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The scope for reducing indigenous imprisonment rates

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The over-representation of indigenous Australians in prison continues to be a serious problem, even a decade after the recommendations of the Royal Commission into Aboriginal Deaths in Custody were handed down. The gaps in our knowledge about indigenous persons in the criminal justice system, however, have made it difficult to gauge where efforts to reduce indigenous imprisonment might be best placed. This bulletin provides new information on the over-representation of indigenous persons in the NSW court system and on the offence profile and penalties imposed on indigenous and non-indigenous offenders. The findings indicate that the over-representation of indigenous persons stems initially from their higher rate of appearance at court, but is amplified at the point of sentencing, with indigenous offenders sentenced to imprisonment at almost twice the rate of non-indigenous persons. The violent nature of indigenous convictions and the greater likelihood of indigenous persons having prior convictions were found to contribute to their higher rate of imprisonment. These findings suggest that the greatest leverage for reducing indigenous imprisonment rates appears to lie in reducing the rate at which indigenous persons appear in court rather than in reducing the rate at which convicted offenders are sentenced to imprisonment.

BACKGROUND

The over-representation of indigenous Australians in prison is an extremely complex and deep-rooted problem. Over-representation manifests itself not only in prison, but at earlier stages of the criminal justice system, such as at arrest and in police custody.[1] Its origins are likely to stem from the nature of indigenous offending and the differential treatment of indigenous persons by the criminal justice system. The chronic social, economic and cultural disadvantage experienced by indigenous persons, as a result of the processes of colonisation, dispossession and the separation of children from their families, is also likely to play an enormous role in indigenous over-representation.

These origins of indigenous over-representation are by no means independent of each other and are likely to operate on a number of different levels. Chronic disadvantage, in all likelihood, underlies much indigenous offending, and contributes to differences in their treatment at the hands of the criminal justice system. Indigenous offending behaviour and differential treatment by the police and other elements of the criminal justice system are likely to contribute to their over-representation at the various stages of the system.

The over-representation of indigenous persons in prison continues to be a serious problem, despite the recommendations of the Royal Commission into Aboriginal Deaths in Custody which were handed down a decade ago. The recommendations emphasised the need to reduce the disproportionate levels of Aboriginal persons in custody, rather than the need to directly prevent their deaths. This emphasis arose out of the Royal Commission's conclusion that the 99 Aboriginal deaths in custody which occurred during the 1980s, were not a result of Aboriginal persons being any more likely than others to die in custody, but a result of their gross over-representation in prison.

The level of indigenous over-representation in NSW prisons since the conclusion of the Royal Commission in 1991 is depicted in Table 1. Both the indigenous and the total prison populations can be seen to have generally increased in size since 1991. The indigenous prison population however has increased at a much faster rate and, as a result, the level of indigenous over-representation has grown. This can be seen in the sixth column which compares the rate at which indigenous persons are imprisoned with the rate at which the general population is imprisoned. This figure indicates that in 1998 indigenous persons were almost 10 times more likely than the general population to be imprisoned, whereas they were less than 8 times more likely in 1991. The growth in indigenous over-representation can also be seen in the

final column which shows the proportion of the total prison population comprised by indigenous persons. This proportion grew from 9 per cent in 1991 to 15 per cent in 1998. Over this period indigenous adults were estimated to comprise less than 2 per cent of the total NSW adult population.[2]

Whether this growth in the indigenous prison population is due to a real increase in the number of indigenous persons being imprisoned is unclear. At least some of the growth can be attributed to better collection of data on the indigenous status of NSW prisoners and a greater willingness on the part of prisoners to identify as indigenous.[6] The extent to which the growth can be attributed to these reasons is not easily determined.[7] Regardless of whether the growth in the indigenous prison population is real, or whether it is merely an artefact of the better identification of indigenous persons, the main point to note here is that the levels of indigenous imprisonment in NSW have remained unacceptably high since 1991.

Table 1: Trends in the indigenous and total NSW prison population, 1991-1999

	Total NSW prisoners		*Indigenous prisoners*			
	n	*Rate per 100,000 population*[a]	*n*	*Rate per 100,000 population*[a]	*Indigenous rate/ NSW rate*	*Indigenous as % of prison population*
1991	7 014	157.8	662	1 208.6	7.7	9.4
1992	7 407	164.5	648	1 143.8	7.0	8.7
1993	7 542	166.1	725	1 253.2	7.5	9.6
1994	7 632	166.1	827	1 399.8	8.4	10.8
1995	7 667	164.8	888	1 473.3	8.9	11.6
1996	7 604	161.2	952	1 568.4	9.7	12.5
1997	7 847	163.4	1 003	1 541.5	9.4	12.8
1998	7 697	158.7	1 090	1 560.2	9.8	14.2
1999	8 433	na	1 265	na	na	15.0

Source: Adapted from data presented in Carcach & Grant (1999),[3] Carcach, Grant & Conroy (1999)[4] and Australian Bureau of Statistics (1999).[5]

na Denotes the data was not available.

a Rates are based on populations aged 18 years and over.

Many agree that the high levels of indigenous imprisonment in NSW, and indeed in most other States in Australia, have continued at least partly because the governments have failed to adequately implement many of the recommendations of the Royal Commission.[8] Cunneen and McDonald (1997) argue that there is still enormous room to reduce indigenous imprisonment rates through effective implementation of the recommendations. They appear particularly optimistic about the reductions in imprisonment that could be brought about through reform at all stages of the criminal justice system.[9] They suggest that changes to the way the police, the courts and the prisons operate would all have a significant impact on indigenous imprisonment rates.

The extent to which reductions could be brought about at the different stages of the criminal justice system, however, remains unclear, due to the lack of data collected on indigenous persons at different stages of the system. Most of the data available to date has been based on indigenous persons in prisons or in police custody. Up until now little data has been available on indigenous persons at arrest or in the court system. Thus to date we do not have a good grasp on whether indigenous over-representation is a problem that steadily escalates at each stage of the criminal justice system, or whether it is a problem only at certain stages. Such information would help identify where efforts to reduce indigenous imprisonment might be best placed.

This paper is designed to bridge some of the gaps in our knowledge about indigenous persons in the court system in NSW. Because substantial improvements have been made to the range of court data available on indigenous defendants in NSW, for the first time we are able to provide a snapshot of indigenous over-representation in the NSW court system in 1999. This includes different stages of the court system from court appearance, to conviction, through to sentencing. The paper then looks in more depth at the conviction and sentencing stages, considering the offence profile and the penalties imposed on convicted indigenous and non-indigenous offenders. It concludes with a discussion on what scope there is for reducing indigenous imprisonment rates. Here we consider where the greatest leverage for reducing indigenous imprisonment might lie and we attempt to quantify the reductions in the indigenous imprisonment that could be achieved through intervention at different points or with different approaches.

INDIGENOUS OVER-REPRESENTATION IN THE NSW COURT SYSTEM

Table 2 shows the numbers and proportions of indigenous and non-indigenous persons at successive stages of the NSW court system in 1999.[10] The proportions at each stage are the proportions that indigenous and non-indigenous persons represent of the total number of persons at each stage.

It can be seen that 11 per cent of those appearing in court, 10 per cent of those convicted, 19 per cent of those sentenced to imprisonment, and 17 per cent of those sentenced to imprisonment for long terms (i.e. 6 months or more) identified themselves as indigenous.[11] As mentioned earlier, indigenous persons were estimated to represent less than 2 per cent of the NSW population in 1999. So indigenous persons can be seen to be over-represented, by varying degrees, at each of the successive stages of the court system.

What is also apparent is that the level of over-representation does not increase progressively at each successive point.

Over-representation is first apparent at the point of court appearance, with indigenous persons appearing at a rate (11%) more than 5 times higher than what we would expect given the relative size of their population. The level of over-representation then remains reasonably steady (or in fact decreases slightly) at the point of conviction, before it increases further at the point of sentencing. Indigenous persons comprise 19 per cent of all persons sentenced to imprisonment, almost 10 times higher than we would expect given their relative population size, and almost double the rate at which they appeared in court. The level of over-representation then drops again slightly, in terms of those sentenced to long prison terms, with indigenous persons comprising 17 per cent of those sentenced to long terms of imprisonment.

This uneven growth in indigenous over-representation is evident only in the Local Courts, which deal with the vast bulk of the criminal caseload (97%). In the Higher Courts indigenous persons are over-represented at each of the four stages, but, after the point of court appearance their level of over-representation remains reasonably steady.

The uneven growth in indigenous over-representation is illustrated more clearly in Table 3.[12] The table shows the proportion of indigenous persons progressing on to the next stage amongst those indigenous persons who reached the previous stage. Non-indigenous proportions are similarly shown. It can be seen that, of those indigenous persons who appeared in court, 75 per cent were convicted and, of those indigenous persons convicted, 17 per cent were sentenced to imprisonment. The corresponding proportions for non-indigenous persons are 82 per cent and 9 per cent, respectively.

The important patterns to note here are that having appeared in court, indigenous persons are slightly less likely than their non-indigenous counterparts to be convicted. Having been convicted indigenous persons are almost twice as likely to be sentenced to imprisonment. Having been sentenced to imprisonment, however, indigenous persons are slightly less likely than non-indigenous persons to be imprisoned for a long term.[13]

The over-representation of indigenous persons is most problematic, then, at the point of entry into the court system and the point of sentencing, with indigenous persons more likely to appear in court and more likely, upon conviction, to be sentenced to imprisonment. At face value these would appear to be the main points of leverage within the court system for reducing indigenous over-representation in prison.[14] This raises three important questions —

- Why do indigenous persons enter the court system at a higher rate?
- Why upon conviction, are indigenous persons sentenced to imprisonment at a higher rate? and
- What scope is there for the use of alternative sanctions among indigenous persons?

The first question is outside the scope of this paper, but it is anticipated that a future study by the Bureau will address this question. The second and third questions are, however, within our scope.

Table 2: Representation of indigenous and non-indigenous persons at each stage of the NSW court system, 1999

	Court appearance		*Conviction*		*Sentenced to prison*		*Sentenced to long prison term*	
	n	*%*	*n*	*%*	*n*	*%*	*n*	*%*
Local Courts								
Indigenous	11 640	11	8 706	10	1 323	20	505	19
Non-indigenous	90 581	89	74 688	90	5 168	80	2 200	81
Higher Courts								
Indigenous	362	12	294	12	222	13	208	13
Non-indigenous	2 729	88	2 111	88	1 434	87	1 363	87
Total								
Indigenous	12 002	11	9 000	10	1 545	19	713	17
Non-indigenous	93 310	89	76 799	90	6 602	81	3 563	83

Table 3: Proportion of indigenous and non-indigenous persons progressing through each stage of the NSW court system, 1999

	% convicted among those appearing	*% sentenced to prison among those convicted*	*% sentenced to long term among those sentenced to prison*
Local Courts			
Indigenous	75	15	38
Non-indigenous	82	7	43
Higher Courts			
Indigenous	81	76	94
Non-indigenous	77	68	95
Total			
Indigenous	75	17	46
Non-indigenous	82	9	54

Figure 1: Penalty type by indigenous status, NSW Local Courts, 1999

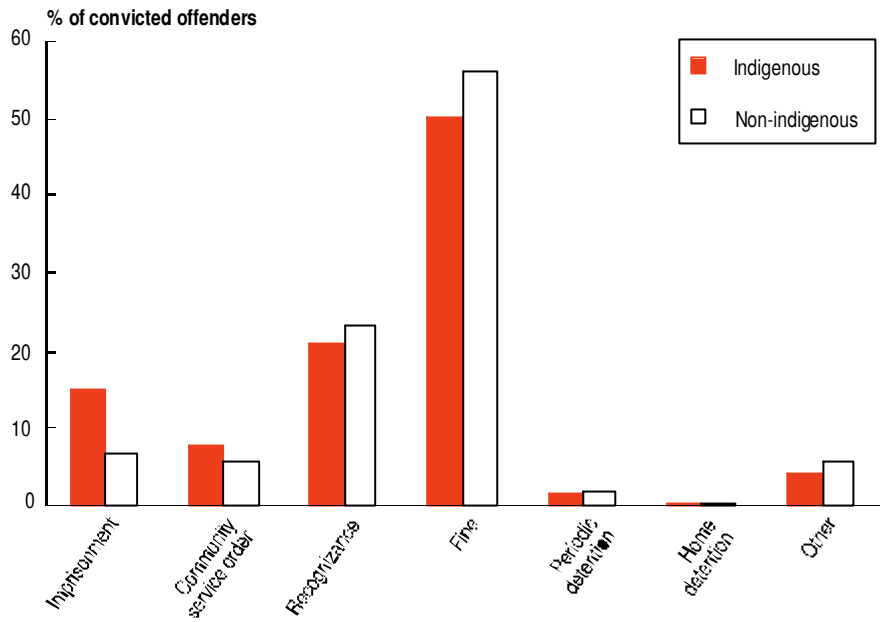
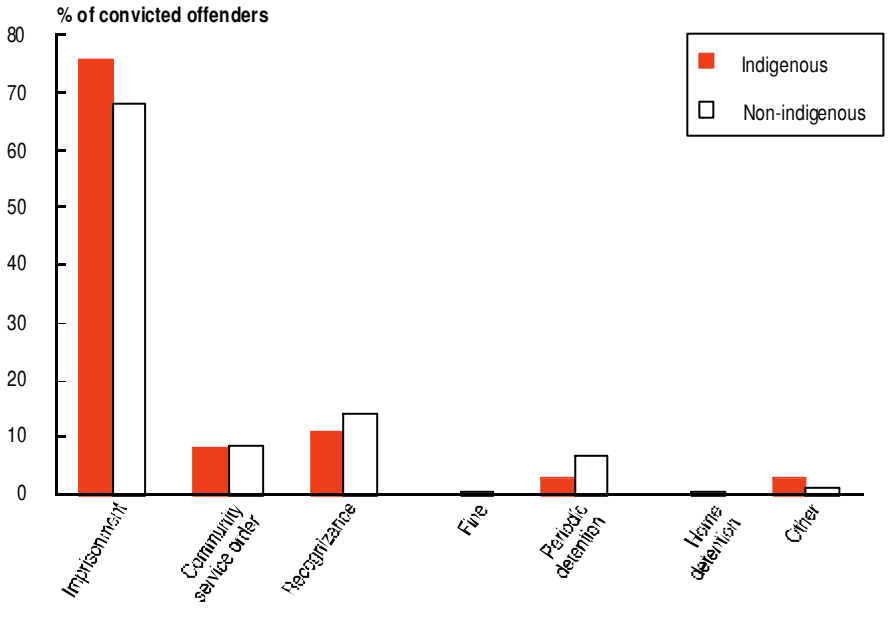


Figure 2: Penalty type by indigenous status, NSW Higher Courts, 1999



We begin by looking at the use of different penalty types among indigenous and non-indigenous offenders to see just what scope there is for the use of alternative sanctions. We then examine why convicted indigenous offenders might be sentenced to imprisonment at a higher rate and why alternative sanctions are not used more often. We consider the nature of indigenous convictions, the use of imprisonment for different types of offence and other factors that might influence the likelihood of imprisonment such as prior convictions, offence severity, age and gender.

PENALTIES FOR INDIGENOUS AND NON-INDIGENOUS OFFENDERS

Figure 1 shows the types of penalty handed down to indigenous and non-indigenous persons by the Local Courts in 1999.[15] It can be seen here (and also earlier in Table 3) that the vast majority of offenders, indigenous or otherwise, do not receive prison sentences. The most common penalty handed down to both indigenous and non-indigenous persons is a fine, followed by a recognizance.[16] In other words, the use of non-custodial sanctions is already quite extensive. There is, however, limited use of community service orders, home detention and periodic detention for both indigenous and non-indigenous offenders.

The use of non-custodial sanctions varies between indigenous and non-indigenous offenders. Non-custodial sanctions are used less frequently with indigenous offenders (as implied by their higher imprisonment rates). The types of alternatives used also varies, however. Fines, recognizances and 'other' types of penalties are more likely to be handed down to non-indigenous persons than indigenous persons. Indigenous persons, on the other hand, are more likely to receive community service orders.

Figure 2 shows the penalty types handed down by the Higher Courts.[17] The use of imprisonment is much more prevalent in the Higher Courts, as we would expect, given that the Higher Courts deal with more severe offences. There is limited use of all other types of penalty, but non-indigenous persons are more likely than indigenous persons to receive periodic detention or a recognizance as a penalty.

OFFENCE PROFILE FOR CONVICTED INDIGENOUS AND NON-INDIGENOUS PERSONS

In this section we examine the types of offences for which indigenous and non-indigenous persons are convicted to see whether these might impact on the greater likelihood of a prison sentence for indigenous persons.

Figure 3 shows Local Court convictions in 1999. The figure indicates that

Figure 3: The classes of offences for which indigenous and non-indigenous persons were convicted, NSW Local Courts, 1999

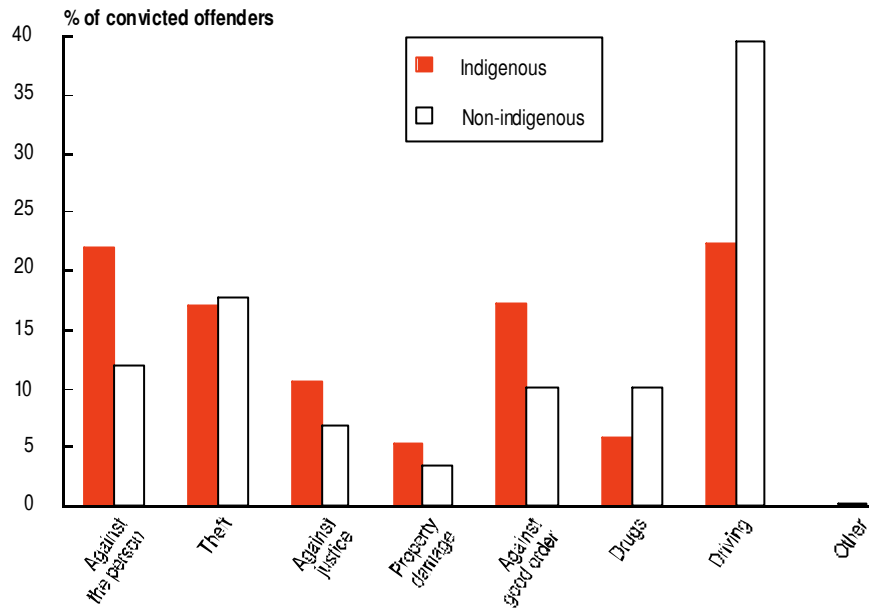
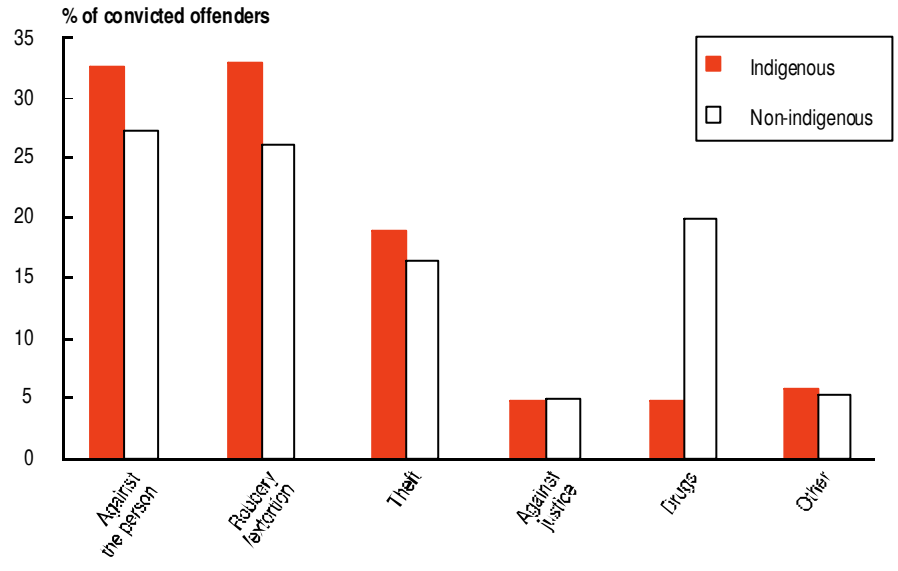


Figure 4: The classes of offences for which indigenous and non-indigenous persons were convicted, NSW Higher Courts, 1999



indigenous persons were much more likely than non-indigenous persons to be convicted of offences against the person, offences against good order and, to a lesser extent, offences against justice. Note that good order offences include mostly offensive behaviour, weapons and other offences of this nature. Justice offences include breaches of court order and resist arrest. Non-indigenous persons, on the other hand, were far more likely to be convicted of driving offences.

Figure 4 shows Higher Court convictions in 1999. Indigenous persons were more likely than non-indigenous persons to be convicted of offences against the person, robbery/extortion and, to a lesser extent, theft. Robbery/extortion, for example, comprised one-third of indigenous convictions, compared with 26 per cent of non-indigenous convictions. Non-indigenous persons were more likely to be convicted of drug offences.

These figures illustrate that indigenous persons are more likely than non-indigenous persons to have been convicted of violent offences and offences against good order and justice. Such differences may reflect the different nature of offending among indigenous and non-indigenous persons. However, they could also reflect differential treatment of indigenous and non-indigenous persons by the criminal justice system. Differences in the level of policing activity, in the use of discretion by the police, and in the use of discretion by prosecution agencies to proceed with certain charges may all impact on the type of charges before the courts and therefore on the type of convictions. Offences against good order and justice, for example, are highly subject to policing activity and discretion. It has also been suggested that indigenous violence may more readily come to the attention of the police as it is a more open and public event.[18] Such factors may all impact upon the types of offences for which indigenous persons are more likely to come before the courts and therefore on their convictions.

Whatever the underlying reasons for the violent nature of many indigenous convictions, their conviction on these types of charges is an important factor contributing to their higher imprisonment rate.

IMPRISONMENT RATES FOR DIFFERENT TYPES OF OFFENCE

Figures 5 and 6 show the percentage of convicted indigenous and non-indigenous offenders sentenced to imprisonment for each type of offence.

Indigenous offenders were more likely than non-indigenous offenders to be sentenced to prison for every class of offence, except 'other', in both the Local and Higher Courts. Disparities in imprisonment rates were particularly evident for person offences, theft and

justice offences in the Local Courts and justice offences in the Higher Courts. Thirty per cent of indigenous offenders convicted of theft by the Local Courts were sentenced to imprisonment, compared with 18 per cent of non-indigenous offenders convicted of theft. Seventy-one per cent of indigenous offenders convicted of justice offences in the Higher courts were sentenced to prison, compared with 52 per cent of convicted non-indigenous justice offenders.

Another point worth noting here is that overall imprisonment rates were highest for theft, offences against justice and offences against the person in the Local Courts and for robbery/extortion in the Higher Courts. As we saw earlier, indigenous persons were more likely than non-indigenous persons to be convicted of these types of offences, with the exception of theft.

In terms of their profile of convictions and penalties, two important factors, therefore, are contributing to the higher proportion of indigenous persons sentenced to prison. Not only do the courts imprison them at higher rates for each class of offence, the classes of offence they are relatively more likely to be convicted of are those which are violent in nature or those which are more likely to attract a prison sentence.

OTHER FACTORS CONTRIBUTING TO THE HIGHER IMPRISONMENT RATE OF INDIGENOUS PERSONS

Apart from the type of offence, a number of other factors may influence the court's decision to impose a particular penalty on an offender. The severity of the offence (within a particular offence category), whether the offender has prior criminal convictions, the age and gender of the offender, the degree of contrition shown by the offender and the availability of non-custodial sentencing options all may influence the penalty. Such factors may influence the court's decision either because they can be taken into account under current sentencing practices, or because they are related to factors that can be taken into account.[19] Differences between indigenous and non-indigenous persons on any of these factors may also contribute to their differential imprisonment rates.

Figure 5: Percentage of convicted persons sentenced to imprisonment by indigenous status within each offence class, NSW Local Courts, 1999

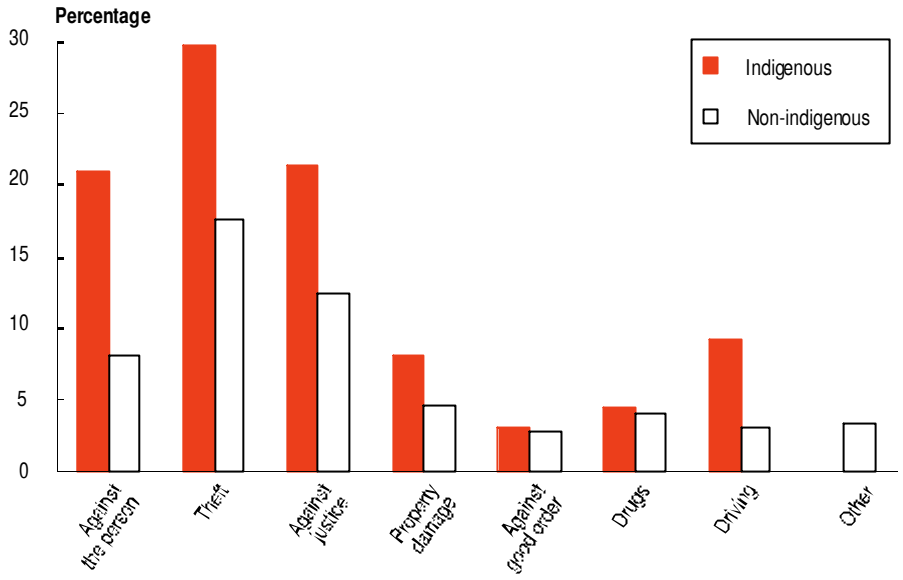
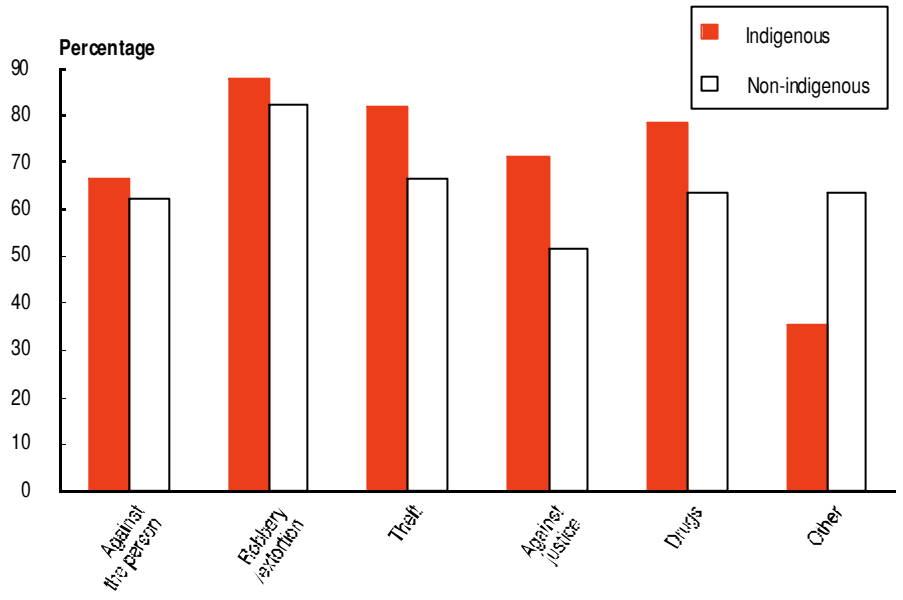


Figure 6: Percentage of convicted persons sentenced to imprisonment by indigenous status within each offence class, NSW Higher Courts, 1999



We examine four of these factors here — the severity of the offence, whether the offender has prior criminal convictions, and the age and gender of the offender. Data on these factors are readily available, and these factors are likely to have potentially important influences on sentencing. The analysis here is limited solely to the offence of assault as dealt with by the Local Courts.[20] There are several reasons for this. This class of offence occurs with sufficient frequency to enable meaningful analysis of subgroups, it is relatively easy to categorise according to severity and it is an offence for which the differential

between indigenous and non-indigenous imprisonment rates is quite large.

In terms of the severity of the assault, the two main kinds of assault dealt with by the Local Court are considered here. The first and more serious assault — assault occasioning actual bodily harm — involves the infliction of bodily injury and attracts a higher statutory maximum penalty of five years imprisonment. The lesser kind of assault — common assault — does not necessarily result in bodily injury and attracts a lower statutory maximum penalty of two years imprisonment.[21] There was little difference in the seriousness of the assaults for which indigenous persons and non-indigenous persons were convicted. Thirty per cent of indigenous assault offenders were convicted of assault occasioning actual bodily harm, compared with 26 per cent of non-indigenous assault offenders.

In terms of the other factors there were, however, differences between indigenous and non-indigenous persons. Indigenous persons convicted of assault were more likely to have prior convictions.[22] Eighty-one per cent had at least one prior conviction, compared with 59 per cent of non-indigenous persons. Indigenous assault offenders were more likely to be younger, with an average age of 29 years, compared with 32 years for non-indigenous assault offenders. Indigenous assault offenders were also more likely to be female. Twenty-two per cent of indigenous assault offenders were female, compared with 10 per cent of their non-indigenous counterparts.

We might expect then that these factors might contribute to differences in the imprisonment rates of indigenous and non-indigenous persons. The greater likelihood of indigenous persons having prior convictions, in particular, is likely to contribute to their higher imprisonment rates. But it is unclear exactly how age and gender might influence the imprisonment rate. Tables 4 and 5 show the imprisonment rate for common assault according to indigenous status, age and prior convictions, for males and females, respectively.[23]

It can be seen that the imprisonment rate is higher for those with prior convictions than for first-time offenders. Almost no first time offenders are sentenced to imprisonment, whereas offenders with prior convictions are much more likely to be sentenced to imprisonment. This was the case regardless of the offenders' indigenous status, age and gender.

On the other hand, the relationship between the imprisonment rate and both the age and gender of the offender is not as clear cut. The imprisonment rate tends to be higher for younger offenders and for males, but only where prior convictions exist.

Moreover, the relationship between the imprisonment rate and the offenders' indigenous status, once the other factors are taken into account, is not clear cut. Indigenous imprisonment rates are generally higher than their non-

Table 4: Imprisonment rates by indigenous status, age and prior convictions for males convicted of common assault, NSW Local Courts, 1999

	Indigenous		*Non-indigenous*	
	No. convicted	*% imprisoned*	*No. convicted*	*% imprisoned*
No prior convictions				
Less than 21 years	16	0.0	157	0.6
21-30 years	32	6.3	398	0.3
31-40 years	14	0.0	319	0.9
41 or more years	15	0.0	249	0.4
Prior convictions				
Less than 21 years	80	22.5	261	10.3
21-30 years	319	23.8	1 222	9.7
31-40 years	195	13.8	954	8.7
41 or more years	71	7.0	488	6.1

Table 5: Imprisonment rates by indigenous status, age and prior convictions for females convicted of common assault, NSW Local Courts, 1999

	Indigenous		*Non-indigenous*	
	No. convicted	*% imprisoned*	*No. convicted*	*% imprisoned*
No prior convictions				
Less than 21 years	14	0.0	52	0.0
21-30 years	36	0.0	81	0.0
31-40 years	16	0.0	61	0.0
41 or more years	10	0.0	32	0.0
Prior convictions				
Less than 21 years	24	12.5	31	9.7
21-30 years	87	4.6	121	0.8
31-40 years	44	2.3	108	4.6
41 or more years	12	8.3	16	0.0

indigenous counterparts, but again only where prior convictions exist.

A similar pattern was found when this analysis was repeated with the more serious assault — assault occasioning actual bodily harm. While the imprisonment rates were somewhat higher generally, the indigenous imprisonment rate was higher than the non-indigenous rate only where prior convictions are concerned.

These findings do not necessarily signal discriminatory treatment of indigenous persons by the courts. First time indigenous and non-indigenous offenders appear to be dealt with on comparable terms.[24] The higher imprisonment rate for those with prior convictions may well be due to differences in the extent of those prior convictions, in terms of the number, type and severity of those offences, which are not discernible from the limited analysis presented above. Other factors we have not considered here such as the degree of contrition shown by the offender could also contribute to the different imprisonment rates.

SUMMARY AND IMPLICATIONS OF KEY FINDINGS

This paper has shown that the over-representation of indigenous persons in the court system stems initially from their higher rate of appearance at court, but is amplified at the point of sentencing. Indigenous persons appear in court at about 5 times the rate that we would expect given their relative population size. At the point of sentencing, indigenous persons are sentenced to imprisonment at about 10 times the rate we would expect given their relative population size, or almost twice the rate we would expect given the rate at which they entered the court system.

Several factors were found to contribute, at least partly, to the higher imprisonment rate (and the limited use of alternative sanctions) among convicted indigenous offenders. Indigenous persons were more likely to be convicted of offences against the person, robbery/extortion and offences against justice which are violent in nature and which are more likely to attract a prison sentence. Indigenous persons were also more likely to have prior criminal convictions.

THE SCOPE FOR DIVERSION

This paper has demonstrated that the main points of leverage within the court system for reducing indigenous over-representation in prison are the point of entry and the point of sentencing as these were the only points in the court system where the levels of indigenous over-representation became amplified.

This paper has also demonstrated, however, that any intervention at the point of sentencing will be quite difficult without any radical change to current sentencing practices, which take into account factors such as prior convictions. Any attempt to reduce the rate at which convicted indigenous offenders are sentenced to imprisonment, and particularly to reduce that rate *relative* to the non-indigenous rate, would have to address the multiple factors which lead to their higher imprisonment rates. These factors, as we have seen, include the violent nature of the offences for which indigenous persons are convicted and their greater likelihood of having prior criminal convictions. Alternative sanctions, such as community service orders, periodic detention, and home detention tend not to be considered appropriate for violent, serious or persistent offenders.

This is not to say that benefits could not be achieved through intervention at the point of sentencing. There is growing acceptance, at least in the United States, that diversion programs may be suitable for violent offenders.[25] The need for culturally appropriate perpetrator programs specifically aimed at violent indigenous offenders is also starting to be recognised in Australia.[26] Family Healing Centres have been suggested as an alternative to prison in response to family violence, for example.[27] However, the use of diversion, particularly for violent offenders, would have to be balanced against the need to protect the indigenous communities to which the offenders return.

Some reductions in the imprisonment rate could be achieved by using non-custodial sanctions in place of short term imprisonment or imprisonment related to breaches of bail or non-custodial orders, as Cunneen and McDonald suggest.[28] In the case of the latter, Broadhurst et al. point out that some efforts should be made to avoid imprisonment for breach, given that the original offence did not merit imprisonment in the first instance.[29] Arguably, however, strategies to achieve such reductions could not apply solely to indigenous persons without being discriminatory to other groups.

The reductions that could be achieved by eliminating imprisonment for breaches of bail or community service orders would be quite modest. Most persons convicted of breach of bail or breach of court order (which fall under the broader justice offence category) were not sentenced to imprisonment. Presumably it would be inappropriate to divert many of those offenders who were sentenced to imprisonment for breach offences, particularly if they had committed breaches on a persistent basis.[30] Putting in place more culturally appropriate orders and providing more opportunities for indigenous persons serving such orders to be supervised by other indigenous persons, as Cunneen and McDonald and Broadhurst et al. suggest, may prove to be a more effective strategy because it may reduce the number of breaches that occur in the first place.

More substantial reductions in the levels of imprisonment and over-representation could be achieved by using alternative sanctions in place of short prison sentences. Table 6 shows the potential reduction in indigenous and non-indigenous imprisonment that would be achieved by eliminating all prison terms of less than six months duration (regardless of factors such as type of offence and prior record).[31]

The table shows that eliminating prison terms of less than six months would achieve a 54 per cent reduction in the number of indigenous persons sentenced to imprisonment. The percentage imprisoned would be reduced from 17 per cent to 8 per cent. A slightly smaller reduction, of 46 per cent, would be achieved in non-indigenous imprisonment levels, which would take the percentage imprisoned down from 9 per cent to 5 per cent.

Even larger reductions would be achieved through eliminating prison terms of less than 12 months. The number of indigenous persons imprisoned would be reduced by 84 per cent and the percentage imprisoned would be reduced from 17 per cent to 3 per cent. The number of non-indigenous persons would be reduced by 76 per cent and the percentage

Table 6: Potential reduction in imprisonment by eliminating prison terms of less than 6 months

	Current imprisonment levels		*Current terms less than 6 months*	*Potential reduction in imprisonment levels*		*% reduction in the numbers imprisoned*
	n	*%*	*n*	*n*	*%*	
Local Courts						
Indigenous	1 323	15	818	505	6	62
Non-indigenous	5 168	7	2 968	2 200	3	57
Higher Courts						
Indigenous	222	76	14	208	71	6
Non-indigenous	1 433	68	70	1 363	65	5
Total						
Indigenous	1 545	17	832	713	8	54
Non-indigenous	6 601	9	3 038	3 563	5	46

imprisoned would become 2 per cent, down from 9 per cent.

Smaller reductions would be achieved if only terms of less than three months were eliminated. However the reductions would still be quite substantial. The number of indigenous persons imprisoned would be reduced by 23 per cent and the percentage imprisoned would be reduced from 17 per cent to 13 per cent. The number of non-indigenous persons would be reduced by 20 per cent and the percentage imprisoned would become 7 per cent.

Once again, however, the reduction in imprisonment that could be brought about by such an approach would have to be balanced against the need to protect the communities to which the offenders return.

Given the difficulties associated with reducing the indigenous imprisonment rate at the point of sentencing, the point of entry into the court system would then appear to be a better point of leverage. Rather than trying to reduce the rate at which convicted indigenous persons are sentenced to prison, it would appear far better to try and reduce the rate at which indigenous persons appear in court. This would mean not only diverting indigenous defendants away from court, but reducing the rate at which indigenous persons are arrested, through both using alternatives to arrest and reducing the rate at which they offend or re-offend.

To reduce the rate at which indigenous persons appear in court will be no easy task either. Even halving the number of indigenous court appearances, (while keeping conviction rates and imprisonment rates at their present levels) would only halve the number of indigenous persons sentenced to imprisonment. This would help reduce the level of indigenous over-representation amongst those sentenced to imprisonment, but not eliminate it as indigenous persons would still comprise about 10 per cent of those sentenced to imprisonment.[32]

It would also be difficult to reduce the indigenous court appearance rate without a better understanding of why indigenous persons appear at a rate five times higher than the rest of the population, or why indigenous persons are more likely to appear for (and be convicted of) certain types of offences.

Clearly factors such as the over-representation of indigenous persons at arrest, the nature of indigenous offending and re-offending, the differential treatment of indigenous persons by the criminal justice system and the disadvantage experienced by indigenous persons will all have a part to play. Without better information on the relative importance of these reasons it is difficult to know where efforts to reduce the rate of indigenous court appearances might be best placed.

NOTES ON THE DATA SOURCES AND METHODS

The analysis of the NSW court system presented in this paper was based on data obtained from the Bureau's Local and Higher Courts databases. Note that the data covers all appearances finalised by the NSW Courts in 1999 and is person-based (rather than charge-based). The data related to offence type is based on the most serious offence for which the person was convicted. All prison terms reported relate to the minimum or fixed term of imprisonment imposed. Only persons whose indigenous status was known are included. Indigenous status is defined according to whether the person identified themselves as Aboriginal or Torres Strait Islander (or both). Indigenous status was unknown for 421 persons convicted by the Higher Courts (15% of convicted persons) and 2 832 persons convicted by the Local Courts (3% of convicted persons). While the proportion of persons whose indigenous status is unknown is relatively large in the Higher Courts, we are reasonably confident that the data presented is representative of both indigenous and non-indigenous patterns. The data available from the courts on indigenous status has been increasing over recent years but the offence profile for both indigenous and non-indigenous persons has remained relatively constant. Note also that in the Local Courts, only persons proceeded against by way of charge or Court Attendance Notice are included. Indigenous status is unknown for persons proceeded against by way of summons (20 496 or 19% of persons). However, the summons cases typically involve driving offences and result in very low imprisonment rates and therefore are unlikely to have much impact on the patterns for most of the offences described in this paper.

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NOTES

1 See, for example, Cunneen, C. & McDonald, D. 1997, *Keeping Aboriginal and Torres Strait Islander People Out of Custody An Evaluation of the Implementation of the Recommendations of the Royal Commission in Aboriginal Deaths in Custody*, ATSIC, Canberra; Broadhurst, R.G., Ferrante, A., Loh, N., Reidpath, D. & Harding, R.W. 1994, *Aboriginal Contact with the Criminal Justice System in Western Australia: A Statistical Profile*, Crime Research Centre, The University of Western Australia.

2 See, for example, Australian Bureau of Statistics 2000, *Australian Demographic Statistics June Quarter 2000*, Cat. no. 3101.0, ABS, Canberra; Australian Bureau of Statistics 1996, *Australian Demographic Statistics June Quarter 1996*, Cat. no. 3101.0, ABS, Canberra; Australian Bureau of Statistics 1998, *Experimental Estimates of the Indigenous Population 1991-1996*, Cat. no. 3230.0, ABS, Canberra; Australian Bureau of Statistics 1998, *Experimental Projections of the Indigenous Population 1996-2006*, Cat. no. 3231.0, ABS, Canberra.

3 Carcach, C. & Grant, A. 1999, 'Imprisonment in Australia: Trends in prison populations & imprisonment rates 1982-1998', *Trends and Issues in Crime and Criminal Justice*, no. 130, Australian Institute of Criminology, Canberra.

4 Carcach, C., Grant, A. & Conroy, C. 1999, 'Australian corrections: The imprisonment of indigenous people', *Trends and Issues in Crime and Criminal Justice*, no. 137, Australian Institute of Criminology, Canberra.

5 Australian Bureau of Statistics 1999, *Prisoners in Australia 1999*, A report prepared for the Corrective Services Ministers' Council by the National Corrective Services Statistics Unit, Australian Bureau of Statistics, June 2000, ABS, Canberra.

6 The ABS estimates that a large proportion of the growth in the indigenous population between the population censuses of 1991 and 1996 is due to the greater willingness by indigenous people to nominate their indigenous origins and more effective census collection. (See Australian Bureau of Statistics 1997, *Population Distribution, Indigenous Australians 1996*, Cat. no. 4705.0, ABS, Canberra.) Similarly, at least some of the growth in the indigenous prison population is likely to be due to the greater willingness of prisoners to identify as indigenous and better data collection.

7 The extent will depend on how closely the growth in the indigenous prison population attributable to better identification of indigenous persons mirrors that in the general population. If the growth in the prison population attributable to better identification is greater than that encountered in the general population then the increasing trend will be overstated. In fact if the differential was large enough it is possible that better identification could account for all of the increase. If, on the other hand, the growth in the prison population attributable to better identification is less than that encountered in the general population then the increasing trend will be understated. The scenario that is most likely is largely a matter of speculation, however.

8 See, for example, Cunneen & McDonald; Aboriginal Justice Advisory Council 2000, *Review of the NSW Government Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* <www.lawlink.nsw.gov.au/ajac.nsf/pages/rciadicreport>

9 Note that many of the Royal Commission's recommendations were directed at the criminal justice system. These covered sentencing and the need to increase the use of alternative sentencing options and to use imprisonment only as a last resort. They also covered earlier aspects of the criminal justice system. The need to divert offenders away from court, to use arrest as a last resort, to improve Aboriginal and police relations and to encourage indigenous persons to become more involved in policing their own communities featured amongst the recommendations. Also central to the recommendations was the fundamental need to address the underlying disadvantage experienced by Aboriginal persons, in recognition of its role in contributing to over-representation.

10 Note that the number of persons appearing in court (second column) refers to persons whose case has been finalised by the court. Note also that one non-indigenous person dealt with by the Higher Courts has been excluded from the final column (those sentenced to long prison terms) as the length of their prison term was unknown.

11 Defining a long prison sentence as one which was six months or more was quite an arbitrary decision. Changing the length at which a long prison sentence is defined, however, has little effect on the percentages. Defining a long sentence as three months or more results in the percentage of persons receiving a long sentence who identify as indigenous increasing from 17 per cent to 18 per cent. Defining a long sentence as 12 months or more results in the percentage decreasing to 14 per cent.

12 Note again that one non-indigenous person dealt with by the Higher Courts has been excluded from the final column (those imprisoned for long terms) as the length of their prison term was unknown.

13 Note again that this pattern was also found when a long prison sentence was defined as three months or more — 77 per cent of indigenous persons sentenced to imprisonment were sentenced to a long term, compared with 80 per cent for non-indigenous persons. Similarly when the definition was increased to 12 months or more, the percentages became 16 per cent and 24 per cent for indigenous and non-indigenous persons, respectively. In other words indigenous persons were still less likely than non-indigenous persons to be sentenced to a long prison term.

14 This is not to say that some gains could not be made elsewhere in terms of the rates at which indigenous persons are convicted and sentenced to long prison terms. The rate at which indigenous persons are convicted could conceivably be reduced by increasing the availability of suitable legal representation and interpreters for indigenous persons. Clearly, however, the potential leverage is not as great here, as indigenous over-representation does not actually increase at these points.

15 Note that 'other' includes 'offence proved, dismissed', 'rising of the court', 'compensation' and 'licence disqualification'.

16 A recognizance is a bond. Generally speaking a recognizance requires the offender to be 'of good behaviour' for a specified period.

17 Note that 'other' includes detention in a 'juvenile institution', 'rising of the court' and 'no conviction recorded'.

18 Gale, F., Bailey-Harris, R. & Wundersitz, J. 1990, *Aboriginal Youth and the Criminal Justice System*, Cambridge University Press, Melbourne.

19 Gender, for example, is not a factor that can be explicitly taken into account by the court under current sentencing practices. Gender, however, is likely to be related to other factors that can be taken into account, such as prior convictions and the circumstances surrounding the commission of the offence. See, for example, Gallagher, P., Poletti P. & MacKinnell, I. 1997, *Sentencing Disparity and the Gender of Juvenile Offenders*, Judicial Commission of New South Wales, Sydney.

20 Note that assault comprises 94 per cent of offences against the person.

21 Note that assaults other than assault occasioning actual bodily harm and common assault were excluded as they are not easily classified according to severity. The two main types of assaults accounted for 82 per cent of indigenous assaults and 86 per cent of all non-indigenous assaults.

22 Assault here refers to assault occasioning actual bodily harm or common assault only.

23 Note that 845 male offenders (15%) were excluded from Table 4 because their age and/or prior conviction status was unknown and 115 females (13%) were excluded from Table 5 because their prior conviction status was unknown.

24 Note when penalties other than imprisonment were considered, there was no clear indication that indigenous persons received more serious types of penalty. The numbers were not always sufficient, however, to allow a reliable comparison.

25 See, for example, Kurki, L. 1999, Incorporating Restorative and Community Justice into American Sentencing and Corrections, *Sentencing and Corrections Issues for the 21st Century, Papers from the Executive Sessions on Sentencing and Corrections No. 3.* US Department of Justice.

26 Thompson, R. (ed.) 2000, *Working in Indigenous Perpetrator Programs: Proceedings of a Forum,* Adelaide 4 & 5 August 1999, Ministerial Council for Aboriginal and Torres Strait Islander Affairs, Darwin.

27 Blagg, H. 2000, 'Aboriginal Family Violence: Prevention and Crisis Intervention Issues' in *Working in Indigenous Perpetrator Programs: Proceedings of a Forum,* Adelaide 4 & 5 August 1999, ed. R. Thompson, Ministerial Council for Aboriginal and Torres Strait Islander Affairs, Darwin.

28 See note 1.

29 See, for example, Broadhurst et al.

30 See, for example, Broadhurst et al.

31 Note again that one non-indigenous person dealt with by the Higher Courts has been excluded from the final column (those imprisoned for long terms) as the length of their prison term was unknown.

32 Halving the number of indigenous court appearances, but maintaining conviction and imprisonment rates, would reduce the number of indigenous persons imprisoned from 1 545 to 765. Maintaining the number of non-indigenous persons imprisoned at 6 602 then reduces the proportion of indigenous persons among those imprisoned to 10 per cent.

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