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Indigenous imprisonment in NSW: A closer look at the trend

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Aim: To explain the upward trend in Indigenous imprisonment in NSW between 2012 and 2016.

Method: Separate analyses were conducted of trends in the factors influencing the number of remand and sentenced prisoners received into custody and the length of time spent in custody by remandees and sentenced prisoners. Trends were tested for significance using Kendall's rank order correlation test.

Results: The growth in Indigenous imprisonment in NSW since 2012 is a result of four main factors: (1) an increase in the proportion of Indigenous defendants refused bail; (2) an increase in the number of Indigenous defendants convicted of criminal offences, especially those in the categories of Stalking/intimidation, Breaching an AVO, Breaching a s.9 Bond and Breaching a s.12 Bond; (3) an increase in the proportion of convicted Indigenous offenders receiving a prison sentence for the offence of Stalking/Intimidation; and (4) an increase in the length of time being spent on remand by Indigenous defendants refused bail, in large part because of a growth in court delay in the NSW District Criminal Court. The growth in imprisonment for Stalking/Intimidation offences has been particularly noteworthy. The number of Indigenous Australians imprisoned for Stalking/Intimidation offences increased by 119 per cent between 2011 and 2016.

Conclusion: The number of Indigenous offenders receiving a prison sentence could be reduced by more than 700 a year if half of those currently given short prison sentences for Assault occasioning Actual Bodily Harm (ABH), Common Assault, Stalking/Intimidation, Breaching an AVO, Breaching a s.9 Bond or Breaching a s.12 Bond were placed on Intensive Correction Orders (ICOs) or Home Detention.

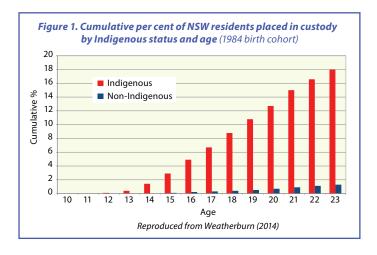
Keywords: *Indigenous, offenders, imprisonment, assault, apprehended violence order, stalking, intimidation, breach section 9 bonds, breach section 12 bonds, intensive correction order, home detention, suspended sentence.*

Introduction

The Royal Commission into Aboriginal Deaths in Custody (Commonwealth of Australia 1991) drew national attention to the acute disparity between Indigenous and non-Indigenous rates of imprisonment. Efforts to reduce the rate of Indigenous imprisonment in Australia, however, have so far failed. Between 1993 (when the Royal Commission handed down its report) and 2016, the Indigenous imprisonment rate in Australia rose by 63 per cent (Australian Institute of Criminology 1995; Australian Bureau of Statistics 2016). The highest rate of growth since 1993 has been in the Northern Territory, where the Indigenous imprisonment rate has more than doubled. The lowest over this time period has been in South Australia, where the Indigenous imprisonment rate rose by 26 per cent (Australian Institute of Criminology 1995; Australian Bureau of Statistics 2016).

The growth in Indigenous imprisonment in NSW has in recent times been particularly rapid. Between 2013 and 2016 the NSW Indigenous imprisonment rate grew by 25 per cent (Australian Bureau of Statistics 2016). The Indigenous imprisonment rate in this State is now 13.5 times higher than the non-Indigenous imprisonment rate (Australian Bureau of Statistics 2016). By way of comparison, the African-American imprisonment rate in the United States is only 5.6 times higher than the white imprisonment rate (Carson & Anderson 2016). Viewed from a longitudinal perspective, the prospects for Indigenous youth in NSW appear particularly grim. One recent study found that by the time they reached the age of 23, 24.5 per cent of the NSW Indigenous population born in 1984 had already been remanded in custody, placed in a youth detention centre or given a prison sentence, compared with just 1.3 per cent of the non-Indigenous population (see Figure 1).

Revisions have been made to original version of this Brief to broaden the law parts included in the analysis of stalking and intimidation offences.



In an earlier report released by the NSW Bureau of Crime Statistics, Weatherburn and Ramsey (2016) examined the factors behind the growth in Indigenous imprisonment in NSW between 2001 and 2015. This report focuses closer attention on the rapid growth in Indigenous imprisonment between January 2012 and September 2016. The first section analyses trends in the number of Indigenous defendants/offenders entering prison. The second section analyses trends in the length of stay in custody by those refused bail or given a prison sentence. The third section takes a closer look at two categories of offence (Acts Intended to Cause Injury and Justice Procedure Offences) which account for much of the growth in Indigenous imprisonment in NSW over the last four years. The final section summarizes the results and outlines their policy implications.

In what follows we examine the trends in various factors related to Indigenous imprisonment in NSW. Although (to avoid clutter) the specific results of each test are not shown, the trends have all been tested for significance using a Kendall's rank order correlation test (Siegel 1956). Except where otherwise indicated, all tests for trend are significant at p < 0.05.

Prison receptions

Little's law (Little 1961) tells us that the average number of people in any form of queue (N) is given by the product of the number arriving (A) and the average service time (L) of those arriving. In the context of prison, if N is the number in custody at any given time, A is the number arriving (receptions) and L is the average time spent in custody by those arriving, then:

$$N = A \times L$$

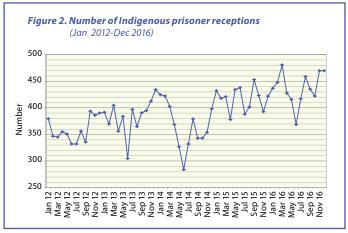
This equation provides a convenient framework for examining the factors underpinning the growth in Indigenous imprisonment. We begin by focussing on the trend in A and the factors affecting it and then move to a discussion of L and the factors affecting it.

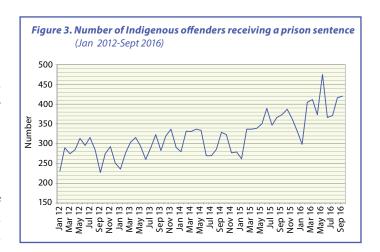
Figure 2 shows the trend in the number of Indigenous receptions in NSW since January 2012. Although the series is quite volatile, the number of Indigenous prisoner receptions clearly rose between January 2012 and December 2016. In 2012, an average of 359 Indigenous defendants/offenders per month were received into custody. Between January 2016

and December 2016, that number rose to 438 per month (an increase of 79 additional receptions per month).

Trends in the number imprisoned

How much of the growth in prisoner receptions was due to an increase in offenders given a prison sentence? Figure 3 shows the trend in the number of convicted Indigenous offenders receiving a prison sentence. The number has significantly increased, rising from an average of 278 per month in the first 12 months of the series to an average of 386 in the last 12 months.





Trends in the percentage imprisoned and the number convicted

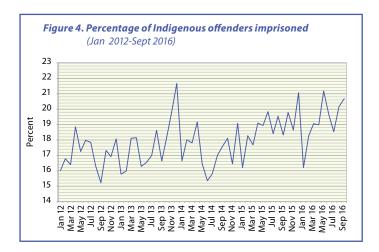
A growth in the number receiving prison sentences can arise because the *percentage* of convicted offenders receiving prison sentences has increased or because the *number* convicted has increased (or both).

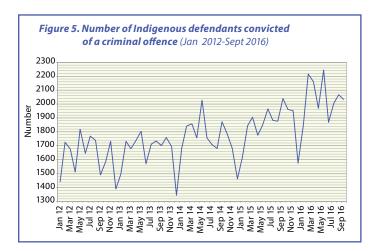
Figure 4 shows the *percentage* of convicted Indigenous defendants receiving a prison sentence between January 2012 and September 2016. There is considerable volatility in the series but the percentage of Indigenous offenders given a prison sentence has increased. In the first 12 months of the series, on average, 17.1 per cent of Indigenous offenders were given a prison sentence. In the last 12 months of the series, 19.4 per cent of Indigenous defendants were given a prison

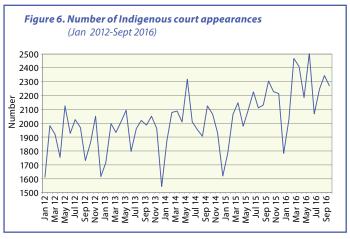
sentence; an increase of 2.3 percentage points. The difference in the percentage imprisoned in the first and last 12 months of the series accounts for around half of the growth in prisoner numbers.

Figure 5 shows the *number* of Indigenous defendants convicted of a criminal offence over the same time period. That number has risen from an average of 1,628 a month in the first 12 months of the series to an average of 1,993 a month in the last 12 months of the series (i.e. an increase in the number convicted by 365 a month between 2012 and 2016).

An increase in the number of Indigenous defendants convicted of a criminal offence can occur in one of two ways — an increase







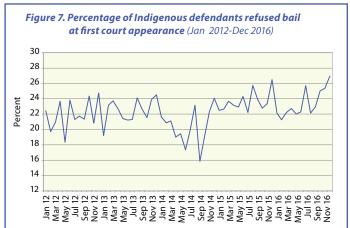
in the *number* of persons charged with a criminal offence or an increase in the *proportion charged who are convicted*.

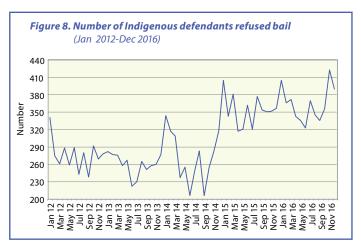
Figure 6 shows the trend in the *number* of Indigenous defendants appearing in court charged with a criminal offence. The upward trend is significant. The difference between the average number of Indigenous court appearances in the first 12 months of the series and the last 12 months is 348; only marginally less than the increase in the number convicted. Most of the increase in Indigenous convictions, then, is attributable to an increase in the number of Indigenous persons charged with criminal offences and brought before a court.

Trends in the proportion and number refused bail

Earlier we noted that an increase in prison receptions could also come about as a result of an increase in the percentage or number refused bail. Figure 7 shows the *percentage* of (all) Indigenous defendants refused bail at first court appearance between January 2012 and December 2016. Although there is considerable variation in the percentage refused bail from month to month, there is a marked spike in the percentage refused bail in December 2016 which resulted in a significant upward trend.

Figure 8 shows the trend in the *number* of Indigenous defendants refused bail over the same time period. As with the percentage refused bail, despite there being considerable fluctuation in the number refused bail, overall there is a significant upward trend.





Length of stay in prison

We turn now to look at changes in the length of time spent in custody. Figure 9 shows the mean time in custody spent by Indigenous defendants/offenders between January 2011 and December 2016. The average is calculated from the time received into custody (whether on remand or as a sentenced prisoner) until the time of release (regardless of whether the release occurs by way of release on remand or release as a sentenced prisoner). The average time spent in custody is significantly up. The change is comparatively small (from 201 days in 2011 to 213 days in 2016) but when multiplied by the number of Indigenous remand prisoners flowing into custody (approximately 438 a month during 2016) the effect on demand for prison beds would not be insignificant.

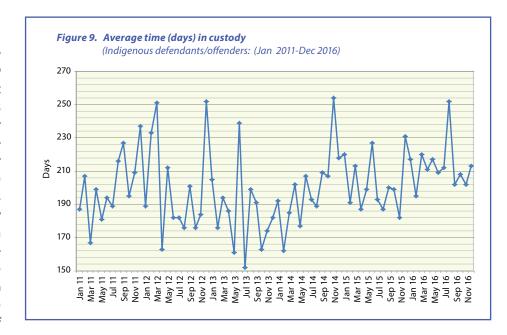
A growth in the length of time spent in custody can come from one of two sources: an increase in the length of time spent in custody by remand prisoners, or an increase in the length of time spent in custody by sentenced prisoners. Figure 10 shows the trend in the average time spent in custody by Indigenous remand prisoners released from custody between January 2011 and December 2016.

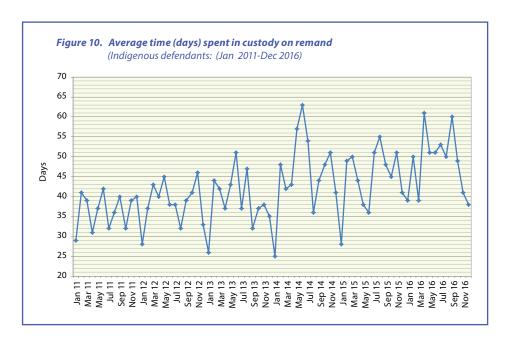
The average time spent on remand by these Indigenous prisoners increased significantly over the period; rising from an average of 37 days in the first 12 months of the series to 49 days in the period last 12 months. Figure 11 shows the trend in the average time spent in custody by Indigenous sentenced prisoners over the same time period. There is no significant increase in the time spent in custody by sentenced prisoners over this period.

A closer look at Indigenous offending and imprisonment

Figure 12 provides a breakdown of Indigenous prisoners by principal offence type in NSW.

There are two important points to note from the graph. The first is that by far the biggest contribution to







Indigenous imprisonment comes from 'Acts Intended to Cause Injury'. There are almost twice as many Indigenous prisoners in custody for an offence in this category than in the next most common category (Justice Procedure Offences). The second point to note is that, between them, offences in the categories of Acts Intended to Cause Injury and Justice Procedure Offences account for almost half (44%) of all Indigenous prisoners.

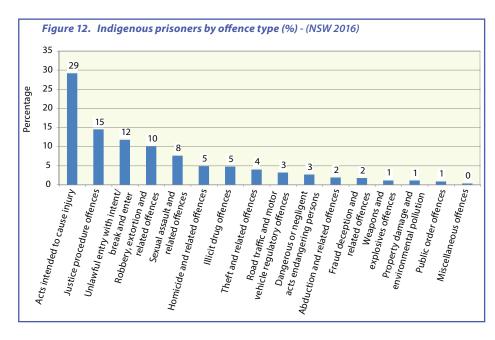
A distinctive feature of offences in the categories of *Acts Intended to Cause Injury* and *Justice Procedure Offences* is that, unlike most of the other offence categories shown in Figure 12, they include offences varying widely in

seriousness. The category *Acts Intended to Cause Injury* for example, includes *Common Assault*, which carries a maximum penalty of two years. It also includes malicious wounding, which carries a maximum penalty of 25 years. Similarly, the category *Justice Procedure Offences* includes resisting or hindering a police officer in the execution of his or her duty, which carries a maximum penalty of 12 months imprisonment. It also includes perverting the course of justice, which carries a maximum penalty of 14 years imprisonment.

In the next section we take a closer look at the offences within in each of these two categories. Our interest lies in finding out, in each of these two broad categories, which specific offences account for the highest proportion of Indigenous offenders receiving prison sentences and which account for most of the growth in Indigenous offenders receiving prison sentences in each category¹.

Acts Intended to Cause Injury

The first column of Table 1 shows the offences within the category *Acts Intended to Cause Injury* (labelled 'AICI' in the table) that resulted in at least one sentence of imprisonment during



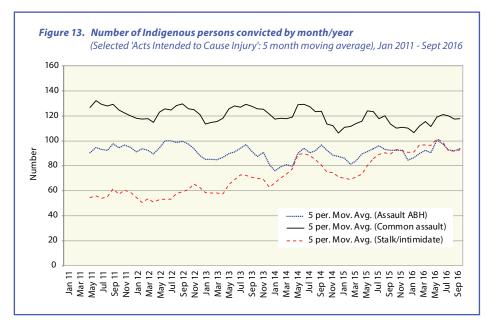
the first nine months of 2016. The second column shows the number of Indigenous offences who received a prison sentence for each offence. The third column shows the percentage each offence makes up of the total of those who were imprisoned for an act intended to cause injury. The final column shows the percentage of all Indigenous imprisonments from January to September 2016 where each offence listed in column one was the principal offence.

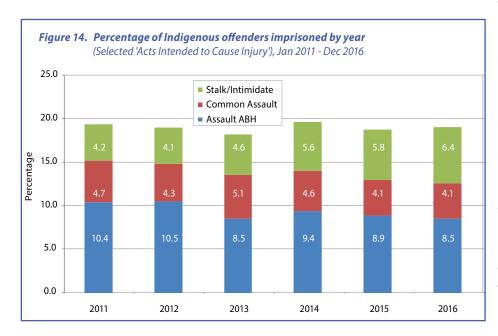
The principal contributors to the number of Indigenous offenders given a sentence of imprisonment for an *Act Intended to Cause Injury are Assault Occasioning Actual Bodily Harm* (36.7%), *Stalking/Intimidation* (25.5%) and *Common Assault* (17.7%). Between them, these three categories account for 80 per cent of all the Indigenous imprisonments from January to September 2016 in the category of *Acts Intended to Cause Injury*. The final column shows they also (collectively) account for a sizable proportion (18.7%) of all Indigenous imprisonments in New South Wales.

Figure 13 shows the trend in the *number* of Indigenous convictions for these three offences. A moving average has been used to smooth out the monthly fluctuations.

Table 1. Relative contribution to Indigenous imprisonment of offences in the category of 'Acts Intended to Cause Injury', NSW, Jan to Sept 2016

Offence subcategory	N	% of Indigenous imprisonments for AICI	% of all Indigenous imprisonment		
Assault occasioning actual bodily harm	304	36.7	8.6		
Stalk/intimidate	211	25.5	6.0		
Common assault	147	17.7	4.1		
Assault officer in execution of duty	41	4.9	1.2		
Assault occasioning abh in company of other(s)	33	4.0	0.9		
Reckless wounding	32	3.9	0.9		
Assault police officer in execution of duty w/o abh	20	2.4	0.6		
Assault law officer (not police officer)	16	1.9	0.5		
Use etc offensive weapon w/i to commit indictable offence-T1	14	1.7	0.4		
Assault police officer in execution of duty cause ABH	11	1.3	0.3		







Looking at Figure 13, the number of Indigenous convictions for *Common Assault* and *Assault Occasioning Actual Bodily Harm (Assault ABH)* have remained comparatively stable. The most striking change is the steady increase in the number of Indigenous convictions for *Stalking/Intimidation* since 2011. In 2011 there were on average 56 Indigenous offenders convicted of stalking per month. By 2016, that number had risen to over 97 a month—almost a 75 per cent increase.

Figure 14 shows the trends in the percentage of convicted offenders given a prison sentence in each of the categories *Common Assault, Stalking/Intimidation* and *Assault ABH*. There is no significant change in the annual percentage imprisoned for either of the assault offences. There is, however, a significant increase in the proportion imprisoned for *Stalking/Intimidation* offences, up 2.2 percentage points (from 4.2 percent in 2011 to 6.4 percent in 2016).

As can be seen from Figure 15, the combination of an increase in Indigenous appearances for *Stalking/Intimidation* offences and an increase in the proportion of those convicted of these offences who receive a sentence of imprisonment has had a substantial effect on the flow of Indigenous offenders into prison for *Stalking/Intimidation*.

The number of Indigenous people imprisoned for *Stalking/Intimidation* offences has more than doubled since 2011 (up 119% from 134 offenders in 2011 to 294 offenders in 2016).

Justice Procedure Offences

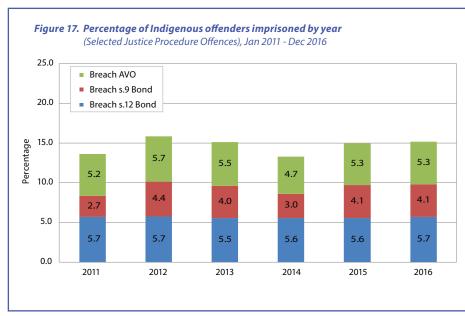
Table 2 mirrors Table 1 but for the category of 'Justice Procedure (JP) Offences'.

Once again, Indigenous offenders given a prison sentence are heavily concentrated in a small number of categories. More than three quarters (77.7%) of the Indigenous imprisonments for Justice Procedure Offences involve principal offences of either: Not Complying With a s.12 Bond; Contravening a Prohibition/Restriction in an Apprehended Violence Order (Breaching an AVO); or Not Complying with a s.9 Bond. Fifteen per cent of all Indigenous

Table 2. Relative contribution to Indigenous imprisonment of offences in the category 'Justice Procedure Offences', NSW, Jan 2011 - Sept 2016

Offence subcategory	N	% of Indigenous imprisonments for JP	% of all Indigenous imprisonment
Not comply with s 12 suspended sentence good behaviour bond	205	29.5	5.8
Contravene prohibition/restriction in AVO (Domestic)	182	26.2	5.1
Not comply condition supervised s 9 good behaviour bond	120	17.3	3.4
Revocation of CSO on application	42	6.0	1.2
Not comply condition unsupervised s 9 good behaviour bond	33	4.7	0.9
Fail to comply with reporting obligations	23	3.3	0.6
Fail to appear in accordance with bail acknowledgment/undertaking	22	3.2	0.6
Fail to comply with extended/interim supervision order	13	1.9	0.4
Resist/hinder officer in execution of duty	45	6.5	1.3
Inmate possess mobile phone/SIM card etc	12	1.7	0.3





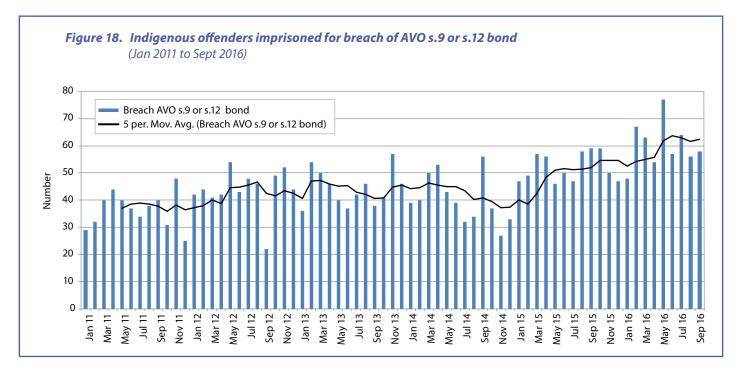
imprisonments in NSW in the first nine months of 2016 involved one of these offences.

Figure 16 shows the trend in these three offences. Once again, a moving average has been used to smooth out the monthly fluctuations. There are significant upward trends in convictions for all three of these breach offences. Despite this, Figure 17 shows no significant change in the percentage imprisoned for any of these offences. The growth in the number imprisoned for these offences is therefore due to a growth in the number arrested and convicted, not a change in penal severity.

Figure 18 shows the (combined) growth in the number of Indigenous offenders imprisoned whose principal offence was *Breach of an AVO, a s.9* or s.12 *Bond.* A five month moving average is also displayed to assist in seeing the upward trend. The annual number of Indigenous offenders imprisoned for breach of one or other of these orders rose by 60 per cent between 2011 and 2016.

Discussion

The purpose of this report is to discuss trends in Indigenous imprisonment in NSW, with a view to helping policy makers identify possible points of intervention that may help reduce the



rate of Indigenous imprisonment. The results indicate that the growth in Indigenous imprisonment in NSW since 2012 is a result of four main factors:

- 1. An increase in the proportion of Indigenous defendants refused bail.
- 2. An increase in the number of Indigenous defendants convicted of criminal offences, especially those in the categories of *Stalking/intimidation*, *Breaching an AVO*, *Breaching a s.9 Bond* and *Breaching a s.12 Bond*.
- 3. An increase in the proportion of convicted Indigenous offenders receiving a prison sentence for the offence of *Stalking/Intimidation*.
- An increase in the length of time being spent on remand by Indigenous defendants refused bail, in large part because of a growth in court delay in the NSW District Criminal Court (Weatherburn & Ramsey 2016).

The question arises as to whether the growth in convictions for these offences reflects an increase in offending behaviour or a change in policing/enforcement policy. The increase in convictions for *Stalking/Intimidation* offences since 2011 (see Figure 13) and the absence of any reason for expecting a growth in this sort of offence suggests that it is more likely to reflect changes in policing policy than a change in criminal behaviour. Since most breaches of bonds (including breaches of s.9 bonds and s.12 bonds) are discovered by police (or parole officers) rather than reported to them it seems likely that the increase in court appearances for these offences also reflects a change to enforcement policy rather than a real increase in offending behaviour.

It is not the purpose of this report to provide a detailed discussion of the policy options for reducing the rate of Indigenous imprisonment but some comments about the implications of the current findings for efforts to reduce Indigenous imprisonment are in order. It is worth noting, for

example, that all 1,401 Indigenous offenders imprisoned in 2015 for Assault ABH, Intimidation/Stalking, Common Assault, Breaching a s.12 Bond, Breaching an AVO and Breaching a s.9 Bond received sentences with non-parole periods of less than 22 months. In 92 per cent of cases, the non-parole periods were less than 12 months (see Appendix 1). This suggests that many of those convicted of these offences may be eligible for home detention or intensive correction orders (ICOs), both of which are alternatives to imprisonment for offenders given sentences of less than 18 months (in the case of Home Detention) or two years (in the case of ICOs).

This is a point of some significance for efforts to reduce Indigenous imprisonment because there is evidence that both sanctions are effective in reducing re-offending. Home Detention has been found to be more effective than a short prison sentence in deterring future offending (Di Tella, & Schargrodsky 2013; Padgett, Bales & Blomburg 2013; Henneguelle, Monnery & Kensy 2016). Henneguelle, Monnery and Kensy (2016), for example, exploited the incremental rollin of electronic monitoring in France to estimate the effect of electronic monitoring on short (one-year) prison sentences which they progressively replaced. They found that fully converting prison sentences into electronic monitoring had long-lasting beneficial effects on recidivism, with estimated reductions in probability of reconviction of 6-7 percentage points (9-11%) after five years. They also found evidence that, in case of recidivism, EM leads to less serious offences compared to prison.

Because they are comparatively new, little research has been conducted into the effectiveness of ICOs and re-offending. Ringland and Weatherburn (2014) found lower rates of re-offending rates among offenders given ICOs compared with a matched group given a supervised s.12 bond; however the difference was not statistically significant. They did not compare matched pairs of offenders given ICOs and offenders given short prison sentences but meta-analyses of studies

comparing prison with sanctions that (like the ICO) combine close supervision and rehabilitative support have generally reported results favouring such sanctions. Aos et al. (2006), for example, found an average 16.7 per cent reduction in re-offending for offenders given sanctions of this sort.

Despite the promise of Home Detention and Intensive Correction Orders, they are not often used for the offences we have been discussing. In 2015 only six Indigenous offenders convicted of Assault ABH, Intimidation/Stalking, Common Assault, Breaching a s.12 Bond, Breaching an AVO and Breaching a s.9 Bond received a home detention order. With one exception, less than three per cent received an ICO; the exception being Breaching a s. 12 Bond where 14.8 per cent received an ICO. The NSW Law Reform Commission in its report on Sentencing (NSW Law Reform Commission 2013) identified a number of barriers and impediments to wider use of Home Detention and ICOs by the courts, including complex arrangements for assessing suitability and the difficulties involved in electronic monitoring in remote rural areas.

Removal of these barriers would assist in expanding the use of home detention and ICOs and reducing—or at least slowing the growth rate—of Indigenous imprisonment. If just half of the Indigenous offenders given a prison sentence in 2015 for one of the offences: Assault ABH, Common Assault, Stalking/Intimidation, Breaching an AVO, Breaching a s.9 Bond or Breaching a s.12 Bond had instead been given an ICO or Home Detention, 700 fewer Indigenous offenders would have received a prison sentence.

Acknowledgements

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Notes

1. A full list of the offences in this category can be found in the report titled Australian and New Zealand Standard Offence Classification (Australian Bureau of Statistics 2011).

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Appendix 1

Table A1. Number of Indigenous people sentenced to prison for selected principal offences, by average imprisonment duration (Non Parole Period – months)

								_			_				
Length (months)	Assault occasioning actual bodily harm DV	Assault occasioning actual bodily harm	Common Assault DV	Common Assault	Stalk/Intimidate intend fear physical etc harm domestic	Stalk/Intimidate intend fear physical etc harm (personal)	Contravene Prohibition/Restriction in AVO Domestic	Contravene Prohibition/Restriction in AVO (Personal)	Not comply Condition supervised s.9 good behaviour bond	Not comply Condition unsupervised s.9 good behaviour bond	Not comply with s.12 suspended sentence good behaviour bond	Total	Cumulative no.	%	Cumulative %
<1	0	0	2	1	2	2	9	0	6	4	7	33	33	2.4	2.4
1 < 2	2	2	2	5	7	1	22	0	23	9	10	83	116	5.9	8.3
2 < 3	10	2	6	4	14	8	30	1	17	7	17	116	232	8.3	16.6
3 <4	25	12	24	20	17	9	35	0	26	9	38	215	447	15.3	31.9
4 < 5	32	14	22	12	41	9	33	0	16	6	34	219	666	15.6	47.5
5 < 6	15	5	11	6	14	10	12	0	2	0	14	89	755	6.4	53.9
6 < 7	49	29	21	20	39	7	40	0	22	11	68	306	1061	21.8	75.7
7 <8	9	9	1	1	2	7	8	0	2	0	5	44	1105	3.1	78.9
8 < 9	16	2	5	0	4	4	8	0	2	0	9	50	1155	3.6	82.4
9 < 10	28	17	4	0	13	10	12	0	6	3	21	114	1269	8.1	90.6
10 <11	5	7	1	0	1	2	2	0	1	0	1	20	1289	1.4	92.0
11 <12	1	2	1	0	0	1	1	0	0	0	0	6	1295	0.4	92.4
12 <13	29	18	1	0	6	3	5	0	0	0	7	69	1364	4.9	97.4
13 <14	5	1	0	0	1	0	0	0	0	0	1	8	1372	0.6	97.9
14 <15	2	1	0	0	0	1	1	0	0	0	0	5	1377	0.4	98.3
15 <16	2	0	0	0	0	0	0	0	0	0	0	2	1379	0.1	98.4
16 <17	1	0	0	0	0	0	1	0	0	0	0	2	1381	0.1	98.6
17 <18	1	0	0	0	0	0	0	0	0	0	1	2	1383	0.1	98.7
18 <19	12	2	0	0	2	0	0	0	0	0	0	16	1399	1.1	99.9
19 < 20	0	1	0	0	0	0	0	0	0	0	0	1	1400	0.1	99.9
20 <21	0	0	0	0	0	0	0	0	0	0	0	0	1400	0.0	99.9
21 <22	0	1	0	0	0	0	0	0	0	0	0	1	1401	0.1	100.0
22 <23	0	0	0	0	0	0	0	0	0	0	0	0	1401	0.0	100.0
23 < 24	0	0	0	0	0	0	0	0	0	0	0	0	1401	0.0	100.0

(a) charge others for access to the work (other than at cost), (b) include the work in advertising or a product for sale, or (c) modify the work.