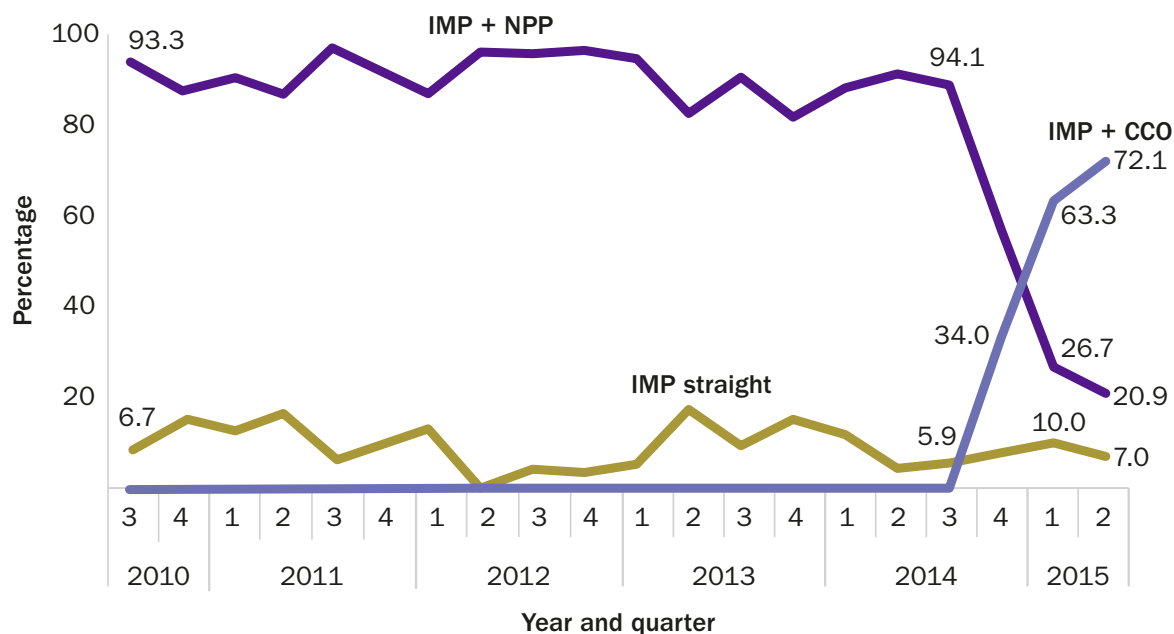
### Higher courts

- 4.37 In the higher courts in 2014–15, a dramatic shift occurred in the use of sentences of imprisonment combined with a CCO. Using quarterly data, Figure 10 shows the proportion of imprisonment cases in the discretionary range (one year to less than two years) according to whether the case had a non-parole period imposed, had a straight sentence of imprisonment without a non-parole period, or had imprisonment combined with a CCO.
- 4.38 Between the September quarter of 2010 and the September quarter of 2014, sentences of imprisonment of one year to less than two years could not be combined with a CCO. In the December quarter of 2014, however, there was a marked shift: suddenly 34.0% of imprisonment sentences in this group were combined with a CCO. This increased again in the March quarter of 2015 to 63.3%. Clearly, judges in the higher courts embraced the new option of combining a short term of imprisonment with a CCO where it was considered appropriate.
- 4.39 It is also clear that the option of combining a CCO with a two-year sentence of imprisonment resulted in a decline in the use of non-parole periods. The proportion of sentences of imprisonment of one year to less than two years that included a non-parole period declined from 94.1% in the September quarter of 2014 to 26.7% in the March quarter of 2015 and then declined further to 20.9% in the June quarter of 2015. There is little doubt that judges developed a preference for the CCO over the non-parole period in combination with imprisonment.

90. *Sentencing Act 1991 (Vic)* s 44(1).

91. *Sentencing Act 1991 (Vic)* s 36(2).

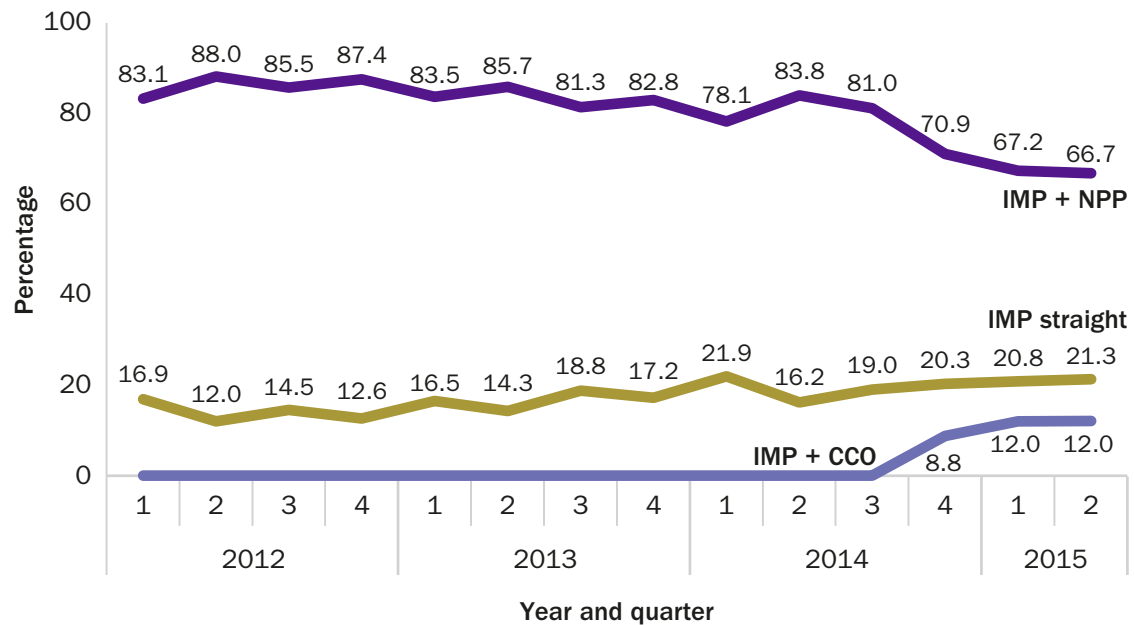
**Figure 10:** Percentage of imprisonment cases with a total effective imprisonment term of one year to less than two years by community correction order/non-parole period status and quarter, higher courts, September quarter of 2010 to June quarter of 2015



### Magistrates' Court

- 4.40 This effect in the higher courts (see [4.38]–[4.39]) makes the amendments from September 2014 a relevant factor to investigate for the decrease in the use of non-parole periods in the Magistrates' Court in 2014–15. As with the higher courts data, of particular interest are any changes to sentencing practices for cases of imprisonment that fall within the discretionary range for the imposition of a non-parole period (one year to less than two years).
- 4.41 Figure 11 presents quarterly data on the use of CCOs, non-parole periods, and straight sentences of imprisonment for cases with imprisonment terms falling within the discretionary range (one year to less than two years) according to the type of imprisonment sentence imposed.
- 4.42 Shown by quarters, the data demonstrate some variability between months; however, there is a relatively consistent proportion of cases within the discretionary range that received a non-parole period from the March quarter of 2012 to the September quarter of 2014. Similarly, the proportion of straight sentences of imprisonment without a non-parole period shows some variation, but this is relatively consistent across the same period.
- 4.43 From the September quarter of 2014 to the March quarter of 2015, however, there is a substantial decline in the proportion of imprisonment cases receiving a non-parole period at the same time as a slight increase in the proportion of straight sentences of imprisonment.
- 4.44 The combined sentences show an immediate rise (from 0.0% to 8.8%) within the first quarter that a CCO could be combined with a term of imprisonment within the discretionary range. This was followed by a slight increase to 12.0% in the March quarter of 2015, remaining stable in the following quarter.

**Figure 11:** Percentage, by quarter, of terms of imprisonment of one year to less than two years that were combined with a community correction order or with a non-parole period, Magistrates' Court, March quarter of 2012 to June quarter of 2015



- 4.45 Given the increase in straight sentences of imprisonment, it is likely that, for terms of imprisonment within the discretionary range, combined sentences of imprisonment with a CCO are replacing sentences of imprisonment with a non-parole period.
- 4.46 This replicates the trend seen in the higher courts, but to a far lesser degree. In the Magistrates' Court, sentences of imprisonment of one year to less than two years are still significantly more likely to receive a non-parole period than to be combined with a CCO or to be served as a straight sentence of imprisonment without a non-parole period.

### Other factors relating to community correction orders

- 4.47 The timing of the decline in the use of non-parole periods in the December quarter of 2014 means that the decline is directly attributable to the September 2014 legislation. However, the broader context needs to be considered to understand why the courts, to varying extents, came to value the CCO over parole. Features of this context include the guideline judgment on CCOs, changes to the parole administration system, and the abolition of partially suspended sentences of imprisonment.

### **Guideline judgment on community correction orders**

- 4.48 The expanded scope of the combined sentence came into effect only a few months before the guideline judgment in *Boulton*<sup>92</sup> was handed down. The data show that the increase in combined sentences commenced prior to delivery of the judgment and continued afterwards.
- 4.49 Appendix I to the judgment in *Boulton* provides guidelines for the sentencing courts on the use of CCOs. In relation to combining a CCO with a sentence of imprisonment, the guidelines state:
- A CCO can be combined with other sentencing options, including a fine and/or a term of imprisonment of up to two years. The availability of that kind of combination adds to the flexibility of the CCO regime.
- Consequently, even in cases of objectively grave criminal conduct, the court may conclude that some or all of the punitive, deterrent and denunciatory purposes of sentencing can be sufficiently achieved by a short term of imprisonment of up to two years if coupled with a CCO of lengthy duration, with conditions tailored to the offender's circumstances and the causes of the offending, directed at rehabilitative purposes.
- Whether an additional sentence of that kind is warranted must be decided consistently with the governing principles of proportionality and suitability.<sup>93</sup>
- 4.50 The guidelines therefore contemplate the use of combined sentences for an increased range of offending (including relatively serious offending) as a consequence of the ability to combine the CCO with a maximum term of imprisonment of two years. Further, such sentences adequately address the purposes of sentencing, including punishment, deterrence, denunciation, and rehabilitation.

### **Changes to parole administration**

- 4.51 Between 2012–13 and 2013–14, the number of parole orders that were granted by the Adult Parole Board declined by 36%, while over the same period, the number of parole orders that were denied increased by 96.2%.<sup>94</sup> Between 2013–14 and 2014–15, the number of parole orders granted increased slightly from the previous year, by 2.1%, and the number of parole orders denied remained relatively stable, increasing by only 0.8%.<sup>95</sup>
- 4.52 The changes to the administration of parole – which, since 2012–13, have resulted in a reduced likelihood of parole being granted and an increased likelihood of parole being denied – are likely to weigh upon a court's consideration of the appropriate sentence, although this cannot be tested using the available data.
- 4.53 As discussed at [2.32]–[2.36], the court's consideration of executive action (such as the likelihood of release on parole) for the purposes of increasing or decreasing the length of a custodial sentence is prohibited by section 5(2AA) of the *Sentencing Act 1991* (Vic). This provision, however, does not prohibit the court from considering the consequences on the offender of the various sentencing options available to it. As a result, the fact that an offender is not automatically granted parole<sup>96</sup> (rather than the likelihood of the offender's release on parole) may appropriately influence the selection of, for example, a combined sentence of imprisonment with a CCO over a sentence of imprisonment with a non-parole period.

92. *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014).

93. *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014), Appendix I: Community Correction Orders: Guidelines for Sentencing Courts [26]–[28].

94. Adult Parole Board of Victoria (2014), above n 77, 7.

95. Adult Parole Board of Victoria (2015), above n 78, 11.

96. *R v Ngo* [1999] 3 VR 265.



### ***Abolition of partially suspended sentences and the use of community correction orders***

- 4.54 Partially suspended sentences were abolished alongside wholly suspended sentences. Partially suspended sentences allowed an offender to serve a term of imprisonment in custody (the unsuspended term) followed by a term of imprisonment served in the community (the partially suspended term). The period of imprisonment served in custody was a straight sentence of imprisonment, that is, the court did not fix a non-parole period, and the offender was released without supervision at the completion of the unsuspended term (on the condition that the offender did not reoffend).
- 4.55 It has been observed that partially suspended sentences were frequently imposed where an offender had spent a substantial amount of time in pre-sentence detention, although this cannot be tested using the available data.
- 4.56 Although conditions could not be imposed on the partially suspended term, the offender was still under sentence. If the offender reoffended, he or she faced the prospect of having to serve the partially suspended term in custody.
- 4.57 A possible contributing factor to the increased use of combined sentences of imprisonment with a CCO is that they are being used similarly, in place of partially suspended sentences where an offender has served a substantial amount of time in pre-sentence detention. The pre-sentence detention is accounted for in the imprisonment sentence, and the nature of the combined sentence means that a court can now place appropriate conditions on the CCO (such as monitoring and supervision), which was not possible under a partially suspended sentence.

### **Summary**

- 4.58 The reduction in the use of non-parole periods in the higher courts and the Magistrates' Court in 2014–15 was driven by a combination of factors. First, legislative changes allowed the CCO to be combined with longer terms of imprisonment, expressly permitting the court to consider imposing a CCO where a wholly suspended sentence would previously have been appropriate.
- 4.59 Second, an environment created by changes to the administration of parole and guidance to the courts has placed greater emphasis on CCOs. This context is likely to have prompted some courts to view the certainty and flexibility of a CCO, when combined with imprisonment, as more appropriate than a possible parole period managed under the parole system.
- 4.60 Third, the abolition of suspended sentences and the resulting increase in short terms of imprisonment were major factors in the reduction in the use of non-parole periods in 2012–13 in the higher courts and a factor in the minor, but observable, reduction in 2014–15 in the Magistrates' Court.

## Implications

- 4.61 There are some major implications of the shift away from parole to CCOs as an avenue for offenders to return from prison to the community. First, offenders sentenced to a term of imprisonment combined with a CCO have certainty about when they will be released from prison. The sentencing judge sets this date at the time of sentence. While the sentencing judge sets the end of the non-parole period, under the parole system it is up to the Adult Parole Board to decide whether release into the community occurs on this date or before the end of the total effective imprisonment term.
- 4.62 A general condition of release on parole by the parole board is that the offender has appropriate accommodation, allowing a transition from custody to living in the community.<sup>97</sup> While Corrections Victoria assists all offenders with returning to the community,<sup>98</sup> an offender sentenced to a term of imprisonment combined with a CCO must be released at the completion of the imprisonment period, regardless of the offender's arrangements for living in the community and completing the CCO.
- 4.63 Second, the certainty of the prisoner's release date means that release from prison is not dependent on an offender's behaviour in prison. Poor behaviour does not result in an extension of time in prison, and good behaviour does not result in less time in prison. This may act as a disincentive to good behaviour in prison. Given the increase in short sentences of imprisonment, a higher proportion of the prison population is likely to be on a shorter sentence (without a non-parole period), and this may result in management issues related to the behaviour of such prisoners.
- 4.64 Third, the conditions of the CCO may not be appropriate for an offender by the time the offender commences the CCO. Conditions are set by the sentencing court at the time of sentence, which can be up to two years before the CCO commences. In the intervening time, the offender has served time in prison and his or her needs may have changed. While the conditions of a CCO may be changed, this can only occur on application to the court by Community Correctional Services.
- 4.65 Fourth, breaches of the conditions of a CCO are dealt with initially by Community Correctional Services and then, if necessary, by the courts (where, for example, there is reoffending) whereas breach of a parole condition by an offender subject to parole is dealt with immediately by the Adult Parole Board.
- 4.66 As more offenders are sentenced to a combined term of imprisonment with a CCO, the responsibility for the post-release supervision of a substantial proportion of offenders is likely to shift away from the Adult Parole Board.
- 4.67 Issues surrounding the breach of CCOs – including the effect of a shift in the authority administering post-release supervision and the possible consequential effects on the workload of the courts – warrant further research.

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97. In considering the release of a prisoner on parole, the Adult Parole Board will 'consider whether the prisoner's proposed accommodation and other plans upon release are realistic and appropriate': Adult Parole Board of Victoria (2015), above n 12, 19.

98. Corrections Victoria's Reintegration Pathway includes measures to assist prisoners with returning to the community. Post-release support is available to prisoners who require more intensive support. Corrections Victoria's Reintegration Program targets a number of key drivers of effective and successful reintegration including housing; Corrections Victoria, *Transition Programs* (Corrections Victoria, 2015) <<http://www.corrections.vic.gov.au/home/release/transition+programs/>> accessed 1 November 2015.

## 5. Factors influencing the length of non-parole periods and parole periods

- 5.1 Chapter 4 presents data examining trends in the imposition of imprisonment sentences and non-parole periods over the reference period. This chapter examines the factors that may influence the length of a non-parole period (and, correspondingly, the possible parole period) once the court has determined to impose an imprisonment sentence that involves a non-parole period. It specifically addresses the second research question: What factors influenced the length of non-parole periods imposed by the courts between 2010–11 and 2014–15?
- 5.2 To answer this question, the Council has examined sentencing practices in the higher courts rather than in the Magistrates' Court, as greater variability in non-parole periods occurs in the higher courts. Four factors have been examined: total effective imprisonment term, offence type, age of the offender, and gender of the offender.

### Purpose of a non-parole period

- 5.3 The non-parole period is the 'period during which the offender is not eligible to be released on parole'.<sup>99</sup> The purpose of a non-parole period is discussed in detail at [2.25]–[2.36]. In summary, the purpose of a non-parole period is not confined to considerations of an offender's rehabilitation; rather the non-parole period is the minimum term that justice requires the offender to spend in custody having regard to the circumstances of the case.<sup>100</sup>

### Non-parole period and total effective sentence

- 5.4 There are two stages to the imposition of a custodial sentence with a non-parole period:<sup>101</sup>
1. the court must impose a total effective sentence that is appropriate to the particular offence in the case, 'keeping in mind the possibility that the prisoner may serve every day of that sentence'; and
  2. the court must decide whether to set a non-parole period and if so the minimum period required to 'serve the objectives of the sentence'.<sup>102</sup>
- 5.5 There are no legislative requirements regarding the length of the non-parole period, other than it must be at least six months less than the total effective sentence.<sup>103</sup>
- 5.6 Further, there is no fixed formula or ratio for determining the proper relationship between the non-parole period and the total effective sentence. In fixing the non-parole period, the sentencing court must consider '[a]ll of the relevant factors'.<sup>104</sup>

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

100. *R v Tran* [2006] VSCA 222 (19 October 2006) [28]; *Bugmy v The Queen* (1990) 169 CLR 525, 531, both citing *Power v The Queen* (1974) 131 CLR 623, 629.

101. Freiberg (2014), above n 13, 857, citing *R v Grmusa* [1991] 2 VR 153.

102. *Ibid*, citing *R v Douglas* [1959] VR 182.

103. *Sentencing Act 1991* (Vic) s 11(3). The minimum non-parole periods for baseline offence cases have been excluded from the Council's analysis; see [3.45]–[3.48].

104. *R v Merritt* [2008] VSCA 238 (4 December 2008) [17].

5.7 A key principle regarding the non-parole period and its relationship to the total effective sentence is proportionality. The non-parole period must be proportionate to the total effective sentence and the gravity of the crime.<sup>105</sup> A general rule is that 'there should not be too great a disparity between the [total effective] sentence and the non-parole period'.<sup>106</sup> However, consistent with the general approach to sentencing in Victoria, it is clear from case law that a court is not to employ a mathematical approach to determining proportionality, as what is proportionate in a particular case depends on the circumstances of the case and the exercise of judicial discretion. Therefore:

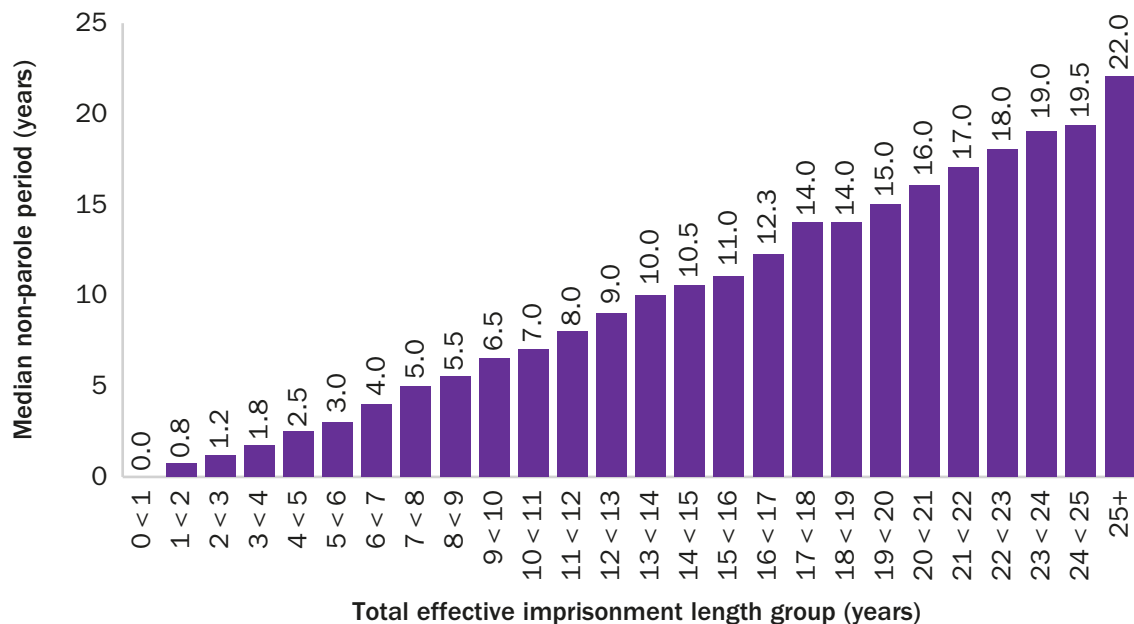
the length of the period on parole is a matter of discretion that will depend upon all of the circumstances of the case including the offender's prospects for rehabilitation, age (both young and old), criminal record and past parole history, and protection of the community.<sup>107</sup>

5.8 The personal nature of the factors relevant to the setting of a non-parole period opens up the possibility of variation in the length of non-parole periods in individual cases, compared with the total effective sentence. There is some case law to suggest that the setting of a total effective sentence invokes a stronger focus on 'frequently re-occurring comparable sets of objective circumstances',<sup>108</sup> whereas there 'can never be a tariff for non-parole periods for any offence'.<sup>109</sup>

### Relationship between the total effective sentence and the non-parole period

5.9 Figure 12 shows the median non-parole period according to the category of total effective sentence length for cases sentenced in the higher courts between 2010–11 and 2014–15.

**Figure 12: Median non-parole period by category of total effective sentence length, higher courts, 2010–11 to 2014–15**



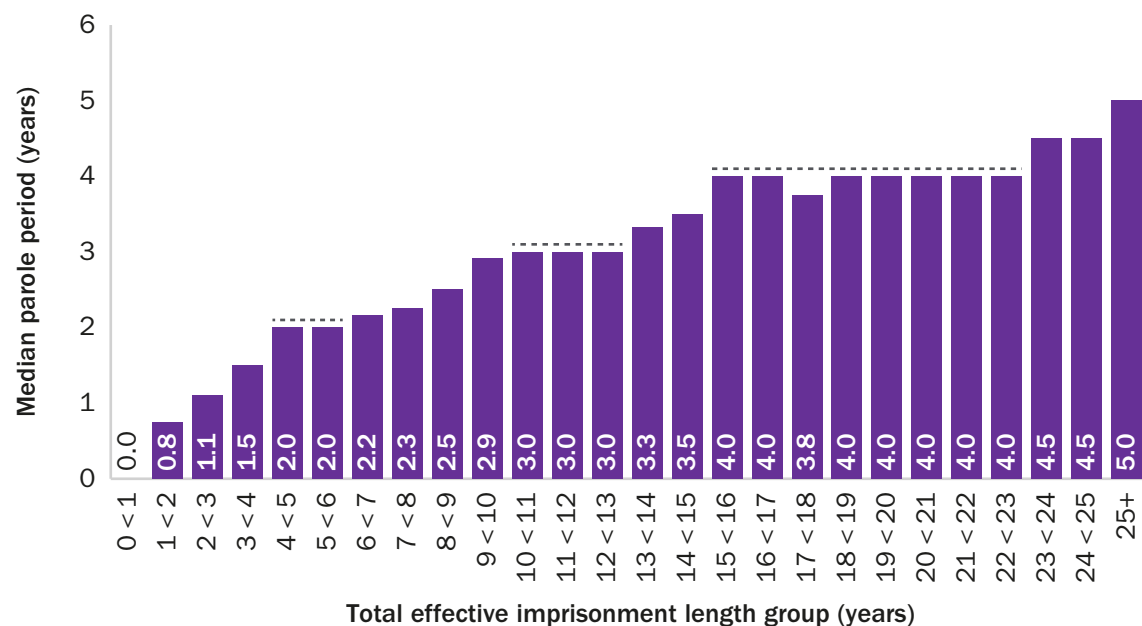
105. Freiberg (2014), above n 13, 858, n 208.  
 106. Ibid 858, citing *R v Williscroft* [1975] VR 292, 298; *R v Chan* (1994) 76 A Crim R 252.  
 107. Ibid 858–859 (citations omitted); see further 858–859 nn 212–215.  
 108. *R v R, AW* (2012) 113 SASR 179, 193 [55] (Peek J).  
 109. *R v R, AW* (2012) 113 SASR 179, 193 [55] (Peek J), citing *R v Moyle* (1996) 186 LSJS 462, 465.

- 5.10 The graph shows that there is a strong relationship between the total effective sentence length and the non-parole period. Longer median non-parole periods are evident for longer total effective sentences.<sup>110</sup>
- 5.11 The data show that there is virtually a one-to-one relationship between the total effective sentence and the non-parole period where the total effective sentence is 10 to under 24 years. In other words, as the total effective sentence length increases by one year, the non-parole period similarly increases by one year. For lower total effective sentence lengths, the increases in non-parole period lengths are smaller than the increases in the total effective sentence lengths.
- 5.12 The strong relationship between the total effective sentence and the non-parole period suggests that the non-parole period is being determined by the court using the same considerations as those that determine the total effective sentence. In accordance with the case law, the data show a proportionate relationship between the total effective sentence and the non-parole period.

### Relationship between the total effective sentence and the *parole period*

- 5.13 Turning to the relationship between the *parole period* and the total effective sentence, Figure 13 shows the median parole period length according to the category of total effective sentence for cases sentenced in the higher courts between 2010–11 and 2014–15.
- 5.14 Unlike for the non-parole period, data for the parole period show a series of plateaus around particular numbers of years.<sup>111</sup> For example, the median parole period is two years for the categories of total effective sentence of four to less than five years and five to less than six years.

**Figure 13: Median parole period by category of total effective sentence length, higher courts, 2010–11 to 2014–15**



110. Overall, there was a very strong and statistically significant relationship between non-parole period and total effective sentence length ( $r = 0.986$ ,  $n = 4,415$ ,  $p < 0.001$ ).

111. The plateaus tend to occur for parole periods where there is a one-to-one relationship between increases in the total effective sentence and increases in the median non-parole period. For example, the plateau between 15 and less than 23 years occurs where the median non-parole period increases, generally, by one year with each additional total effective sentence length.

- 5.15 In other words, the most likely sentences in those categories are four years with a two-year non-parole period, and five years with a three-year non-parole period. There is a one-year increase in the non-parole period as the total effective sentence increases by one year (demonstrating the relationship discussed at [5.11]); however, the absolute value of the parole period remains the same, at two years.
- 5.16 The same plateau in parole period length is observed at three years. Considering argument against a sentence of 12 years' imprisonment with a non-parole period of nine years, Maxwell P and Whelan JA in *BM v The Queen* commented that three years on parole was 'about as long a period as it is realistic to maintain an effective supervisory regime'.<sup>112</sup>
- 5.17 Most noticeably, however, a median parole period of four years is observed for a broad range of total effective sentence categories – from 15 to less than 16 years, right up to 22 to less than 23 years. This means that, while the non-parole period increases in step with the total effective sentence (each increasing by one year), the parole period remains constant.
- 5.18 Table 3 shows the most likely sentences imposed, based on analysis of the median parole period for each category of total effective sentence.
- 5.19 These data show that while the parole period remains constant, the non-parole period increases by one-year increments (in alignment with the one-year increment increase in total effective sentence).
- 5.20 As a consequence, the non-parole period becomes a larger proportion of the total effective sentence as the total effective sentence increases.
- 5.21 Figure 14 shows the median percentage of the total effective imprisonment term represented by the non-parole period.
- 5.22 As the total effective sentence length increases, the non-parole period becomes a larger proportion of the total effective sentence length: from 50% for the category of total effective sentence length of one year to less than two years, to 80% for categories of total effective sentence length of 20 years and above.

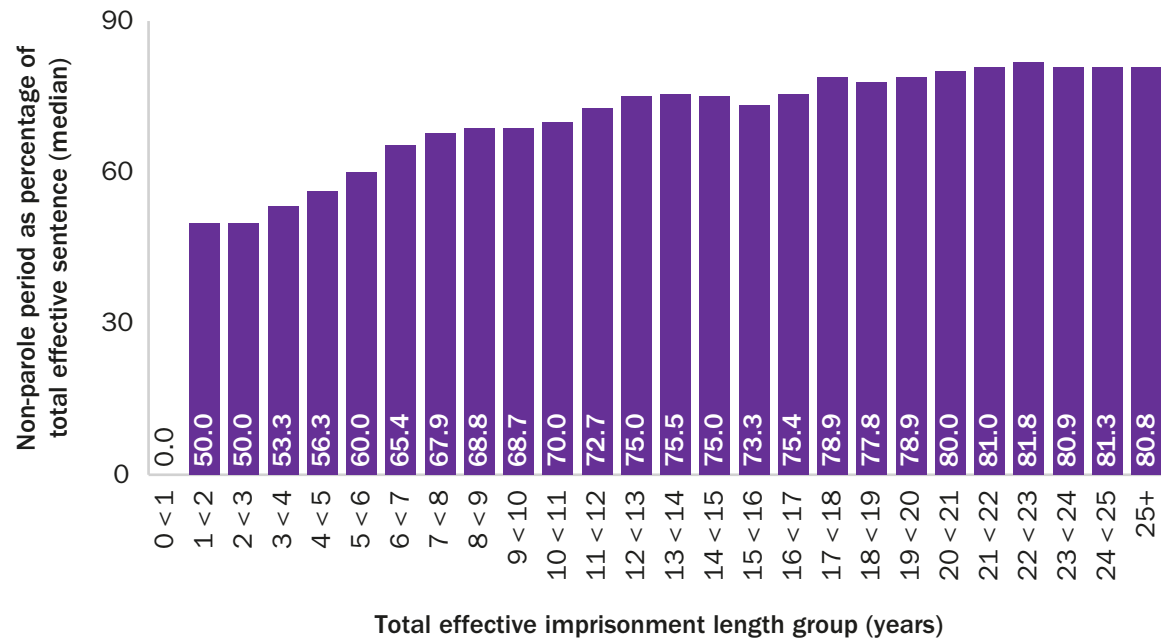
**Table 3: Approximate values of total effective sentence, non-parole period, and parole period for cases sentenced in the higher courts, 2010–11 to 2014–15**

Total effective sentence	Non-parole period	Parole period
15 years	11 years	4 years
16 years	12 years	4 years
17 years	13 years (approximately) <sup>a</sup>	3.8 years
18 years	14 years	4 years
19 years	15 years	4 years
20 years	16 years	4 years
21 years	17 years	4 years
22 years	18 years	4 years

a. This figure is approximately 13 years, as for this category of total effective sentence the parole period was slightly less than 4 years.

112. *BM v The Queen* [2013] VSCA 3 (17 January 2013) [37].

**Figure 14:** Non-parole period as a percentage of total effective imprisonment length by category of total effective sentence length, higher courts, 2010–11 to 2014–15



5.23 This increase in the proportion of the total effective sentence represented by the non-parole period (as the total effective sentence increases) is in accordance with case law.

5.24 In *Romero v The Queen*, Redlich JA (Buchanan and Mandie JJA agreeing) noted that:

The ratio between the [total effective] sentence and non-parole period more commonly found for lesser offences and lower sentences are generally unlikely to be appropriate for murder and other serious crimes attracting similarly long [total effective] sentences, as they would create inordinately long parole periods and the non-parole period would not then, as it must, also reflect the gravity of the offending. The non-parole sentence would be shortened beyond the lower limit of what might be reasonably regarded as condign punishment. Other purposes of sentencing that are relevant to fixing the non-parole period as well as to fixing the [total effective] sentence, such as deterrence and protection of the community, would not then have been given their necessary weight.<sup>113</sup>

5.25 This principle was followed in *Kumova v The Queen*, where Nettle JA stated:

As has been noted, the concept of a usual non-parole period of between 60 per cent and 75 per cent of head sentence ceases to be of much guidance where the [total effective] sentence is in the order of 10 years' imprisonment or more. ... in such cases it is to be expected that the usual range of non-parole periods will ordinarily be higher. Just as the needs of denunciation, deterrence, condign punishment and community protection demand a [total effective] sentence of a higher order, so too are they likely to dictate that the non-parole period be a higher percentage of the [total effective] sentence. Otherwise, the gap between [total effective] sentence and non-parole period may so much detract from the punitive effect of the sentence as to prejudice community protection and undermine public confidence in the integrity of the sentencing process.<sup>114</sup>

5.26 Factors that influence the total effective sentence must therefore also influence the non-parole period. An important question is whether, after taking into account the total effective sentence, there is variation in the non-parole period or the parole period by offence and by offender characteristics.

<sup>113</sup>. *Romero v The Queen* (2011) 32 VR 486, 493 [25].

<sup>114</sup>. *Kumova v The Queen* (2012) 37 VR 538, 544 [19].

## Non-parole period and offence type

- 5.27 A key factor in the length of the total effective sentence is the gravity of the offending. The Council explored whether offence type, over and above the total effective imprisonment term, influenced the length of non-parole periods. The methodology pursued involved examining non-parole periods for a range of offences at particular lengths of total effective sentences: three years and six years. Using the analysis of variance technique, tests of statistical significance were conducted on the average non-parole period for each offence pairing.
- 5.28 Figure 15 presents the average non-parole period for select offences according to the two total effective sentence lengths: three years and six years. An average, rather than the median, value was chosen for this analysis because an average picks up variability better than the median. Very few of the differences in non-parole periods between offences were statistically significant. Of the 32 possible comparisons, only four were found to be statistically significant. This suggests that, once the influence of total effective sentence is controlled for, the offence type generally does not play a role in the selection of the length of the non-parole period.
- 5.29 The statistically significant differences were as follows. For three-year total effective sentences, intentionally causing serious injury (16.3 months) had a significantly lower average non-parole period than both aggravated burglary (19.5 months)<sup>115</sup> and armed robbery (18.9 months),<sup>116</sup> while obtain financial advantage by deception (15.7 months) had a significantly lower average non-parole period than armed robbery (18.9 months)<sup>117</sup> and aggravated burglary (19.5 months).<sup>118</sup> For six-year total effective sentences, the only significant difference was for obtain financial advantage by deception (41.1 months), which had a lower average non-parole period than rape (45.9 months).
- 5.30 The relatively short non-parole periods for obtain financial advantage by deception and intentionally causing serious injury are likely to relate to the courts' assessment of offenders committing these offences as having relatively good prospects of rehabilitation, despite the serious nature of their offending. To better understand these differences, further research is required into factors influencing sentencing practices for these offences.

## Non-parole period and the age of the offender

- 5.31 Turning to the effect of age on the length of the non-parole period, Figure 16 shows the average non-parole period for a range of total effective sentence lengths for offenders aged under 25 compared with offenders aged 25 and over. Holding the total effective sentence length constant allows the effect of age to be explored. An average, rather than the median, value was chosen for this analysis because an average picks up variability better than the median.
- 5.32 Only three of the 20 comparisons achieved statistical significance, meaning that, generally speaking, age had no relationship with non-parole period length. However, three statistically significant comparisons all had younger offenders receiving shorter average non-parole periods than older people: total effective sentences of one year,<sup>119</sup> two years,<sup>120</sup> and six years.<sup>121</sup> Thus, there is some evidence that younger offenders receive shorter non-parole periods.

115.  $F(34,1) = 10.240, p < 0.01$ .

116.  $F(89,1) = 7.927, p < 0.01$ .

117.  $F(75,1) = 4.402, p < 0.05$ .

118.  $F(20,1) = 17.023, p < 0.05$ .

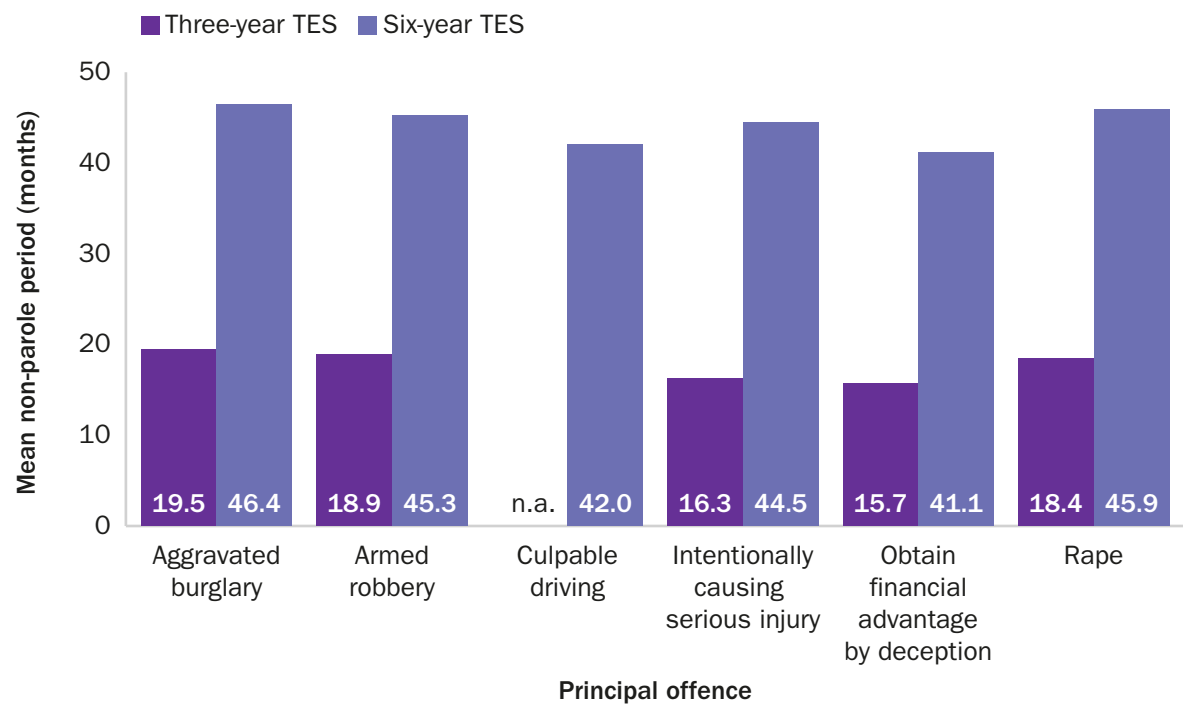
119.  $F(1,48) = 7.681, p < 0.01$ .

120.  $F(1,253) = 6.516, p < 0.05$ .

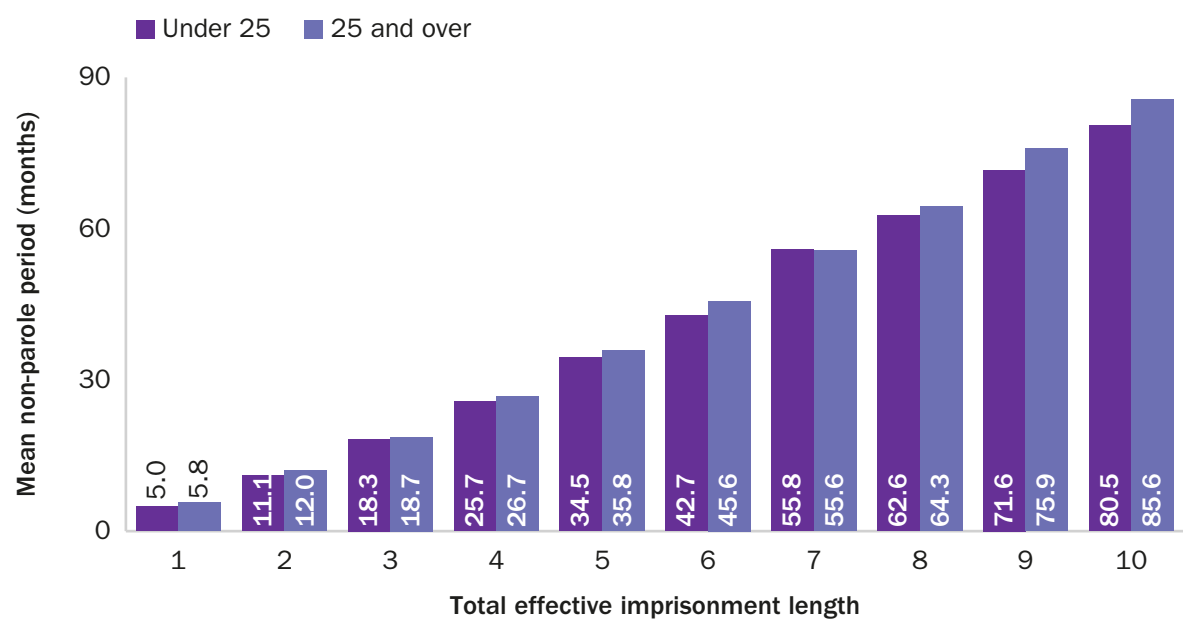
121.  $F(1,161) = 8.527, p < 0.01$ .



**Figure 15:** Average non-parole period by category of total effective sentence and principal offence, higher courts, 2010–11 to 2014–15<sup>122</sup>



**Figure 16:** Average non-parole period by category of total effective sentence and age of offender, higher courts, 2010–11 to 2014–15<sup>123</sup>



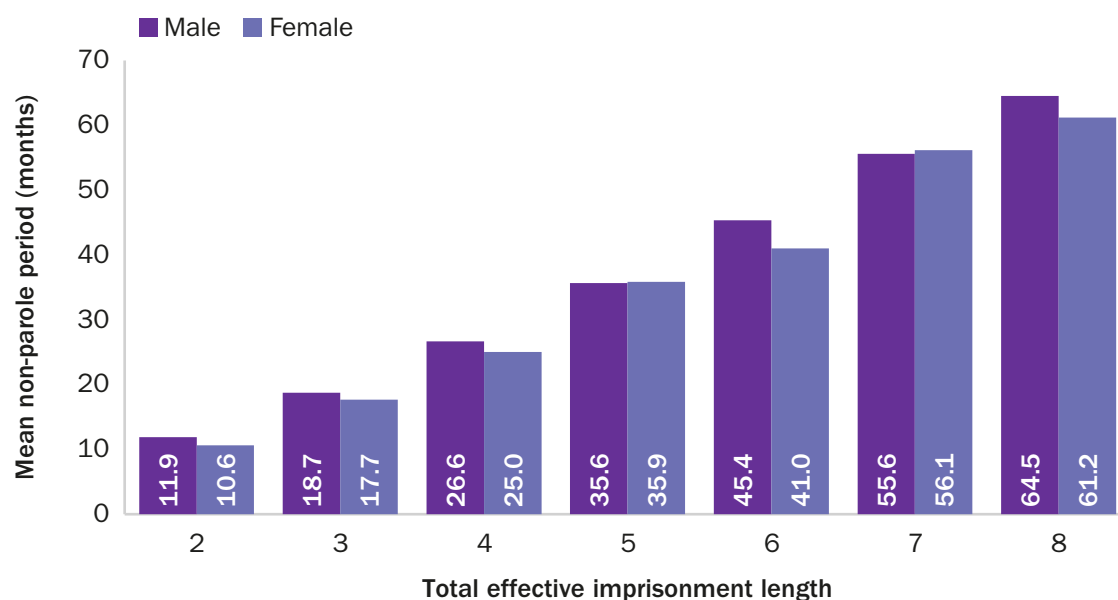
122. Average non-parole periods are only presented where the number of offenders in a subgroup exceeded four. An average non-parole period is not presented for culpable driving at the three-year total effective sentence subgroup as no cases received this sentence during the reference period.

123. Average non-parole periods are only presented for total effective sentence lengths where the number of offenders in both age groups exceeded four.

## Non-parole period and gender of offender

- 5.33 Turning to the gender of the offender, Figure 17 compares the average non-parole period by the categories of total effective sentence lengths for males and females. These data should be considered in light of the fact that the number of female offenders is much lower than the number of male offenders. An average, rather than a median, value was chosen for this analysis because an average picks up variability better than the median.
- 5.34 As with offence type and age of the offender, few of the differences in non-parole periods were statistically significant for gender of the offender, suggesting that the total effective sentence is the primary factor driving the non-parole period length.
- 5.35 The only statistically significant differences were for total effective imprisonment terms of two years<sup>124</sup> and six years.<sup>125</sup> In both instances, female offenders had the lower average non-parole period.
- 5.36 The differences in non-parole periods are likely to be due to the personal circumstances of the offenders. Female offenders, in general, have less serious criminal histories than do males. Females have fewer prior convictions and less serious previous and current offending in terms of the type of offences for which they have been imprisoned,<sup>126</sup> and as a consequence, they may have greater prospects for rehabilitation.
- 5.37 As with the analysis of offence type and age of the offender, the specific factor of the gender of the offender did not show as strong a relationship with the non-parole period as with the total effective sentence.

**Figure 17: Average non-parole period by category of total effective sentence and gender of offender, higher courts, 2010–11 to 2014–15<sup>127</sup>**



124.  $F(1,253) = 6.550, p < 0.05$ .

125.  $F(1,161) = 7.189, p < 0.01$ .

126. Sentencing Advisory Council, *Gender Differences in Sentencing Outcomes* (2010) vii.

127. Average non-parole periods are only presented for total effective sentence lengths where the number of offenders in both gender groups exceeded four.

## 6. Conclusion

- 6.1 The Council has analysed data on the imposition of non-parole periods for sentences of imprisonment over the reference period from 2010–11 to 2014–15. This period has witnessed substantial reform both to the sentencing landscape within Victoria and to the administration of the parole system.
- 6.2 The courts' use of non-parole periods over the reference period underwent substantial change. In the higher courts, the proportion of all imprisonment sentences that included a non-parole period declined from 94.6% in 2010–11 to 69.2% in 2014–15, with three-quarters of the decline occurring in 2014–15 and one-quarter in 2012–13. In the Magistrates' Court, the proportion of all imprisonment sentences that included a non-parole period declined from 21.6% in 2010–11 to 9.9% in 2014–15. The vast majority of this decline occurred in 2013–14 and 2014–15.
- 6.3 Increases in the use of short terms of imprisonment help explain these reductions in the use of non-parole periods. Over the reference period, there was an increase in the proportion of terms of imprisonment that were ineligible to have a non-parole period imposed (a non-parole period may not be imposed for a term of under one year). The proportion of imprisonment sentences that were under one year increased between 2010–11 and 2014–15 from 5.3% to 21.3% in the higher courts and from 74.6% to 86.4% in the Magistrates' Court.
- 6.4 While there were declines in the use of non-parole periods for all imprisonment sentences, there were also declines in the use of non-parole periods for terms of imprisonment that fell within the discretionary range for the imposition of a non-parole period (that is, where the sentence of imprisonment for the case was one year to less than two years). Between the September quarter of 2014 and the June quarter of 2015, the proportion of imprisonment sentences of one year to less than two years that had a non-parole period declined from 94.1% to 20.9% in the higher courts and from 81.0% to 66.7% in the Magistrates' Court.
- 6.5 The start of the decline (September 2014) coincided with legislation increasing the term of imprisonment that may be combined with a community correction order (CCO) from three months to two years. This legislation in effect permitted the use of the CCO as an alternative to parole for imprisonment sentences of up to two years. The courts embraced the CCO, using it instead of non-parole periods for terms of imprisonment of one year to less than two years. Between the September quarter of 2014 and the June quarter of 2015, the proportion of imprisonment sentences of one year to less than two years that were combined with a CCO increased from 0.0% to 72.1% in the higher courts and 0.0% to 12.0% in the Magistrates' Court.
- 6.6 This emphatic move towards the CCO instead of a non-parole period, particularly in the higher courts, was influenced by contextual factors relating to sentencing and parole, including:
  - the phase-out of suspended sentences and the consequential rise in short terms of imprisonment;
  - the uncertainty of an offender being granted parole in light of changes to the administration of parole;
  - the influence of the guideline judgment in *Boulton* in late 2014 on the use of CCOs; and
  - the abolition of partially suspended sentences, which were previously used in cases where the offender had spent a substantial period of time on remand prior to sentencing.

- 6.7 With the courts' shift away from the non-parole period towards the CCO, it is important to remember the two have different features. Although a similarity is that both offer a range of conditions that an offender must comply with following prison, the time at which conditions are set for the offender differs. Conditions for parole are determined at the time an offender is released from prison, whereas conditions for a CCO are set when an offender is sentenced, at the commencement of their prison term. Following a relatively long imprisonment sentence, an offender's needs and risk of reoffending may change, and his or her CCO conditions may be unsuitable. The value of setting conditions at the time of sentence may therefore be limited.
- 6.8 A prisoner's desire to behave well and attempt to rehabilitate while in prison may not be as strong for prisoners who move on to a CCO rather than parole. This is because prisoners who have a non-parole period have an opportunity for possible release before the end of the imprisonment sentence. Under the parole system, prisoners know their earliest possible release date (the end of their non-parole period) and their latest possible release date (the end of their total effective imprisonment term). Theoretically, prisoners who behave well in prison and complete relevant programs are more likely to be released on their earliest possible release date (though the likelihood of release on parole has reduced substantially in recent years). In contrast, for imprisonment sentences combined with a CCO, the date of release from prison is fixed and provides certainty of the release date for the prisoner.
- 6.9 The differences between the CCO and parole make it important that policy-makers consider whether elements of the CCO, at least when it is used by the courts as a post-prison sentence, need to be reformulated.

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