

Comparing Sentencing Outcomes for Koori and Non-Koori Adult Offenders in the Magistrates' Court of Victoria

A note on terminology

The term 'Koori' is used throughout this document to describe Indigenous inhabitants of Victoria. It is used when presenting results of analyses of data collected by the Victorian courts and by Corrections Victoria. However, the Council acknowledges that not all Indigenous people who appear in the Victorian courts and prisons are necessarily of Koori background.

The term 'Indigenous' is used to describe Aboriginal and Torres Strait Islander peoples nationally. It is used when presenting results of analyses based on data collected by the Australian Bureau of Statistics, which requires a terminology that can be applied to Indigenous people across the country as a whole.

When citing publicly available research or data, the Council keeps the terminology used in the original, published report.

This approach is consistent with the approach used by the Department of Justice, Victoria. The Department has agreement from the Koori Caucus of the Aboriginal Justice Forum that, for consistency, the term 'Koori' is the preferred term ('Koories' for plural) to be used in Victoria's Aboriginal Justice Agreement and related initiatives.

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Glossary

Case	A collection of one or more charges against a person sentenced at the one hearing.
Charge	A single proven allegation of an offence.
E-Justice	An administrative database combining records from police, courts and corrections for each case and allowing the accused person's progress to be tracked as he or she interacts with these three branches of the criminal justice system.
Indigenous	In this report the term 'Indigenous' is used to describe both Aboriginal and Torres Strait Islander peoples when discussing data on a national level. The collective term 'Indigenous' has been adopted for the purpose of consistency with the Australian Bureau of Statistics and other Australian criminological research.
Instinctive synthesis	The method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a judgment as to the appropriate sentence, given all the circumstances of the case. Sometimes instinctive synthesis is referred to as the 'intuitive synthesis' or 'sentencing synthesis'.
Koori	In this report the term 'Koori' is used to describe both Aboriginal and Torres Strait Islander peoples when discussing Victorian data.
Principal proven offence	The proven offence for each case that attracted the most serious sentence within the sentencing hierarchy during the original sentencing hearing for that case. If two or more offences are given equally serious forms of sentence within the case, the principal proven offence will be the offence that received the highest amount or duration of that sentence. If a principal proven offence still cannot be isolated, the offence that had the most serious rank according to the National Offence Index is selected as the principal proven offence among the offences still competing. If a principal proven offence still cannot be selected, the first offence listed on the charge sheet among those offences still competing is chosen as the principal proven offence.
Total effective sentence	In a case involving a single charge, the sentence imposed for that charge; in a case involving multiple charges, the sentence resulting from orders of concurrency and/or cumulation for each sentencing order for each charge in the case.
Victorian Intervention Screening Assessment Tool (VISAT)	A tool used by Corrections Victoria to assess both risk factors and treatment and service needs of offenders entering supervision, either in custody or on community correction orders.

Executive summary

Background

The 2011 Australian census reveals that Aboriginal and Torres Strait Islander peoples comprise 0.7% (37,991) of the population of Victoria. As at 30 June 2012, however, Aboriginal and Torres Strait Islander peoples comprise 7.6% (371 people) of the Victorian prison population. Further, as at that date, the rate of imprisonment of Indigenous people in Victoria is 13.4 times higher than the rate of imprisonment of non-Indigenous people.

The over-representation of Aboriginal and Torres Strait Islander peoples in Australian prisons has recently been described as 'shameful' (Gooda, 2012) and 'the most intractable problem facing the justice system' (Martin, 2012).

In the last 20 years a number of studies have sought to examine the causes of Indigenous over-representation, often testing individual reasons. Even with an appreciation of the historical context as a fundamental consideration, Indigenous over-representation remains a complex issue, requiring the examination of multiple, interrelated causes and influences.

The impact of disadvantage

A body of recent Australian research supports the position that the differential sentencing outcomes of Indigenous offenders are the result of differential involvement in criminality, rather than the result of any identifiable racial discrimination on the part of judicial officers.

Nonetheless, while sentencing outcomes may not be directly attributable to racial discrimination, racially discriminatory policies historically – particularly with regard to dispossession of land, removal of children and denial of Indigenous culture – are unquestionably a contributing cause of the chronic disadvantage that is associated with Indigenous involvement in criminality in the first place.

This Indigenous disadvantage is a result of a history of differential treatment – from colonialism and through successive governments – that was, in large part, based on racially discriminatory policies. Indigenous disadvantage is therefore an intergenerational legacy of racial discrimination, the effects of which persist over time and reach into the present day and include the over-representation of Indigenous people in Australian prisons.

Scope of the report

In accordance with the Council's statutory functions, this examination of sentencing outcomes for Koori and non-Koori offenders in Victoria is necessarily limited to an analysis of the available sentencing data.

Research questions

This report seeks to answer the following research questions:

- What is the profile of Koori and non-Koori offenders sentenced to various sentencing orders, including terms of imprisonment, partially suspended sentences, intensive correction orders and community-based orders?
- How do average terms of imprisonment compare for Koori and non-Koori prisoners? What proportion of offenders sentenced to a term of imprisonment is Koori? If this proportion is disproportionate, what is the effect on sentencing outcome of Indigenous status, current offending and prior offending?
- Do Koori and non-Koori offenders vary on key social, personal and economic measures?

While no single analysis can determine the causes of Indigenous over-representation in prison, in answering the questions above, this report aims to provide greater insight into the profile of Koori offenders sentenced in Victoria and compare sentencing outcomes for Koori and non-Koori offenders who share similar offence and offender characteristics.

The Council's approach

In order to answer these research questions, the Council has adopted both a quantitative and a qualitative approach. The main focus of this report is a statistical analysis of differences in sentencing outcomes for Koori and non-Koori offenders, and the presentation of broader data to provide some context for the main analysis.

In addition to its statistical analysis, the Council convened a Reference Group for this project, comprising people from a number of agencies that work closely with Koori communities. The purpose of the Reference Group was to assist the Council in interpreting and validating its results, thereby complementing the quantitative analysis with a qualitative and more nuanced examination of the data.

Key findings

Victorian imprisonment and detention rates over time

The Indigenous imprisonment rate has increased substantially since 2002, rising from 705 prisoners per 100,000 adults in 2002 to 1,444 prisoners per 100,000 adults in 2012, an increase of 105%. In contrast, the non-Indigenous imprisonment rate increased from 90 prisoners per 100,000 adults in 2002 to 108 prisoners per 100,000 adults in 2012, representing an increase of 20%. The Indigenous imprisonment rate therefore has increased more than five times as much as the imprisonment rate for the non-Indigenous population in Victoria. From 2011 to 2012 the increase was noticeably greater, rising from 1,165 per 100,000 adults to 1,444 per 100,000 adults – an increase of 24%.

It is possible that the increase in the Indigenous imprisonment rate over the last decade is due to an increase in the willingness of Indigenous people to identify as Indigenous upon reception into prison. This may be partly due to the efforts of agencies such as Corrections Victoria to implement a range of culturally appropriate programs specifically for Indigenous offenders. It may also be due to the extensive work that has been done under the various Aboriginal Justice Agreements: in the absence of the moderating effects of these agreements, the over-representation of Koori people in the criminal justice system may have been far worse. These hypotheses could not be tested with the available data.

When examining the relationship between Indigenous and non-Indigenous imprisonment rates as a ratio, it is apparent that the difference between the two rates has also increased, from 7.9 in 2002 to 13.4 in 2012.

The over-representation of Indigenous youth in juvenile detention facilities is even more pronounced than it is for Indigenous adults. In Victorian juvenile detention facilities in 2010–11, on an average night the rate of detention for Indigenous youth (aged 10 to 17) was 2.48 per 1,000 young people, while for non-Indigenous youth the detention rate was 0.12 per 1,000 young people. Indigenous youth were therefore over 20 times more likely than non-Indigenous youth to be in a Victorian detention facility during the year. While this rate ratio remains extremely high, it has decreased slightly in the past four years (from 22.10 in 2007–08 to 20.67 in 2010–11).

Current offence type

For both Koori and non-Koori offenders, the most common offence for which they are sentenced at their index episode is 'acts intended to cause injury'. The prevalence of this offence among Koori offenders is substantially higher than for non-Koori offenders: one-third (32.7%) of all Koori offenders sentenced in the Magistrates' Court in 2010–11 were sentenced for this offence, compared with less than one-quarter (24.3%) of non-Koori offenders.

Burglary is also more prevalent among Koori offenders, with burglary constituting 12.4% of sentenced offences for Koori offenders, compared with 9.0% of sentenced offences for non-Koori offenders. Non-Koori offenders are far more likely to be sentenced for a traffic offence (16.3% versus 8.6% for Koori offenders), a drug offence (8.2% versus 4.0% for Koori offenders) and a deception offence (7.0% versus 3.2% for Koori offenders).

Prior sentence

For almost one-quarter (24.7%) of non-Koori offenders, the sentence imposed in 2010–11 was their first sentencing episode in the reoffending database. In contrast, only 15.7% of Koori offenders had no recent prior sentencing episodes within the reoffending database.

Not only are Koori offenders more likely to have prior sentences, but they also have a greater number of prior sentences, with Koori offenders more likely to have been sentenced three or more times within the reoffending database.

Overall, the average number of recent prior sentences among Koori offenders sentenced in 2010–11 was higher than among non-Koori offenders: among Koori offenders, the average was 3.9 recent prior sentences, while among non-Koori offenders the average number of recent prior sentences was 2.9. This difference is indicative of differences in the reoffending profile of Koori and non-Koori offenders.

Although the Council's data do not include broader measures of disadvantage, it is likely that the observed differences in prior sentencing reflect the social, personal and economic disadvantage that is more commonly found among Indigenous populations. The Council's analysis of one year of data from the Victorian Intervention Screening Assessment Tool (VISAT) shows that Koori prisoners have higher intervention needs in relation to drug and alcohol abuse, education and employment, and they have had more previous contact with both the juvenile and the adult justice systems. Overall, Koori prisoners are more likely to be classified as at high risk for reoffending.

The higher prevalence of prior sentencing among Koori offenders may also be a function of their over-representation in the child protection system: in 2010–11, Koori children had a rate of substantiated child protection notifications that was nine times higher than the rate for non-Koori children.

Sentence type

Analysis shows a significantly higher proportion of Koori people being sentenced to imprisonment (36.7% of Koori offenders versus 28.5% of non-Koori offenders) and a statistically significantly lower proportion receiving an intensive correction order (7.0% of Koori offenders versus 17.5% of non-Koori offenders). Although the absolute number of Koori offenders in these two categories is not large, the tests of statistical significance show that these differences are unlikely to have occurred by chance.

Even when controlling for relevant factors such as offence type and prior sentencing, Koori offenders are still significantly more likely to receive a custodial sentence.

Sentence length

Koori offenders are more likely to be sentenced to a short term of imprisonment (a term of less than three months), while non-Koori offenders are more likely to be sentenced to a longer term of imprisonment, particularly terms of two years or more.

When controlling for relevant factors, however, there was no statistically significant relationship between Indigenous status and the length of the imprisonment term. That is, there were no meaningful differences in sentence length between Koori and non-Koori offenders – the differences could have occurred by chance.

Conclusions

The two primary findings of this research are that, when taking into account all the available relevant factors, Koori people are statistically significantly more likely to receive a custodial sentence in the Magistrates' Court than non-Koori people, but there is no difference in the length of the term that they receive. For both Koori and non-Koori offenders, the strongest predictor of the sentence type and the length of the imprisonment term is whether the person has a prior sentencing episode: people with prior episodes are more likely to receive a custodial sentence but to be sentenced to a shorter term of imprisonment. The impact of prior sentencing is thus greater on the decision to incarcerate.

These findings are consistent with the existing body of research in this field.

The causes of over-representation of Koori people in Victoria's prisons are multifaceted and complex. The findings of this report show that the over-representation of Koori people in prisons is partly influenced by an increased likelihood of being given a custodial sentence. While the analysis cannot definitively identify the reasons for this difference, and hence cannot conclusively rule out the possibility of racial discrimination in sentencing, it is feasible that Koori sentencing outcomes are influenced by Koori over-representation in the youth justice system, which in turn is influenced by Koori over-representation in the child welfare system. This, in turn, may be part of the ongoing consequences of the historical disadvantage that began with colonisation, with the economic and social impacts that followed.

But despite the historical disadvantage that separates Koori Victorians from non-Koori Victorians, the nature of the risk factors that lead to offending behaviour is no different for Koori communities. Risk factors for offending among Koori people are the same as they are for non-Koori people: being young and male, being of low socio-economic status, having poor education and being unemployed, using drugs and alcohol and experiencing poor parenting, often in the form of child abuse and neglect. The risk factors themselves are no different. What is different is that there is a higher prevalence of each of these risk factors among Indigenous communities in Australia.

Definitive conclusions about the causes of Indigenous over-representation cannot be obtained through an analysis of sentencing outcomes alone. The complexity of physical and mental health issues with which Koori prisoners present in prison – particularly in terms of alcohol use – suggests that the issue is a broader one, requiring an appreciation of the high levels of disadvantage faced by Koori people across a number of domains.



Introduction

The 2011 Australian census reveals that Aboriginal and Torres Strait Islander peoples comprise 0.7% (37,991) of the population of Victoria (Australian Bureau of Statistics, 2012c). As at 30 June 2012, however, Aboriginal and Torres Strait Islander peoples comprise 7.6% (371 people) of the Victorian prison population. The rate of imprisonment of Indigenous people in Victoria is 13.4 times higher than the rate of imprisonment of non-Indigenous people (Australian Bureau of Statistics, 2012f, p. 34).

Nationally, the level of over-representation of Indigenous people in prison is even higher. According to the latest data available from the Australian Bureau of Statistics, despite representing only 2.5%¹ of the total Australian population, Aboriginal and Torres Strait Islander prisoners comprise just over one-quarter (27% or 7,981 people) of the total prisoner population. The age-standardised imprisonment rate for Aboriginal and Torres Strait Islander prisoners is 1,914 per 100,000 adults in the Aboriginal and Torres Strait Islander population – 15 times higher than for non-Indigenous prisoners (Australian Bureau of Statistics, 2012f, p. 8).

The over-representation of Aboriginal and Torres Strait Islander peoples in Australian prisons has recently been described as 'shameful' (Gooda, 2012) and 'the most intractable problem facing the justice system' (Martin, 2012).² In 2011, the Commonwealth House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs characterised the over-representation of Indigenous juveniles and young adults in the criminal justice system as 'a national disgrace' (House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, 2011, p. 2).

These comments were made some 20 years after the release of the final report of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), which examined the deaths in custody of Aboriginal and Torres Strait Islander peoples between 1 January 1980 and 31 May 1989. One significant conclusion of the RCIADIC was that Aboriginal and Torres Strait Islander peoples constituted a high proportion of the deaths in custody:

not because [Indigenous] people in custody are more likely to die than others in custody but because [that] population is *grossly over-represented* in custody (Royal Commission into Aboriginal Deaths in Custody, 1991, [1.3.3], emphasis added).

The final report of the RCIADIC, delivered on 15 April 1991, provided 339 recommendations, primarily concerned with procedures for persons in custody, liaison with Aboriginal groups, police education and improved access to information. A large portion of the report³ was dedicated to examining the specific issue of Indigenous over-representation in custody, including its causes and its historical context.

In the report (Royal Commission into Aboriginal Deaths in Custody, 1991, vol. 2, pt C), commissioner Elliott Johnston emphasised the importance of acknowledging the historical context when examining the causes of Indigenous over-representation, stating:

It is important that we understand the legacy of Australia's history, as it helps to explain the deep sense of injustice felt by Aboriginal people, their disadvantaged status today and their current attitudes towards non-Aboriginal people and society. In this way, it is one of the most important underlying issues that assists us to understand the disproportionate detention rates of Aboriginal people.

¹ In 2011, 548,370 people in the population of Australia identified as being of Aboriginal and/or Torres Strait Islander origin and were counted in the census: Australian Bureau of Statistics (2012c).

² This situation is not unique to Australia. Other countries that inherited the British justice system through colonisation – the United States, Canada and New Zealand, for example – face similar problems, with increasing prison populations, high rates of recidivism and 'sustained, multi-generational harm to communities' (National Congress of Australia's First Peoples, 2012, p. 3).

³ See, for example: Royal Commission into Aboriginal Deaths in Custody (1991), Part B: 'The Disproportionate Number of Aboriginal People in Custody' and Part C: 'The Underlying Issues Which Explain the Disproportionate Detention Rates of Aboriginal People'.

The RCIADIC report found that Indigenous over-representation was largely attributable to social, economic and cultural disadvantage (Royal Commission into Aboriginal Deaths in Custody, 1991, [1.71], ch. 2) and also bias in the operation of the criminal justice system (Royal Commission into Aboriginal Deaths in Custody, 1991, vol. 3, chs 21–22).

In the last 20 years, a number of studies have sought to examine the causes of Indigenous over-representation. Cunneen and the Aboriginal Justice Advisory Council (NSW) (2002, p. 33) caution that, even with an appreciation of the historical context as a fundamental consideration, Indigenous over-representation remains a complex issue, requiring the examination of multiple, interrelated causes and influences. They state:

There is a need for a multifaceted conception of Aboriginal over-representation which goes beyond single causal explanations (such as poverty, racism, et cetera). An adequate explanation involves analysing interconnectedness issues which include historical and structural conditions of colonisation, of social and economic marginalisation, and systemic racism, while at the same time considering the impact of specific (and sometimes quite localised) practices of criminal justice and related agencies.

In the years since the RCIADIC there has been a raft of measures implemented in Victoria to address the report's recommendations. These initiatives, including the first, second and now third versions of the Aboriginal Justice Agreement, have sought to respond to the findings of the RCIADIC and provide a comprehensive and enduring justice response (Nous Group, 2012, p. 3).

An evaluation of the Aboriginal Justice Agreement has found that there have been significant improvements in justice outcomes for Koori people but there is more work to be done. The evaluation finds that, since 2006, over-representation of Koori people in the Victorian criminal justice system has become worse, but in the absence of the moderating effects of the Aboriginal Justice Agreements, the over-representation of Koori people in the criminal justice system would be far worse. Analysis in the evaluation report shows that, compared with trends based on data from 2001 to 2006, in 2011 there were 70 fewer Koori people in prison, 200 fewer Koori offenders on community orders and 1,300 fewer offences committed by Koori offenders (Nous Group, 2012, pp. 5–6).

There have also been calls for a model of 'justice reinvestment' to be applied to address the issue of Indigenous over-representation in the criminal justice system. According to the National Indigenous Drug and Alcohol Committee of the Australian National Council on Drugs, justice reinvestment acknowledges the relationship between incarceration and disadvantage. It also emphasises the role for the justice system of investing in communities to provide targeted interventions, such as those that improve housing, expand employment options and improve access to substance abuse treatment. By reducing spending on imprisoning Indigenous offenders and instead investing in interventions known to reduce the likelihood of offending (and reoffending), justice reinvestment can help keep people – especially young people – out of the criminal justice system (National Indigenous Drug and Alcohol Committee, 2013, p. 7).

Sentencing and over-representation

Although every term of imprisonment is necessarily the result of a sentencing decision, the sentencing process itself represents just one of the criminal justice practices that may contribute to the over-representation of Indigenous people in Australian prisons.

Cunneen and the Aboriginal Justice Advisory Council (NSW) (2002, p. 33) explain that a substantial number of factors are related to Indigenous over-representation:

Some important and specific factors necessary to explain Aboriginal over-representation include:

- offending patterns (particularly over-representation in offences likely to lead to imprisonment such as serious assault, sexual assaults and property offences)
- the impact of policing (particularly the adverse use of police discretion and 'over-policing' in Aboriginal communities)
- legislation (particularly the impact of laws giving rise to indirect discrimination ...)
- factors in judicial decision-making (particularly bail conditions, the weight given to prior record, the availability of non-custodial options)
- environmental and locational factors (particularly the social and economic effects of living in small rural communities)
- cultural difference (such as different child-rearing practices, the use of Aboriginal English, vulnerability during police interrogation)
- socio-economic factors (in particular, high levels of unemployment, poverty, lower educational attainment, poor housing, poor health)
- marginalisation (in particular, drug, alcohol and other substance abuse; alienation from family and community)
- the impact of specific colonial policies (in particular, the forced removal of Aboriginal children).

In addition, Indigenous people are far more likely to be victims of crime than non-Indigenous people. A study of police records in New South Wales shows that Indigenous people are almost three times more likely to be the victims of sexual assault and sexual assault against a child than for the state population as a whole. Indigenous people are three times more likely to be the victims of assault and five times more likely to be the victims of family violence assaults. In the vast majority of family violence assaults (85%), sexual assaults (73%) and sexual assaults against children (72%), the offender is also Indigenous (Fitzgerald and Weatherburn, 2001, pp. 1–3).

Although a number of these factors are relevant to the sentencing of Indigenous offenders (particularly those factors that a sentencing judge or magistrate may take into account when sentencing), each factor may contribute to the level of over-representation independently of the sentencing process. An examination of the myriad factors that may contribute to the over-representation of Indigenous people is therefore more likely to give an accurate picture of its causes than an analysis of sentencing outcomes alone.

The impact of disadvantage

A body of recent Australian research supports the position that the differential sentencing outcomes of Indigenous offenders are the result of differential involvement in criminality, rather than the result of any identifiable racial discrimination on the part of judicial officers.

Nonetheless, while sentencing outcomes may not be directly attributable to racial discrimination, racially discriminatory policies historically – particularly with regard to dispossession of land, removal of children and denial of Indigenous culture – have clearly been a contributing cause of the chronic disadvantage that is associated with Indigenous involvement in criminality in the first place. The National Congress of Australia's First Peoples (2012, p. 8) has suggested that:

justice for Aboriginal and Torres Strait Islander peoples in Australia must be understood within a historical context that has seen the law used as a tool of dispossession, oppression, family dislocation and racial discrimination.

Victoria's Koori population has been affected by the racially discriminatory practices of the Stolen Generations to a greater extent than other Australian Indigenous populations. The 2008 National Aboriginal and Torres Strait Islander Social Survey found that 11.5% of Victorian Aboriginal respondents who were living in households with children had been removed from their natural family, and 47.1% had a relative who had been removed. These figures were substantially higher than the national rate of 7.0% of people who had been removed from their family and 37.6% of people who had a family member who had been removed (Department of Education and Early Childhood Development, 2009, p. 26). This dislocation is thought to have had a significant impact on levels of family violence and child abuse and neglect in Victoria (Victorian Aboriginal Legal Service, 2013).

Broadly speaking, the claim that the over-representation of Indigenous offenders in Australian prisons is a result of racial discrimination (Cunneen, 1992; Blagg et al., 2005; Cunneen, 2005–06) is therefore arguably correct. It is correct, however, not because sentencers currently differentiate between offenders solely on the basis of race, but because the characteristics associated with many Indigenous offenders (and considered when sentencing) reflect entrenched and continuing disadvantage.

This Indigenous disadvantage is a result of a history of differential treatment – from colonialism and through successive governments – that was, in large part, based on racially discriminatory policies (National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, 1997). Indigenous disadvantage is therefore an intergenerational legacy of racial discrimination, the effects of which persist over time and reach into the present day, and which includes the over-representation of Indigenous people in Australian prisons (National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, 1997, pt 1, ch. 1):

The truth is that the past is very much with us today, in the continuing devastation of the lives of Indigenous Australians.

There have been significant efforts in Victoria and elsewhere around Australia to address this disadvantage. Victoria has seen the development of an Aboriginal Justice Agreement (now in its third phase) between the government and the Koori community, the convening of an associated Aboriginal Justice Forum, the establishment of Koori Court Divisions in the Children's Court, the Magistrates' Court and the County Court, the placement of specialist Koori liaison workers within the courts and the implementation of targeted programs to assist Koori offenders, such as the Wulgunggo Ngalu Learning Place designed for Koori men undertaking community sentences. Each of these initiatives has been designed to address the causes and consequences of Koori offending in an effort to reduce Koori over-representation in both prison and the criminal justice system more broadly.

Scope of this report

While all of the factors listed by Cunneen and the Aboriginal Justice Advisory Council (NSW) (2002, p. 33) are deserving of specific attention and research, consideration of each factor is beyond the scope of this report. In accordance with the Council's statutory functions, this examination of sentencing outcomes for Koori and non-Koori offenders in Victoria is necessarily limited to an analysis of the available sentencing data.

Research questions

This report seeks to answer the following questions:

- What is the profile of Koori and non-Koori offenders sentenced to various sentencing orders, including terms of imprisonment, partially suspended sentences, intensive correction orders and community-based orders?⁴
- How do average terms of imprisonment compare for Koori and non-Koori prisoners? What proportion of offenders sentenced to a term of imprisonment is Koori? If this proportion is disproportionate, what is the effect on sentencing outcome of Indigenous status, current offending and prior offending?
- Do Koori and non-Koori offenders vary on key social, personal and economic measures?

While no single analysis can determine the causes of Indigenous over-representation in prison, in answering the questions above, this report aims to provide greater insight into the profile of Koori offenders in Victoria who are sentenced to imprisonment, partially suspended sentences, intensive correction orders and community-based orders and compare sentencing outcomes for Koori and non-Koori offenders who share similar offence and offender characteristics.

The Council's approach

In order to answer these research questions, the Council has adopted both a quantitative and a qualitative approach. The main focus of this report is a statistical analysis of differences in sentencing outcomes for Koori and non-Koori offenders, and the presentation of broader data to provide some context for the main analysis.

In addition to its statistical analysis, the Council convened a Reference Group made up of expert stakeholders in the field. The primary purpose of the group was to assist in interpreting, validating and qualifying the results of the analysis.

⁴ As of 16 January 2012, intensive correction orders and community-based orders are no longer available in Victoria under amendments to the *Sentencing Act 1991* (Vic). The data used in this report, however, are from the period prior to these changes. These are the only orders for which data were available in this dataset.



Indigeneity and sentencing law in Victoria

An important preliminary matter, before analysis of statistical data on sentencing outcomes for Koori offenders, is examining the ways in which an offender's Indigenous status may be considered during the sentencing process.

The ways in which an offender's Indigenous status is recognised by sentencing legislation or the common law – and how such recognition may bear upon the court's consideration of the appropriate penalty – may have a direct effect on sentencing outcomes.

Sentencing considerations

The sentencing of all adult offenders⁵ in Victoria is governed by the provisions in the *Sentencing Act 1991* (Vic) and the principles of sentencing developed by the common law.

The only purposes for which a court may impose a sentence in Victoria are:

- just punishment – to punish the offender to an extent and in a way that is just in all of the circumstances;
- deterrence – to deter the offender (specific deterrence) or other people (general deterrence) from committing offences of the same or a similar character;
- rehabilitation – to establish conditions that the court considers will enable the offender's rehabilitation;
- denunciation – to denounce the type of conduct engaged in by the offender;
- community protection – to protect the community from the offender; or
- a combination of two or more of these purposes.⁶

When deciding the sentence to impose in a particular case, the specified factors that the court must take into account are:

- the maximum penalty for the offence;
- current sentencing practices;
- the nature and gravity of the offence;
- the offender's culpability and degree of responsibility for the offence;
- whether the crime was motivated by hatred or prejudice;
- the impact of the offence on any victim of the offence;
- the personal circumstances of any victim of the offence;
- any injury, loss or damage resulting directly from the offence;
- whether the offender pleaded guilty to the offence;
- the offender's previous character; and
- the presence of any aggravating or mitigating factors.⁷

⁵ Children convicted in the Children's Court are sentenced under the *Children, Youth and Families Act 2005* (Vic), which involves different sentencing considerations. A higher court may sentence a child either under the *Children, Youth and Families Act 2005* (Vic) or under the *Sentencing Act 1991* (Vic). However, if the court wishes to impose a sentence of detention, it must sentence the child under the *Sentencing Act 1991* (Vic). See Sentencing Advisory Council (2012, pp. 177–182).

⁶ *Sentencing Act 1991* (Vic) s 5(1).

⁷ *Sentencing Act 1991* (Vic) s 5(2).

The Indigenous status of an offender is not a specific legislated factor that a court must take into account when sentencing. Indeed, the sentencing legislation remains neutral for Indigenous status, as it does for many other characteristics of an offender, such as gender or family status.

Indigeneity as a sentencing factor

Under Victorian law, Indigenous identity 'is not a basis for discrimination in the sentencing process'.⁸ The factors and principles of sentencing to be applied are the same regardless of an offender's ethnicity;⁹ however, 'that does not mean the sentencing court should ignore those facts which exist by reason of the offender's membership of such a group'.¹⁰

As stated by Eames JA in *R v Fuller-Cust*:

To ignore factors personal to the applicant, and his history, in which his Aboriginality was a factor, and to ignore his perception of the impact on his life of his Aboriginality, would be to sentence him as someone other than himself. ...

To have regard to the fact of the applicant's Aboriginality would not mean that any factor would necessarily emerge by virtue of his race which was relevant to sentencing, but it would mean that a proper concentration would be given to his antecedents which would render it more likely that any relevant factor for sentencing which did arise from his Aboriginality would be identified, and not be overlooked. Exactly the same approach should be adopted when considering the individual situation of any offender, so that any issue relevant to that offender's situation which might arise by virtue of the offender's race or history would not be overlooked by a simplistic assumption that equal treatment of offenders means that differences in their individual circumstances related to their race should be ignored.¹¹

It is not Indigenous status, in and of itself, but the factors associated with Indigenous identity that may be taken into account where relevant.¹² In particular, 'the social and economic disadvantages often faced in Indigenous communities are powerful considerations'.¹³

⁸ *R v Fuller-Cust* (2002) 6 VR 496, 520 (Eames JA).

⁹ *Neal v The Queen* (1982) 149 CLR 305, 326 (Brennan J); *Director of Public Prosecutions v Terrick* (2009) 197 A Crim R 474, 488–489.

¹⁰ *R v Fernando* (1992) 76 A Crim R 58, 62 (Wood J); *Director of Public Prosecutions v Terrick* (2009) 197 A Crim R 474, 488–489.

¹¹ *R v Fuller-Cust* (2002) 6 VR 496, 520 (Eames JA). Eames JA dissented as to the result.

¹² *R v Fuller-Cust* (2002) 6 VR 496, 520 (Eames JA).

¹³ *Director of Public Prosecutions v Terrick* (2009) 197 A Crim R 474, 490.

In *Director of Public Prosecutions v Terrick*, the Court of Appeal affirmed the principles regarding the sentencing of Indigenous offenders, and the way in which an offender's Indigeneity should be considered, stating:

The following propositions emerge from the authorities ...

4. The same sentencing principles apply irrespective of the offender's race. Thus, Aboriginal offenders are not to be sentenced more leniently than non-Aboriginal persons on account of their race.
5. In sentencing persons of Aboriginal descent, the court must avoid any hint of racism, paternalism or collective guilt. At the same time, the sentencing court is bound to take into account 'facts which exist only by reason of the offender's membership of an ethnic or other group'.
6. When applying sentencing principles, which are common to all Victorians, a different outcome may result for an Aboriginal offender if it is shown that 'mitigating factors in the background of the offender, or [in the] circumstances of the offence, occurred or had an impact peculiarly so because of the Aboriginality of the offender'.
7. Such considerations require a careful examination of the history of the offender.¹⁴

These common law principles, which determine the way in which Indigenous status is to be treated under sentencing law in Victoria, highlight the importance of individual offender characteristics. Irrespective of Indigenous status, the presence of particular aggravating or mitigating circumstances still requires an individual assessment by the sentencing court.

Nonetheless, particular circumstances that may aggravate the sentencing outcome and that may be associated with a sentence of imprisonment (such as the seriousness of the principal offence, prior convictions and whether the offender has previously received a sentence of imprisonment) may have become associated with Indigenous status over time.

It is therefore necessary to examine whether, in sentencing, the association of certain characteristics with Indigenous status influences sentencing outcomes beyond a consideration of the particular characteristics of an individual offender.

¹⁴ *Director of Public Prosecutions v Terrick* (2009) 197 A Crim R 474, 488–489 (citations omitted).



Indigenous over-representation in Australia's prisons

This section presents data collected by the Australian Bureau of Statistics on various measures of the characteristics of the Australian Indigenous population. Beginning with an overview of the demographics of the Indigenous population as a way of establishing context, the section moves specifically to examining data on Indigenous people in prison.

The Indigenous population in Australia

Figures from the 2011 national population census indicate that Indigenous persons make up about 2.5% of the total Australian population or around 550,000 people. The number of Australians identifying as Indigenous has increased 20.5% since the 2006 census, when 450,000 people identified as Indigenous. In contrast, the number of people who identified as non-Indigenous increased by 8.9% from 2006 to 2011.

Victorian data from 2011 show that the Koori population is only 0.7% of the state's total population, or about 38,000 Koori people. Victoria has the lowest proportion of Indigenous people in its population of all the states and territories.

Since the 2006 census, there has been a 26.0% increase in the number of Victorians identifying as Indigenous, from 30,000 in 2006 to 38,000 in the 2011 population census, compared with a 9.3% increase in the non-Indigenous population. While some of this increase may be due to the combined effects of births and deaths and possible migration, it is also possible that some of the increase may be due to a higher propensity to identify as Indigenous. Indeed, a 2002 study in South Australia found that this increased propensity to identify as Indigenous accounted for about 35% of the increase in the Indigenous population (Doherty, 2002, p. 3).¹⁵

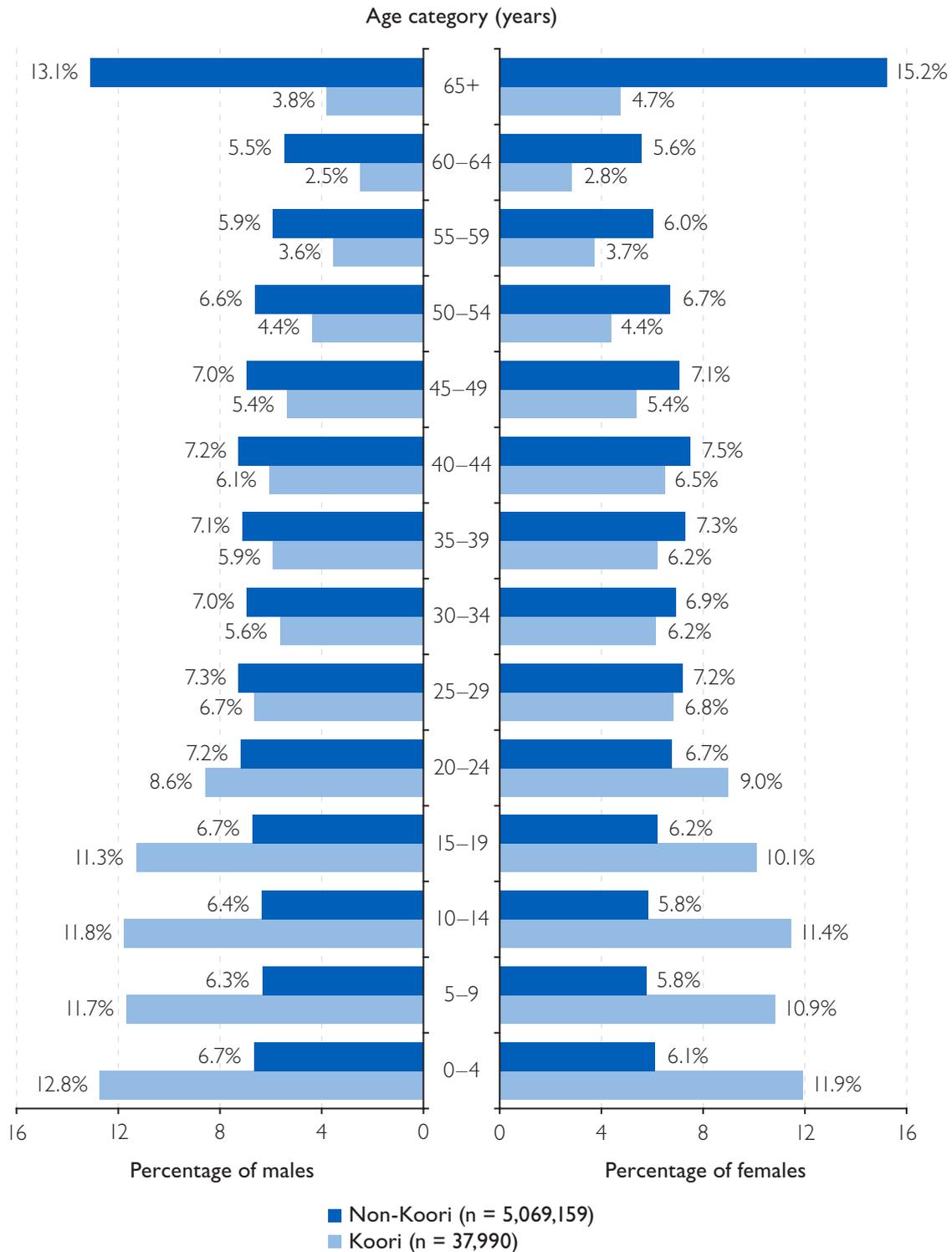
At the same time as there has been an increase in people identifying as Indigenous both nationally and in Victoria, there has been a decrease of about 7% in the number of people whose Indigenous status is 'not stated' on both a state and a national level.

¹⁵ The increase in the number of people identifying as Indigenous has been attributed to demographic changes in birth and death rates, procedural changes in the collection and processing of census data and changes in the number of people identifying as Indigenous. Factors that encourage identification include a sense of pride in identity, the perception that identifying could benefit the individual and the Indigenous community more generally, and the sense that identifying could promote recognition of issues relating to Indigenous people (Australian Bureau of Statistics, 2012e, p. 10). Younger Indigenous people may be more willing to self-identify than older Indigenous people (Australian Bureau of Statistics, 2012e, p. 11); the increasingly younger age profile of the Indigenous population may thus be having an impact on rates of self-identification.

Age distribution of the Indigenous population

Of particular relevance in a discussion of criminal justice outcomes for Indigenous people is the age distribution of the Indigenous population. The most noticeable difference between the Indigenous and the non-Indigenous populations in Australia is that the Indigenous population is, on average, far younger than the non-Indigenous population. This is in part due to a higher birth rate among the Indigenous population, but it is also due to a shorter life expectancy, with higher death rates at younger ages.

Figure 1: Percentage distribution of Koori and non-Koori populations in Victoria by age group, 2011



Source: Sentencing Advisory Council analysis of data from Australian Bureau of Statistics (2012a)

The younger age distribution for the Indigenous population potentially plays a role in an analysis of differential criminal justice system outcomes, as the prevalence of criminal behaviour is consistently higher among younger age groups than among older groups (see, for example, Farrington, 1986; Fagan and Western, 2005).

Data from the 2011 Australian census show that the median age of the Indigenous population of Victoria was 22 years, compared with a median of 37 years for non-Indigenous people. That is, half the Victorian Indigenous population in 2011 was aged 22 years or less while half the non-Indigenous population was aged 37 years or less.

Figure 1 shows that the Victorian Indigenous population has a higher proportion of people aged younger than 24 years and a lower proportion aged 30 or above than the non-Indigenous population. The Indigenous population therefore has a greater proportion of its people in the crime-prone younger age groups, while the non-Indigenous population is more evenly distributed throughout all the age groups.

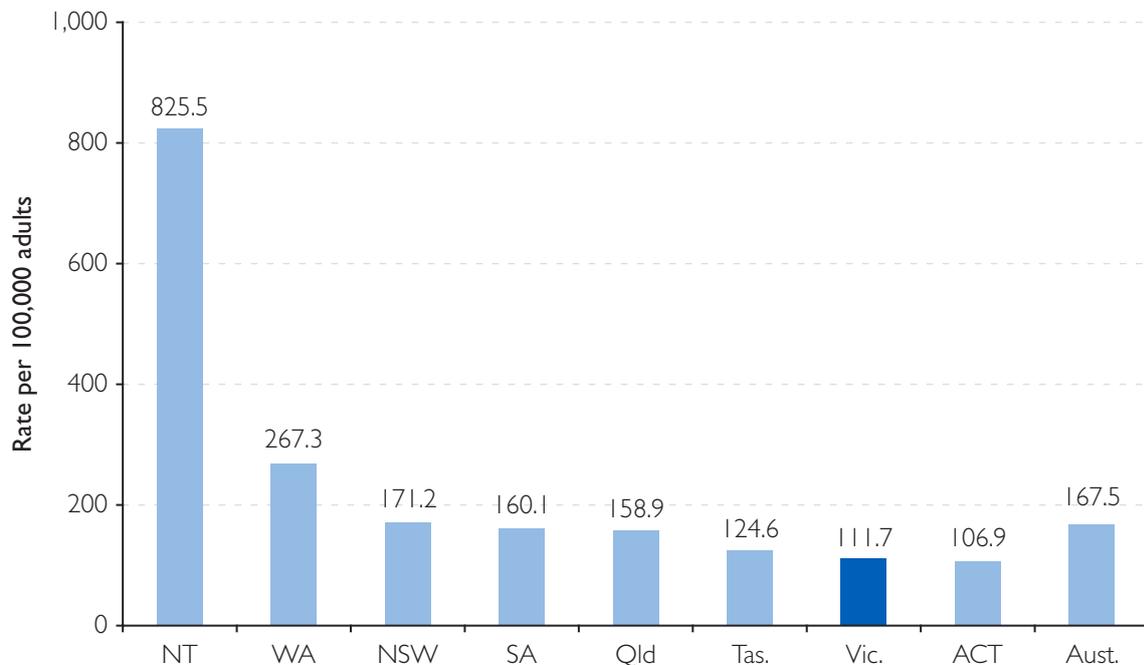
These different age profiles likely reflect both higher rates of fertility and higher rates of death occurring at younger ages among the Indigenous population.

The Indigenous prisoner population in Australia

Comparative imprisonment rates in 2012

Across Australia, the average imprisonment rate is 168 prisoners per 100,000 adults. Figure 2 shows that Victoria has the second lowest imprisonment rate of all the states and territories, while the Northern Territory has by far the highest overall imprisonment rate.

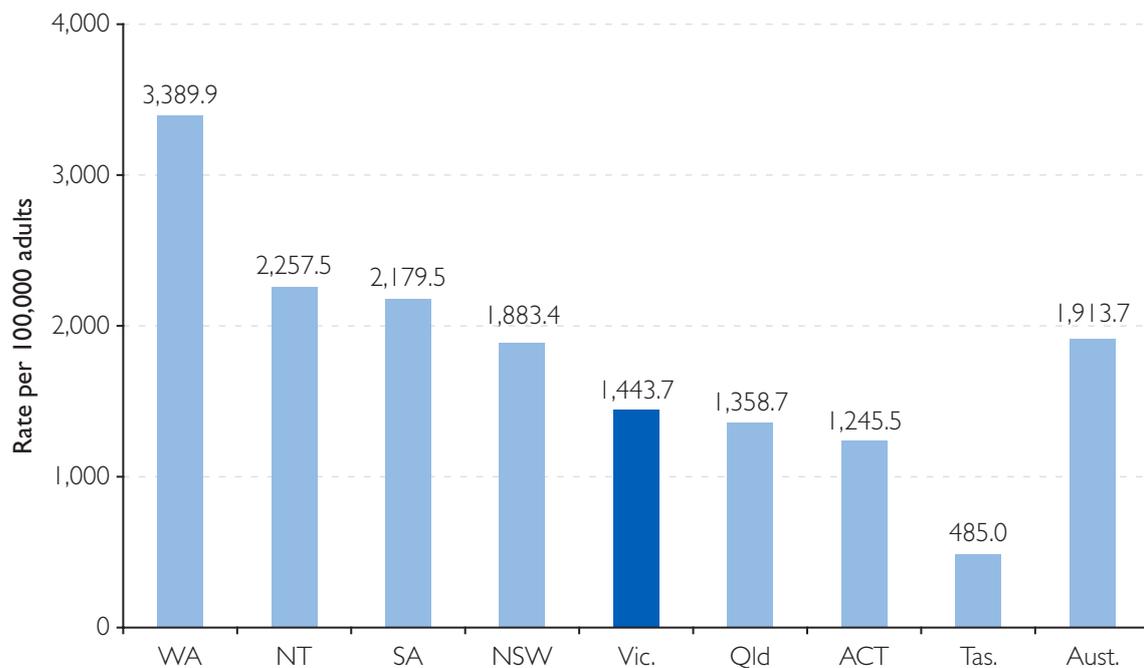
Figure 2: Imprisonment rate per 100,000 adults for all states and territories, 30 June 2012



Source: Australian Bureau of Statistics (2012f)

A similar pattern is found in Figure 3, showing the age-standardised¹⁶ imprisonment rates for the Indigenous population only, with Victoria once again having one of the lowest rates of Indigenous imprisonment. Of note, however, is that the rates for Indigenous people are far higher than for all people in every state and territory and in Australia overall. In particular, the Indigenous imprisonment rate in Victoria in 2012 was 1,444 prisoners per 100,000 Indigenous adults, compared with 112 prisoners per 100,000 total adults.¹⁷

Figure 3: Age-standardised imprisonment rate per 100,000 Indigenous adults for all states and territories, 30 June 2012



Source: Australian Bureau of Statistics (2012f)

¹⁶ Age standardisation is a statistical method that adjusts crude rates to account for age differences between study populations. Due to the differing age profiles of the Indigenous and non-Indigenous populations in Australia, using crude rates to examine differences between the two populations in imprisonment rates (a variable known to be correlated with age) could lead to erroneous conclusions. The Australian Bureau of Statistics therefore prefers to present age-standardised imprisonment rates for Indigenous populations (Australian Bureau of Statistics, 2012f).

¹⁷ The Australian Bureau of Statistics presents data for Indigenous people and data for all people. Data for non-Indigenous people are not presented.

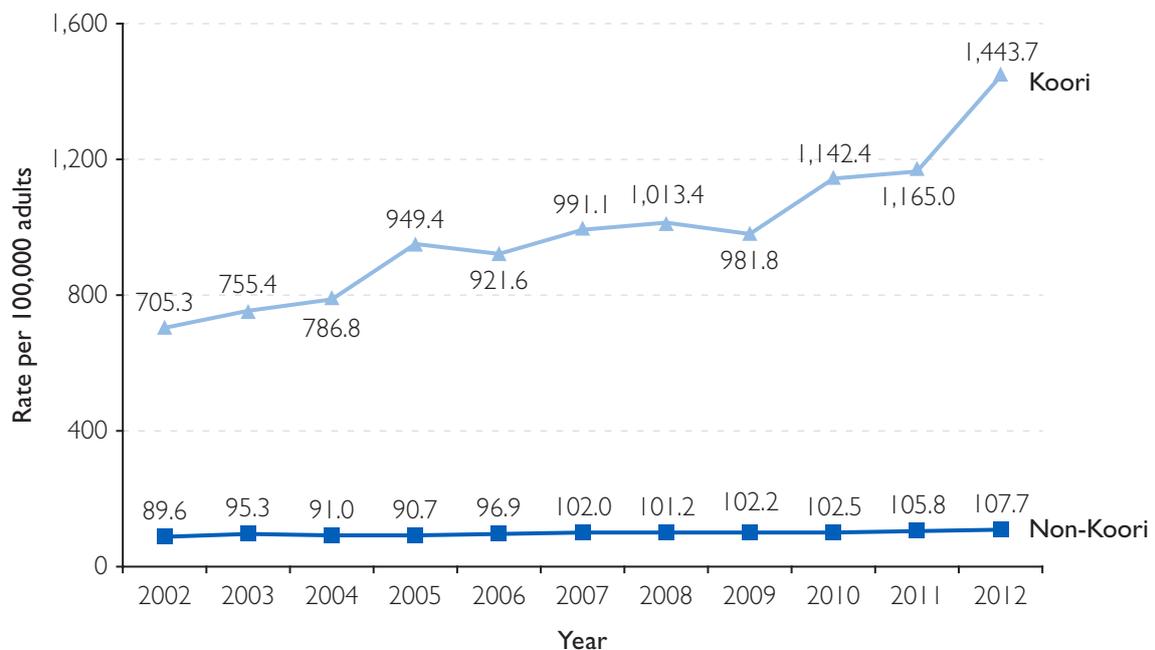
Victorian imprisonment rates over time

Figure 4 shows how Indigenous and non-Indigenous imprisonment rates in Victoria have changed over the 10 years since 2002.

The most noticeable pattern in this figure is the steady increase in the Indigenous imprisonment rate over this period, rising from 705 prisoners per 100,000 adults in 2002 to 1,444 prisoners per 100,000 adults in 2012, representing an increase of 105%.¹⁸ In contrast, the non-Indigenous imprisonment rate increased from 90 prisoners per 100,000 adults in 2002 to 108 prisoners per 100,000 adults in 2012, representing an increase of just 20%.

These data show that the imprisonment rate for the Indigenous population in Victoria has experienced an increase more than five times that of the imprisonment rate for the non-Indigenous population in Victoria. The increase from 2011 to 2012 is noticeably greater, rising from 1,165 per 100,000 adults to 1,444 per 100,000 adults – an increase of 24%.

Figure 4: Age-standardised imprisonment rate per 100,000 Victorian adults, by Indigenous status, 2002 to 2012



Source: Australian Bureau of Statistics (2012f)

¹⁸ At the Council's second Reference Group meeting (4 February 2013), Corrections Victoria advised that the lower imprisonment rate for Koori prisoners in 2009 may be partly a consequence of problems with the recording of Indigenous status data, resulting in a large number of prisoners with an 'unknown' Indigenous status. Since that time a number of intensive collection and monitoring processes have been implemented to ensure that reliable Indigenous status data are collected.

It is possible that the increase in the Indigenous imprisonment rate over the last decade is due to an increase in the willingness of Indigenous people to identify as Indigenous upon reception into prison. This may be partly due to the efforts of agencies such as Corrections Victoria to implement a range of culturally appropriate programs specifically for Indigenous offenders. Although this hypothesis could not be tested with the available data, members of the Reference Group confirmed that this is a plausible hypothesis, based on their experiences. In addition, the Reference Group suggested that a number of other mechanisms may also be contributing to the increasing Indigenous imprisonment rate:

- Corrections Victoria has implemented a range of intensive processes for collecting and confirming Indigenous status data, and has created a range of support roles specifically for Koori offenders both in prisons and in community corrections. Thus at the same time as offenders may be more likely to identify as Koori, improved data collection practices may be providing more complete counts of Koori offenders.
- In the Victorian Koori Courts, formal systems have been implemented to ensure that data are being collected more systematically about people's Indigenous status.
- The sudden increase in the Indigenous imprisonment rate from 2011 to 2012 may be partly due to the improved counting of Indigenous Australians in the 2011 population census. The Australian Bureau of Statistics has yet to apply its new estimates of the Indigenous population to its prisoner census data: the increase in the general Indigenous population has not yet been reflected in the Australian Bureau of Statistics' calculations of imprisonment rates, such that the 2012 rate may be unrealistically high and may decrease somewhat once the new estimates are released in 2014.¹⁹

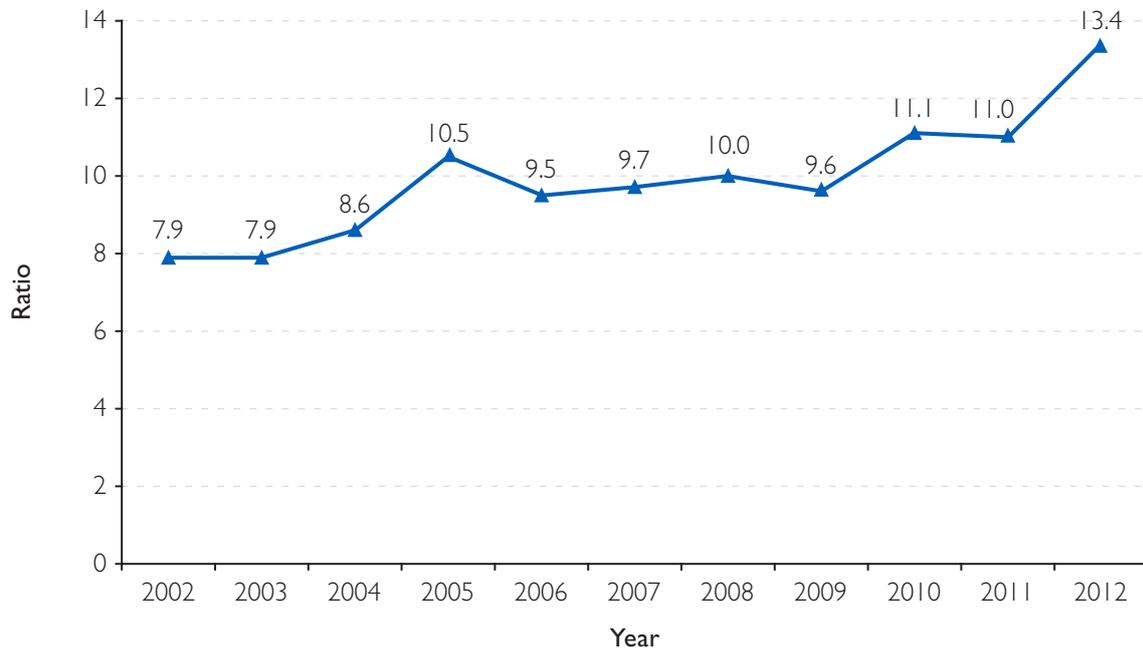
To make the relationship between Indigenous and non-Indigenous imprisonment rates clearer, Figure 5 presents the ratio between the two sets of rates in the 10 years since 2002. Consistent with the increase in Indigenous imprisonment rates seen in Figure 4, the ratio between the two rates has also increased steadily throughout this period, from 7.9 in 2002 to 13.4 in 2012. This means that, in 2012, the Indigenous imprisonment rate was 13.4 times higher than the non-Indigenous imprisonment rate.

The increase in the ratio of imprisonment rates has been particularly substantial in the most recent year, from 2011 to 2012.

It has been suggested that one of the reasons for the increasing use of imprisonment is the proliferation of reforms and changes in practice across a number of areas in criminal justice. These include changes in sentencing laws and practice, restrictions on judicial discretion, changes to bail eligibility, changes to parole surveillance practices and the limited availability of non-custodial sentencing options and rehabilitative programs. These changes to the overall criminal justice environment are thought to have a disproportionate impact on Indigenous offenders (Cunneen, 2011, p. 11).

¹⁹ The estimate of the Indigenous population is used as the denominator for calculations of imprisonment rates. The rate is calculated by taking the number of Indigenous prisoners and dividing that by the number of Indigenous adults in the population. If the number of Indigenous adults in the general population has increased more than the number of Indigenous prisoners, then the imprisonment rate of Indigenous prisoners should decrease. As the new Indigenous population estimates have not yet been applied to the prisoner census calculations, the high imprisonment rate for 2012 may be subject to change and must therefore be treated with caution. The Australian Bureau of Statistics will not be revising its Indigenous population estimates until 2014 (see Australian Bureau of Statistics 2012g).

Figure 5: Ratio of Indigenous to non-Indigenous age-standardised imprisonment rates per 100,000 Victorian adults, 2002 to 2012



Source: Australian Bureau of Statistics (2012f)

The over-representation of Indigenous youth in juvenile detention facilities is even more pronounced than it is for Indigenous adults. In Victorian juvenile detention facilities in 2010–11, on an average night the rate of detention for Indigenous youth (aged 10 to 17) was 2.48 per 1,000 young people, while for non-Indigenous youth the detention rate was 0.12 per 1,000 young people. Indigenous youth were therefore over 20 times more likely than non-Indigenous youth to be in a Victorian detention facility during the year (Australian Institute of Health and Welfare, 2012a, p. 97). While this rate ratio remains extremely high, it has decreased slightly in the past four years in both Victoria (from 22.10 in 2007–08 to 20.67 in 2010–11) and Australia (from 25.29 in 2007–08 to 21.17 in 2010–11) (Australian Institute of Health and Welfare, 2012a, p. 103).

The following section summarises previous research that has attempted to explain the over-representation of Indigenous adults and youth in the formal Victorian criminal justice systems.



Previous explanations of over-representation

Explaining over-representation

A number of hypotheses have been advanced in the literature to explain the causes of over-representation of Indigenous people in the criminal justice system. These explanations have fallen into two main areas: differential criminal justice processing and differential involvement in crime.

Differential criminal justice processing

Although there has been some research on differences in outcomes for Indigenous people at a variety of stages in the criminal justice system, the focus in recent years has been on sentencing.

There is little by way of empirical data on police decision-making practices, although what data there are seem to indicate differences in outcomes for Indigenous people. For example, Snowball (2008) examined statistics on police cautions and court conferences from Western Australia, South Australia and New South Wales to determine if there were differences based on Indigenous status in the rate of diversion from further contact with the juvenile justice system. Snowball's analysis showed that, even controlling for legally relevant factors such as offence type and prior criminal history, Indigenous youth were less likely to be diverted from the justice system than non-Indigenous offenders who had committed the same type of offence, with the same number of prior contacts and the same history of custody (Snowball, 2008, p. 4).

In addition, some research has examined the effect of Indigenous status on the risk of bail refusal. Weatherburn and Snowball (2012), for example, found that, while the effect of Indigenous status does progressively diminish as other legal factors (such as age, gender, plea, concurrent offences and prior convictions) are taken into account, Indigenous status nonetheless 'remains a significant predictor of bail refusal'. That is, Indigenous people are less likely to be granted bail than non-Indigenous people.

There is far more research on the effects of judicial decision-making practices, with substantial research on the decision to imprison and on decisions on sentence length.

Australian research on differential treatment in sentencing

In the last 10 years, increasing attention has been given to Indigenous sentencing, including a number of rigorous statistical studies examining different Australian jurisdictions that compare Indigenous and non-Indigenous sentencing outcomes.

Much of the criminological research has been based on explaining disparity in Indigenous and non-Indigenous sentencing outcomes by testing three hypotheses (Bond and Jeffries, 2012). First, the disparity is the result of differential involvement of Indigenous offenders in criminal activity. Secondly, Indigenous offenders are negatively discriminated against, resulting in harsher sentencing outcomes than for non-Indigenous offenders. Thirdly, Indigenous offenders may be positively discriminated against, whereby an offender's Indigeneity may operate to mitigate the sentence imposed.

To date, previous research has shown 'strong support for the differential involvement thesis, some support for positive discrimination and little foundation for negative discrimination in the sentencing of Indigenous defendants' (Jeffries and Bond, 2010, p. 1).

Baseline differences

Most studies conduct an initial examination of the 'baseline' differences in sentencing outcomes for Indigenous and non-Indigenous offenders. In other words, they present the apparent differences in sentencing outcomes based solely on offenders' Indigenous status before controlling for any other factors. In addition, most focus primarily on the higher courts; only two studies have been undertaken on the relationship between Indigenous status and sentencing in the lower courts (Bond, Jeffries and Weatherburn, 2011; Bond and Jeffries, 2012).

These baseline differences have consistently demonstrated a higher likelihood of imprisonment of Indigenous offenders compared with non-Indigenous offenders (Bond and Jeffries, 2012; Bond and Jeffries 2011; Bond and Jeffries 2010; Snowball and Weatherburn, 2007; Snowball and Weatherburn, 2006). Weatherburn and Holmes (2010, p. 562) examined data from New South Wales to suggest that the higher rate of entry into prison for Indigenous offenders is due partly to three causes:

1. a higher rate of arrest for serious offences (particularly those involving violence);
2. a higher likelihood of bail refusal (among those arrested); and
3. a higher likelihood of imprisonment (among those convicted).

There is less clarity, however, with regard to differences in the length of imprisonment terms. Some researchers have found that Indigenous offenders are more likely to receive a longer prison term than non-Indigenous offenders (Jeffries and Bond, 2009). Others, however, have found the reverse. For example, Weatherburn and Holmes (2010) use data from the Australian Bureau of Statistics to point out that the average expected sentence length for Indigenous prisoners in all states and territories in 2009 was shorter than the average expected term for non-Indigenous prisoners. In some jurisdictions this difference was very large: in the Northern Territory, for example, the average expected time to serve for non-Indigenous prisoners was 63.4 months, while for Indigenous prisoners it was less than half that, at 30.9 months (Weatherburn and Holmes, 2010, p. 561). Although smaller in magnitude, this difference was also seen in the Victorian data (an average of 37.8 months for Indigenous prisoners compared with 48.3 months for non-Indigenous prisoners).

Examining the length of incarceration for people sentenced in the lower courts, Bond, Jeffries and Weatherburn (2011) found that being Indigenous significantly reduced the length of prison term imposed, even after adjusting for relevant sentencing factors. This difference, however, was small.

After examining the baseline differences, however, most studies then control for a number of sentencing factors, in order to determine whether Indigenous status itself is the source of the sentencing disparity.

These studies have controlled for a number of variables, such as age, gender, prior criminal history, seriousness of the principal offence, conviction for multiple counts and entering a plea of guilty. A number of studies have included additional variables, such as the offence-related variables of the presence of co-offenders or evidence of premeditation.

The essential questions that most studies have sought to answer are as follows:

- Does Indigeneity have a direct impact on the decision to imprison, once other key sentencing factors have been controlled for?
- Does Indigeneity have a direct impact on the length of a term of imprisonment imposed, once other key sentencing factors have been controlled for?

The decision to imprison

Most recently, Bond and Jeffries (2012) have examined Indigeneity and the likelihood of imprisonment in Queensland. For adult offenders, they found that, after controlling for other sentencing variables, an initial baseline disparity (whereby Indigenous status increased the likelihood of an offender receiving a prison sentence) dissipated completely in the higher courts, and was reduced but continued in the lower courts. That is, differences in the decision to imprison disappeared in the higher courts but remained in the lower courts, with Indigenous offenders more likely to receive a prison term, all other factors being equal.

The disappearance of differences in the likelihood of imprisonment in the higher courts was also seen in Western Australia, where Bond and Jeffries (2011) found that, after adjusting for other sentencing variables, Indigenous status had no direct effect on the decision to imprison.

Confirmation of differences in sentencing outcomes for Indigenous offenders in the lower courts was shown in an examination of data for adult offenders sentenced between 2005 and 2007 in three separate jurisdictions: South Australia, New South Wales and Western Australia. Jeffries and Bond (2011) found that Indigenous offenders were more likely than non-Indigenous offenders to be sentenced to prison and less likely to receive a monetary penalty such as a fine, even after accounting for other legally relevant factors. For those Indigenous offenders who did receive a fine, the amount of the fine was actually lower than for non-Indigenous offenders (Jeffries and Bond, 2011, p. 7).

Bond and Jeffries (2012, p. 4) suggest that a theoretical framework based on 'focal concerns' may provide an explanation for the disparities seen in sentencing in the lower courts. According to the authors:

Research suggests that sentencing decisions are guided by a number of judicial focal concerns, particularly offender blameworthiness and harm caused by the offence, community protection, and practical constraints presented by individual offenders, organisational resources, political and community expectations. Offender characteristics, such as Indigeneity, may increase judicial assessments of blameworthiness or culpability, as well as judicial perceptions of increased risk to the community. Organisational constraints may create (or amplify) such perceptions by pressuring judges to make decisions with limited information and time, leading to judicial reliance on 'perceptual shorthand' – or stereotypical attributions of increased threat and criminality to minority group offenders – to determine sentences (citations omitted).

Disparities may therefore be more readily apparent in the lower courts, where limited information and increased time pressures on judicial officers may result in use of the perceptual shorthand described above.

While this theoretical approach may be useful as a framework within which to understand observed sentencing disparities, it does not address the problematic nature of its underlying assumption. That is, simply applying this theory does not call into question either the causes or the effects of such 'stereotypical attributions of increased threat and criminality' for Indigenous offenders.

Snowball and Weatherburn's analysis (2007) of lower and higher courts in New South Wales identified very high baseline disparities between Indigenous and non-Indigenous offenders. After accounting for sentencing variables, Indigenous status remained a significant predictor of imprisonment, although the difference between Indigenous and non-Indigenous offenders was reduced to less than one percent (0.79% difference). This study followed on from Snowball and Weatherburn's examination of the role of offender characteristics in the sentencing outcome, comparing Indigenous and non-Indigenous offenders in New South Wales courts (Snowball and Weatherburn, 2006).

In that 2006 study, the authors explored the relationships between various offender characteristics and the likelihood of a prison sentence and found that, in relation to adult Indigenous offenders in New South Wales, Indigenous status had no influence on sentencing outcome after controlling for other sentencing factors (Snowball and Weatherburn, 2006).

The authors (Snowball and Weatherburn, 2006, p. 14) suggest that the difference in the likelihood of imprisonment between Indigenous and non-Indigenous adult offenders appears to be due to the fact that, in comparison with non-Indigenous offenders, Indigenous offenders have the following characteristics:

- they have much longer criminal records;
- they are more likely to be convicted of a serious violent offence;
- they are more likely at any particular court appearance to be convicted of multiple offences;
- they are more likely to have breached a previous court order; and
- they are much more likely to have reoffended after being given an alternative to full-time imprisonment, such as periodic detention and/or a suspended sentence.

In addition to the possible effects of such legally relevant characteristics, the impact of broader offender characteristics on the decision to imprison has also been considered. Weatherburn, Snowball and Hunter (2006) used the results of the 2002 National Aboriginal and Torres Strait Islander Social Survey (NATSISS) to examine the economic and social factors that underpin Indigenous contact with the criminal justice system. In their multivariate analysis of the predictors of imprisonment, the authors considered such factors as education, employment, family disruption, economic stress, social support and substance abuse.

Results of the regression analyses showed that the strongest predictor of whether someone had been imprisoned in the five years prior to the survey was the person's gender, with males being 1.5 times more likely than females to have spent time in prison (Weatherburn, Snowball and Hunter, 2006, p. 10). The likelihood of having been imprisoned was also increased by the following:

- being unemployed;
- having left school before the completion of Year 12;
- living in a household defined as crowded;
- being a member of the Stolen Generation, or having a relative who was a member of the Stolen Generation; and
- participating in high-risk consumption of illicit drugs or alcohol (the second largest and fourth largest effects in the model, respectively).

The authors conclude that the most important finding of the study relates to substance abuse, suggesting that 'one of the key ways to reduce Indigenous contact with the criminal justice system is to reduce Indigenous drug and alcohol abuse' (Weatherburn, Snowball and Hunter, 2006, p. 11).

The length of the imprisonment term

Unlike the research on the effect of Indigenous status on the likelihood of receiving a prison sentence, there has been very little research on the effect of Indigenous status on the length of prison term received. Bond, Jeffries and Weatherburn (2011) note that sentencing decisions about whether to imprison and the length of the term to impose are separate and 'are not necessarily influenced in the same way by the same factors' (Bond, Jeffries and Weatherburn, 2011, p. 277).

The authors examined this question for higher and lower courts in New South Wales, finding that, after controlling for other sentencing factors, Indigenous offenders received shorter terms of imprisonment than non-Indigenous offenders in the lower courts, but that there was no significant difference between imprisonment terms for Indigenous and non-Indigenous offenders in the higher courts (Bond, Jeffries and Weatherburn, 2011). Research comparing outcomes specifically in the lower courts, however, found that disparities in the length of imprisonment terms varied by jurisdiction: in South Australia, Indigenous offenders received shorter terms than non-Indigenous offenders, in New South Wales they received almost equal terms, and in Western Australia Indigenous offenders received longer terms of imprisonment (Jeffries and Bond, 2011, pp. 7–8).

Given the variation in findings on this issue, broad consensus in the field on the impact of Indigenous status on the length of imprisonment terms imposed remains elusive.

International research

The majority of international research on sentencing disparities where race is a factor has been in North America, focusing on disparities between Caucasians and African Americans. There, race, ethnicity or Indigenous status 'continues to have a *direct* effect on sentencing outcomes independent of other key sentencing variables' (Bond, Jeffries and Weatherburn, 2011, p. 274).

Unlike the experience of African Americans or ethnic Latino populations in the United States, the experience of Indigenous Australians may more closely mirror that of Indigenous populations in Canada (Bond, Jeffries and Weatherburn, 2011).

Weinrath (2007) notes that, as in Australia, Canadian researchers generally do not find evidence of lengthier custody terms once prior criminal history and offence severity are considered. Some studies suggest that Aboriginal offenders are treated more leniently, not more severely, than non-Aboriginal Canadians, with sentence length data suggesting the possibility of shorter sentences for Aboriginal offenders for some offences (see, for example, La Prairie, 1990). On the other hand, other researchers find that, while there is no difference in the likelihood of receiving a custodial sentence, young Aboriginal offenders in Canada do receive longer custodial terms, regardless of standard legal considerations such as criminal history and offence severity (see, for example, Latimer and Foss, 2005).

Researchers have attempted to explain Aboriginal over-representation in the criminal justice system in Canada by factors such as demographic characteristics or a history of child neglect or substance abuse. For example, Boe (2002: cited in Latimer and Foss, 2005) has suggested that over-representation may be partly explained by population demographics: the Aboriginal population in Canada is younger than the non-Aboriginal population, resulting in a higher proportion of Aboriginal people falling into the age groups with the highest risk of involvement in criminal behaviour (those aged under 30). La Prairie (1992, 2002: cited in Latimer and Foss, 2005) has argued that over-representation may be due partly to Aboriginal social and economic marginalisation, with poverty and lack of education and employment long being linked to criminal behaviour in the research literature.

Evidence from Canadian studies of Aboriginal offenders is therefore mixed, especially with regard to differences in the length of custodial sentences.

Differential involvement in crime

There is also a body of research that suggests Indigenous over-representation in the justice system can be explained by differential involvement in crime, with Indigenous people being more likely to be involved in criminal behaviour and in the type of criminal behaviour that is more likely to result in a prison term.

Snowball and Weatherburn (2006) used data from New South Wales to show that Indigenous prisoners were more likely to have been imprisoned for violent offences. For Indigenous prisoners, 32.0% were imprisoned for major assault, sexual assault and robbery, compared with 22.7% of non-Indigenous prisoners. Indigenous prisoners were also more likely to have been imprisoned for other assault offences (14.6% compared with 8.5% for non-Indigenous offenders). Non-Indigenous offenders were more likely to have been sentenced to prison for a driving offence (9.4% of non-Indigenous prisoners, compared with 5.4% of Indigenous prisoners) (Snowball and Weatherburn, 2006, p. 4).

In addition, Indigenous offenders were more likely to have prior convictions: 74.7% of Indigenous offenders had previously been convicted at least once, compared with 41.5% of non-Indigenous offenders. Indigenous offenders were also more likely to have a large number of prior convictions: 21.6% of Indigenous offenders had been convicted five or more times, and 6.7% had been convicted eight or more times. In comparison, 5.3% of non-Indigenous offenders had been convicted five or more times, and 1.2% had been convicted eight or more times (Snowball and Weatherburn, 2006, p. 13).

The authors suggest that this higher prevalence of violent offending and prior offending may contribute to Indigenous over-representation in prison: where there are many prior convictions, and where prior convictions involve violence, they may be attributed substantial weight in sentencing decisions. Indeed, the regression analysis found that the effect of Indigenous status on the decision to imprison disappeared when current and prior offence characteristics were included. The findings of Snowball and Weatherburn's analysis (2006) replicate those found in earlier analyses of Indigenous offending in New South Wales (Weatherburn, Fitzgerald and Hua, 2003).

When differential participation in crime has been found, further studies have been undertaken in order to explain these differences. The primary approach of these studies has been to examine key factors that have consistently and broadly been shown to be associated with crime, such as substance abuse and unemployment. Such factors are related to involvement in criminal behaviour for all populations, not just for Indigenous people.

The main hypothesis underlying this body of research is that Indigenous people may be more likely to experience those factors that are associated with an increased risk of crime, leading to increased involvement in crime, a longer criminal history and therefore an increased likelihood of being imprisoned.

This hypothesis has been borne out in analyses of data from the Australian Bureau of Statistics' National Aboriginal and Torres Strait Islander Social Survey (NATSISS).

Weatherburn and Holmes (2010) have examined four key measures of risk for involvement in crime: child neglect and abuse, drug and alcohol abuse, poor school performance/early school leaving and unemployment. Presenting data from a variety of sources, they show that Indigenous people are greatly over-represented in all the measures. For example, data from the Australian Institute of Health and Welfare are used to measure the over-representation of Indigenous children in substantiated child maltreatment cases. The ratio of Indigenous to non-Indigenous rates of child neglect and abuse ranges from 6.1 in the Northern Territory to 13.4 in South Australia (with a rate of 10.0 in Victoria). Similar ratios are found in data on alcohol-induced death rates and drug-induced death rates, with both alcohol and drug abuse being far more prevalent among Indigenous populations. Finally, the data show that Indigenous students perform more poorly in every state and territory on a variety of measures of educational performance, and Indigenous people have lower employment rates than non-Indigenous people (Weatherburn and Holmes, 2010, pp. 566–569).

Weatherburn and Holmes (2010, p. 569) conclude that:

Indigenous Australians fare much worse than non-Indigenous Australians in terms of each of the four critical factors known to play a significant role in the onset, frequency or seriousness of offending.

Broader disadvantage is thus seen as being a direct contributor to levels of offending in the Indigenous community. Indeed, Blagg et al. (2005, p. 26) suggest that 'recognising the criminogenic effects of economic disadvantage and unemployment [is] important in understanding offending levels in communities irrespective of their racial composition'.

While such studies have confirmed the increased prevalence of these risk factors in the Indigenous population, they have been criticised for their failure to link such social and economic difficulties to the history of colonisation and marginalisation experienced by Australian Indigenous populations. Clearly, such widespread difficulties did not arise in a vacuum. Rather, as the Royal Commission into Aboriginal Deaths in Custody acknowledged, the deeper structural disadvantage of Indigenous populations plays a substantial role in Indigenous offending and, ultimately, Indigenous over-representation in prison.

This argument is reflected in the views of those Indigenous people who contributed to a 2005 review of over-representation of Indigenous people in the Victorian criminal justice system. Blagg et al. (2005) report that factors such as homelessness and unemployment are seen as directly contributing to involvement in the system and, particularly, to reoffending. The authors note (Blagg et al., 2005, p. 10) that:

Our discussions would suggest that 'underlying' issues such as drug and alcohol use, homelessness, unemployment, marginalisation and family violence play a very direct and constitutive role in shaping the contexts in which offending occurs.

Indeed, research has shown that Indigenous people are more likely to be victims of crime, particularly in the case of Indigenous women as victims of family violence. During 2006–07, Indigenous women were hospitalised as a result of family violence assaults at 35 times the rate for non-Indigenous women, and were 15 times more likely to seek accommodation assistance through formal programs. During the period 2003–07, the homicide rate for Indigenous people was seven times that for non-Indigenous people (Steering Committee for the Review of Government Service Provision, 2009, p. 24).

Research in New South Wales has shown that, among Indigenous women in custody, 69% had been abused as a child, with three-quarters of these women experiencing sexual abuse. The vast majority (82%) had not told anyone of their victimisation, while 68% still needed counselling or support to deal with their experience. Three-quarters (73%) of Indigenous women in custody had been abused as adults, with 42% of these experiencing sexual assault (NSW Aboriginal Justice Advisory Council, 2001, p. 7).

The far higher levels of victimisation among Indigenous people have implications for their involvement as offenders. The link between exposure to family violence and offending patterns and imprisonment is illustrated in the New South Wales Aboriginal Justice Advisory Council report (NSW Aboriginal Justice Advisory Council, 2001, p. 7):

at least 80% of the women surveyed said that their experience of abuse was an indirect cause of their offending. Some women revealed that the underlying cause of their drug and criminal habits was to avoid dealing with, or because they had not been able to address, the abuse that they had suffered as a child, in particular child sexual assault.



The current study

Davies (2003) has identified a number of methodological flaws that are commonly found in studies of over-representation of minority populations. While some of these flaws are easily remedied, others are more difficult to address, and therefore tend to be more widespread.

Two of the common problems noted by Davies (2003, pp. 21–24) that are of most relevance to the current study are as follows:

- The failure to use multivariate models to control for factors that might help explain observed differences in outcomes based on race. Davies notes the importance of multivariate models to offer more nuanced explanations for these differences, notwithstanding her assertion that caution is required when interpreting supposedly objective 'legal' factors.
- The failure to complement quantitative analysis with qualitative information that can illuminate the social and political context from which the quantitative data have been drawn.

Approach

The Council has adopted an approach that aims to address the methodological issues that Davies (2003) raises:

- The Council uses a multivariate analysis in the examination of the role of Indigenous status in influencing the length of imprisonment terms, in order to ensure that the impact of Indigenous status is being measured accurately, while taking into account the impact of other factors, such as prior and current offending.
- In addition to its statistical analysis, the Council has convened a Reference Group for this project, comprising people from a number of agencies that work closely with Koori communities. The purpose of the Reference Group is to assist the Council in interpreting and validating its results, thereby complementing the quantitative analysis with a qualitative and more nuanced examination of the data.

For those analyses in this report that involve comparing two different populations (Koori and non-Koori), the Council has employed a commonly used statistical technique to test for meaningful differences between the two groups.²⁰ Unless otherwise noted, the differences that are reported are statistically significant, meaning that they are unlikely to have occurred by chance.

²⁰ Whenever data for two populations (or samples of populations) are compared, it is possible that observed differences between them could simply be due to random variation. This is particularly so if either or both of the populations or samples are small. The Chi square test is a commonly used statistical technique that has been developed to calculate the probability of any particular differences being due to chance. If the probability is low (conventionally less than 5%), the difference is reported to be 'statistically significant', meaning that the difference is likely to be meaningful, rather than simply one due to random variation. Throughout the remainder of this report, any comparison between data for Koori offenders and non-Koori offenders has been checked using the Chi square test. Unless otherwise noted, the differences that are reported have been found to be statistically significant. For most of the figures reported, there was an extremely low probability that the difference was due to chance (typically it was far below the conventional 5% threshold for statistical significance).

Data

The analyses presented in this report draw on data from a number of sources: the Australian Bureau of Statistics, the Victorian Department of Justice E-Justice database, as linked into the Council's reoffending database, and data provided by Corrections Victoria from the Victorian Intervention Screening Assessment Tool (VISAT).

Australian Bureau of Statistics

Using data from the Australian Bureau of Statistics, the report provides a broader, national context to the question of sentencing outcomes for Indigenous offenders in Victoria. These data show how Victoria fares compared with other states and territories regarding important measures relevant to its Indigenous population.

E-Justice and the Council's reoffending database

Indigenous status data are not available from the courts, and data from Victoria Police are not sufficiently reliable to include in this kind of analysis.²¹ The most reliable data on people's Indigenous status come from Corrections Victoria, where it is acknowledged that people are most likely to self-identify. Corrections Victoria has a significant organisational commitment to collecting reliable Indigenous status data, and has a range of ongoing, intensive collection and monitoring practices in place for identifying and confirming Indigenous status. In addition, Corrections Victoria provides a range of culturally appropriate programs and services, including specific support roles²² in both prisons and community corrections, for its Koori clients.

Given the paucity of reliable data from earlier stages of the criminal justice system, the Council has accessed data collected by Corrections Victoria through the Department of Justice's integrated criminal justice system database (E-Justice). The E-Justice database links data from Victoria Police, the courts and Corrections Victoria on offenders who have been sentenced to an order requiring the involvement of Corrections Victoria. These data have been linked with the Council's own reoffending database, which is created from data provided by the Victorian courts.

While basing the analysis on Corrections Victoria's data provides the most reliable information on Indigenous status, such data are not available for people who either have not been sentenced or have been sentenced to an order that does not require the direct involvement of Corrections Victoria, such as an adjourned undertaking, a fine or a wholly suspended sentence.

This report therefore presents sentencing data to allow comparisons of Koori and non-Koori adult offenders sentenced to specific orders supervised by Corrections Victoria. Those orders are imprisonment, partially suspended sentences, intensive correction orders and community-based orders.²³

²¹ An ongoing problem for people who work and conduct research in the field of Indigenous justice is the lack of reliable data on people's Indigenous status. Indeed, one of the key recommendations of the *National Justice Policy* developed by the National Congress of Australia's First Peoples is 'significant improvements to data collection regarding Aboriginal and Torres Strait Islander people within the justice system' (National Congress of Australia's First Peoples, 2012, p. 2).

²² Corrections Victoria has created various support roles, such as Aboriginal Wellbeing/Liaison Officers, Indigenous Community Corrections Officers and Indigenous Support Officers.

²³ As of 16 January 2012, intensive correction orders and community-based orders are no longer available in Victoria under amendments to the *Sentencing Act 1991* (Vic). The data used in this report, however, are from the period prior to these changes.

The reoffending database developed by the Council draws on data collected by all sentencing courts in Victoria and includes people who have been sentenced for a criminal offence between 1 July 2004 and 30 June 2011 in the higher courts (the Supreme and County Courts), the Magistrates' Court and the Children's Court.²⁴

The database is a new development for Victoria in that it provides an opportunity to follow offenders as they appear and reappear for sentencing in the Victorian courts. The database has therefore allowed the Council to examine an individual's multiple sentencing episodes over the seven-year period.

Victorian Intervention Screening Assessment Tool

In addition to the E-Justice data, the report draws on data from the Victorian Intervention Screening Assessment Tool (VISAT). VISAT is a risk–need assessment tool administered by Corrections Victoria. It collects data from offenders across a range of criminological and psycho-social measures, including the offender's social, economic, physical and mental health status, as a way of assessing the offender's needs. It also collects data on the offender's prior and current offending patterns in order to assess the offender's level of risk of reoffending.

VISAT was designed as a specifically Victorian tool to assist corrections officers to assess adult offenders when they enter correctional supervision. Without such assessment, it is difficult to design appropriate, targeted and effective correctional interventions.

The tool measures both risk and need. In order to manage offenders appropriately, information is needed about their propensity to reoffend – their level of risk of reoffending. Information on offenders' needs and deficits allows for the most appropriate interventions to be provided. Although VISAT has been described as an aid to decision-making, rather than a decision-maker itself, it is intended to provide the foundation for an integrated assessment based on a range of classification and clinical assessment processes.

One year of VISAT data (1 July 2010 to 30 June 2011) is used in this report to provide a more detailed context to the Council's analysis of the sentencing data.

²⁴ Data on people sentenced in the various Koori Courts in Victoria are not included in this report. The number of people sentenced in these courts, however, is very small compared with the number sentenced in the mainstream courts. For example, the Council's report on the Koori Court Division of the Magistrates' Court identified 381 Koori people who had been sentenced in this court in 2009 (Sentencing Advisory Council, 2010, p. 25).



Victorian sentencing outcomes

This section uses data from the Council's reoffending database to examine the characteristics of Koori and non-Koori people sentenced to imprisonment, a partially suspended sentence, an intensive correction order or a community-based order in the Victorian Magistrates' Court, as well as their current and prior offending profile and their sentencing outcomes.

Number of people sentenced

There were 8,647 people sentenced to imprisonment, a partially suspended sentence, an intensive correction order or a community-based order in the Magistrates' Court from 1 July 2010 to 30 June 2011.²⁵ Of these, 502 people (5.8%) identified as Koori, while 7,069 people (81.8%) identified as non-Koori. The remaining 12.4% of people had an Indigenous status of 'not stated' (2.0%) or else could not be matched in the database (10.4%).

Offender and offence characteristics

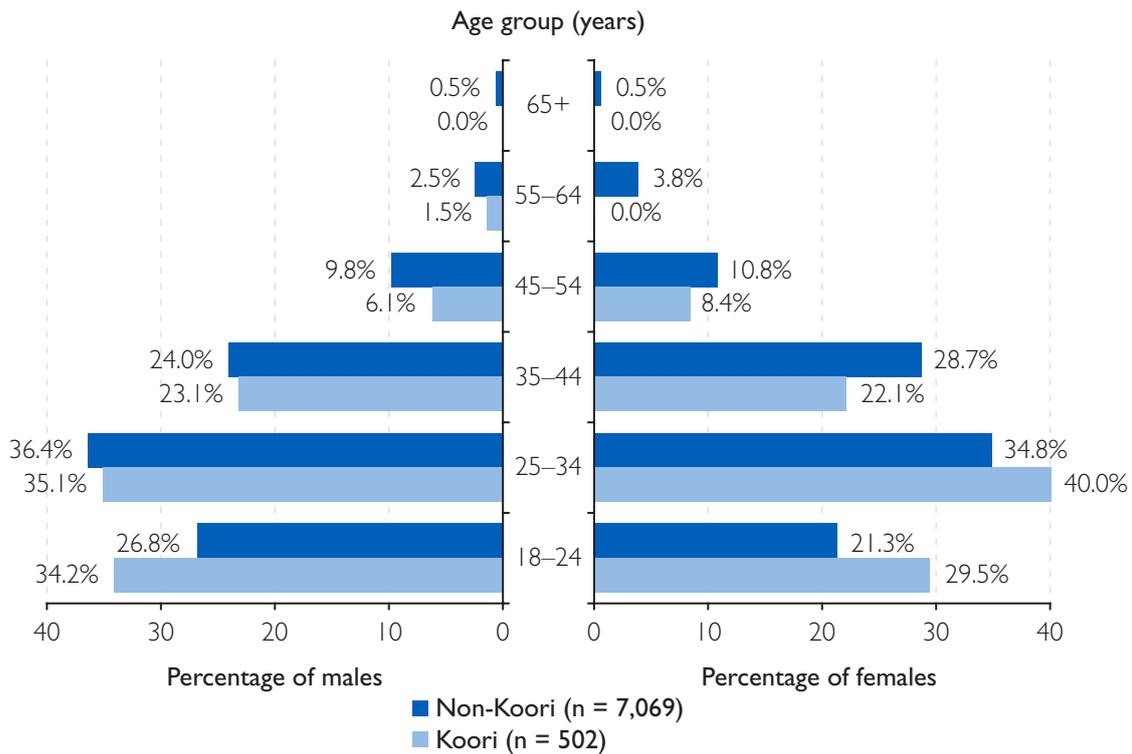
Age and gender of people sentenced

The vast majority of people sentenced to imprisonment, a partially suspended sentence, an intensive correction order or a community-based order were male, among both Koori and non-Koori offenders. However, there was a far higher proportion of females among Koori offenders (18.9%) than among non-Koori offenders (13.7%).

Koori offenders were also somewhat younger, with a median age of 29.1 years compared with a median age of 31.3 for non-Koori offenders. In particular, the proportion of young people in the 18–24 age group was far higher for Koori offenders than for non-Koori offenders: 34.2% of Koori males and 29.5% of Koori females fell into this age group, compared with 26.8% of non-Koori males and 21.3% of non-Koori females. This is of particular relevance to crime rates, as it is a well-established fact in criminology that younger people account for a large proportion of all crime (see, for example, Farrington, 1986; Fagan and Western, 2005). The higher proportion of young women among Koori offenders is of particular concern, as Koori women tend to have children at a younger age than women in the general community. The younger age profile of Koori offenders thus has implications for the impact of custodial sentences on families and especially children (Victorian Aboriginal Legal Service, 2013).

²⁵ When counting all sentence types, a total of 77,126 people were sentenced in the Magistrates' Court in 2010–11. The majority of these people (42,085) were sentenced by way of a fine. The next most common sentencing outcome was an adjourned undertaking (9,532). The 8,647 people in this database who were sentenced to imprisonment, a partially suspended sentence, an intensive correction order or a community-based order therefore represent a small proportion (11.2%) of all people sentenced in the Magistrates' Court during 2010–11.

Figure 6: Age and gender of offenders at index episode, Magistrates' Court, 2010–11



Current offence type

The two graphs below (Figures 7 and 8) show the distribution of offence types for Koori and non-Koori people who were sentenced to imprisonment, a partially suspended sentence, an intensive correction order or a community-based order in the Magistrates' Court of Victoria during the index period, from July 2010 to June 2011.

The first of these two graphs shows the principal proven offence for which the person was sentenced at the index episode, meaning the offence that attracted the most severe sentence.²⁶

Using principal proven offence data allows a count of a single offence per person, and provides a good indication of the most serious offence for which the person was sentenced.

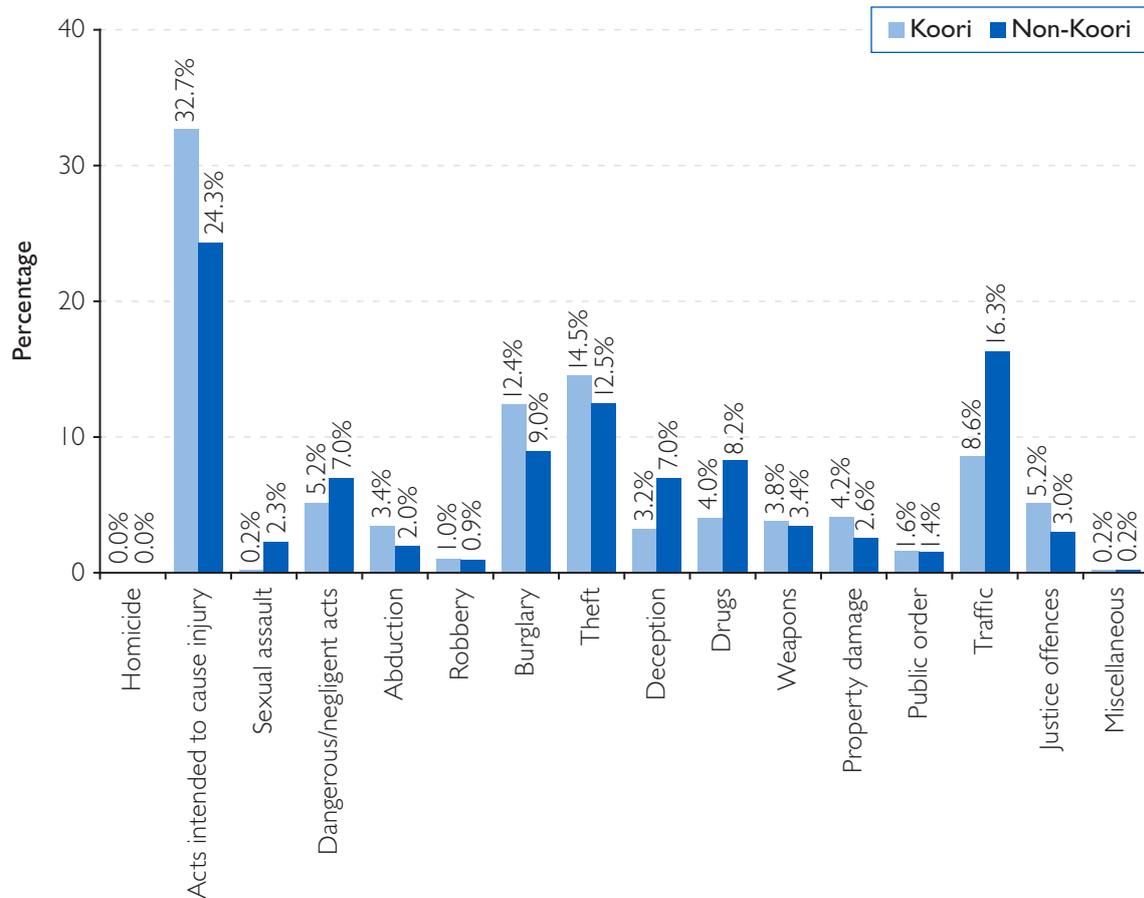
For both Koori and non-Koori offenders, the most common offence for which they were sentenced at their index episode was 'acts intended to cause injury'.²⁷ The prevalence of this offence among Koori offenders was substantially higher than for non-Koori offenders: fully one-third (32.7%) of all Koori offenders sentenced in the Magistrates' Court in 2010–11 were sentenced for this offence (164 people), compared with less than one-quarter (24.3%) of non-Koori offenders (1,716 people).

Various Australian studies have attempted to identify the reasons for the higher prevalence of violent offences among the Indigenous population. Factors that have been postulated include those based on the historical processes of violent dispossession and disempowerment, leading to hopelessness, despair and rage, as well as more situational factors such as alcohol abuse, unemployment, boredom and tolerant attitudes towards violence (Allard, 2010, p. 4).

²⁶ The principal proven offence is the offence that received the most severe type of sentence on the Victorian sentencing hierarchy. If two offences received the same type of sentence, the offence with the longest sentence duration is the principal proven offence.

²⁷ The category of 'acts intended to cause injury' is a broad one, covering offences ranging from serious assaults that result in injury (such as intentionally causing serious injury) to less serious common assaults. Other acts intending to cause injury, such as stalking, are also included.

Figure 7: Principal proven offence for which a sentence was imposed during the index year, Magistrates' Court, 2010–11



Burglary was also more prevalent among Koori offenders, with burglary constituting 12.4% of sentenced offences for Koori offenders (compared with 9.0% of sentenced offences for non-Koori offenders). The absolute number of Koori people sentenced for burglary offences, however, remained far lower than for the non-Koori sample: 62 Koori offenders were sentenced for burglary compared with 633 non-Koori offenders.

Non-Koori offenders were far more likely to be sentenced for a traffic offence (16.3% versus 8.6% for Koori offenders), a drug offence (8.2% versus 4.0% for Koori offenders) and a deception offence (7.0% versus 3.2% for Koori offenders).

These findings are strikingly consistent with recent research from four other Australian jurisdictions on Indigenous people charged by police.²⁸ Allard (2010) found that acts intended to cause injury and public order offences accounted for half of all principal offences for which Indigenous people were charged by police. Indigenous offenders were less likely to be charged with illicit drug offences, theft offences and deception offences (Allard, 2010, p. 1).

The findings are also consistent with the body of research discussed above (see 'Differential involvement in crime', page 24) that has concluded that Indigenous over-representation is largely due to differential involvement in crime, with Indigenous people being more likely to be involved in criminal behaviour.

²⁸ The jurisdictions are New South Wales, Queensland, South Australia and the Northern Territory. Data from other jurisdictions were excluded due to concerns about data quality.

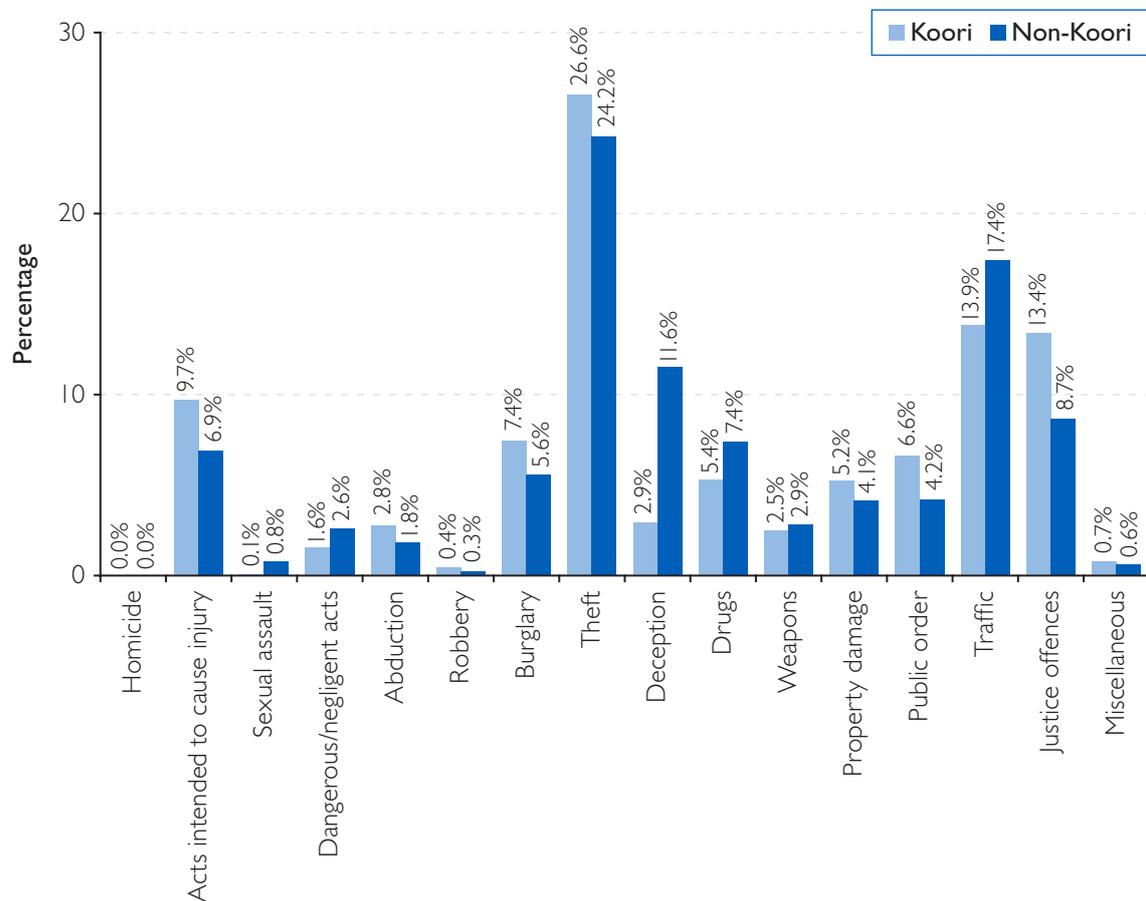
Members of the Council's Reference Group were not surprised to see that the proportion of Koori people within the injury offences category was statistically significantly higher in particular. Several explanations were offered for this:

- Koori people typically present with substantial comorbidity, typically in the form of alcohol abuse and cognitive impairment. Alcohol is often the driver of violent assaults, and the combination of alcohol and cognitive impairment (in the form of a lack of consequential thinking) often results in arguments leading to violent confrontations.
- Violence has become part of the daily life and environment for many Koori people, especially Koori youth. Young Koori children are grossly over-represented in child protection and are more likely to be in out-of-home care due to abuse and trauma. Koori youth are also grossly over-represented in youth detention, where they are typically surrounded by violent peers. This environment of violence endures into adulthood, such that a reaction to a simple confrontation is more likely to become violent.
- Both the complexity with which Koori offenders present in court and the violent environment in which many Koori people live may be linked to their historical (and current) disadvantage.

Analysis of principal proven offence, however, does not capture fully the often varied nature of a person's offending. Specifically, offenders may be sentenced for a wide range of offence types, which can be captured only when examining data for all charges for which a person is sentenced.

The following graph presents the same analysis of current offence type, but uses a count of all charges, allowing for multiple offences to be counted for each individual person. This count captures all offences for which a person was sentenced, regardless of whether or not the sentencing outcome was a Corrections Victoria supervised outcome.

Figure 8: All charges (including non-Corrections outcomes) for which a sentence was imposed during the index year, Magistrates' Court, 2010–11



The proportions in Figure 8 are different from those in Figure 7, although the overall patterns remain. Using a charge count, the most common offence for both Koori and non-Koori offenders is now theft, with fairly similar proportions for the two populations (26.6% of all charges for Koori offenders, or 797 charges, compared with 24.2% of all charges for non-Koori offenders, or 9,912 charges). It is possible that the predominance of the theft category among charges is due to police charging practices; theft is a somewhat unusual offence in that it is often charged in such a way as to result in multiple charges for a single incident.²⁹

Acts intended to cause injury now represent a much lower proportion than they did when examining principal proven offence. Nonetheless, the difference between Koori and non-Koori offenders in the proportion of all charges that are injury offences remains statistically significant.

Apart from the change in proportion for injury and theft offences, the general pattern remains: Koori people have higher proportions of injury, burglary and theft charges and lower proportions of deception, drugs and traffic charges. These differences are all statistically significant, meaning that they are unlikely to have been found by chance and likely reflect actual, meaningful differences in the distribution of charges.

Notably, for Koori offenders the proportion of justice offence³⁰ charges is now far higher, with 13.4% of all charges being a justice offence (402 charges). This is a statistically significantly larger proportion than for non-Koori offenders (8.7%, or 3,546 charges). Similarly, Koori offenders have a statistically significantly higher proportion of public order charges (6.6%, or 198 charges), than non-Koori offenders (4.2%, or 1,734 charges). These offences in particular are problematic, as they may be seen as being more consistent with poverty than with criminality as such. This category includes, for example, disorderly behaviour in a public place, using alcohol in a regulated public space, offensive language, public drunkenness and vagrancy. Given the high prevalence of alcohol use among Indigenous populations (discussed further in later sections of this report), it may be argued that Koori people are more likely to participate in such offences (and possibly to do so more publicly) and are therefore more likely to be charged with such offences.

According to the Reference Group members, in order to understand offending patterns and rates for Koori people it is imperative to consider the Koori community's gross over-representation in both child protection data and youth justice data. These data highlight the high levels of victimisation and trauma that are found in the Koori community.

Understanding Koori offending: Koori people in child protection

The Australian Institute of Health and Welfare (AIHW) collects data from each state and territory on a variety of child protection measures. These data allow for comparisons between Aboriginal and Torres Strait Islander children and other children in the Victorian community. The most recent report (Australian Institute of Health and Welfare, 2012b) covers the 2010–11 reporting period.

In 2010–11, Indigenous Victorian children had a rate of substantiated notifications of 50.4 per 1,000 children, compared with a rate of 5.4 per 1,000 non-Indigenous children. This represents a rate ratio of Indigenous to non-Indigenous children of 9.4 to one (Australian Institute of Health and Welfare, 2012b, p. 15).

²⁹ An offender may be charged with multiple thefts if multiple items are stolen in a single incident. Alternatively, police may discover that a single offender has actually committed multiple thefts on many occasions. In either case, the result will be many charges of theft for a single offender. Thus the high proportion of both Koori and non-Koori offenders with theft charges in this graph may be an artefact of police charging practices.

³⁰ The category 'justice offences' covers a broad range of offences such as breaches of various orders, offences against government operations (such as failing to vote) and offences against justice procedures (such as resisting police or failing to answer bail).

The most common type of abuse or neglect for Victorian Indigenous children during this year was emotional abuse, which is any act where a child suffers any kind of significant emotional deprivation or trauma. This accounted for 56.1% of Indigenous children's substantiated notifications compared with 50.7% for non-Indigenous children. The data for Victoria are very different from the data for Australia as a whole, where the most common reason for a substantiated claim for Indigenous children was neglect (37.8%), compared with 23.0% for non-Indigenous children (Australian Institute of Health and Welfare, 2012b, p. 54).

A similar over-representation is seen in data on out-of-home care. In 2010–11, Indigenous Victorian children had a rate of being in out-of-home care of 57.3 per 1,000 children, compared with a rate of 3.8 per 1,000 non-Indigenous children. This represents a rate ratio of Indigenous to non-Indigenous children of 14.9 to one (Australian Institute of Health and Welfare, 2012b, p. 36).

The AIHW report suggests that the reasons for the over-representation of Aboriginal and Torres Strait Islander children in child protection data are complex (Australian Institute of Health and Welfare, 2012b, p. 14):

The legacy of past policies of forced removal, intergenerational effects of previous separations from family and culture, poor socioeconomic status and perceptions arising from cultural differences in child-rearing practices are all underlying causes for over-representation of Aboriginal and Torres Strait Islander children in the child welfare system.

The implications of this early over-representation are seen most keenly in data on Indigenous people in youth detention.

Understanding Koori offending: Koori people in youth detention

Although the AIHW report on Indigenous young people in the juvenile justice system does not contain data from Victoria, the available data are illustrative of the continuing over-representation of Indigenous youth in Australia's formal systems of social control.

Nationally, 39% of young offenders under juvenile justice supervision on an average day in 2010–11 were Indigenous. Indigenous youth were four to six times more likely than non-Indigenous youth to be proceeded against by police, and were eight to 11 times more likely to be proven guilty in the Children's Court. On average, Indigenous young offenders were 14 times more likely to be under community-based supervision at some point during the year and were 18 times more likely to be in detention (Australian Institute of Health and Welfare, 2012c, p. 1).

In addition, Indigenous youth entered the juvenile justice system at a younger age, with most (58%) Indigenous young people under supervision in 2010–11 first entering supervision when they were aged 10–14, compared with 32% for non-Indigenous youth under supervision (Australian Institute of Health and Welfare, 2012c, p. 1). That is, Indigenous people first come into contact with the police at an earlier age; this, in turn, may see them move through key diversionary options earlier, leading to a more serious offending history by the time they reach the adult criminal justice system.

Once again, the AIHW report (Australian Institute of Health and Welfare, 2012c, p. 4) notes the complexity of reasons for such over-representation, drawing on the conclusions of the 2011 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs:

contact with the juvenile justice system was a symptom of the chronic social and economic disadvantage experienced by many Indigenous young people.

Indeed, the Committee's report makes recommendations that cover a broad range of relevant areas, such as education, health, accommodation, employment, social norms, individual family dysfunction, connection to culture, alcohol and drug abuse, mental health and criminal justice process (House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, 2011, pp. 4–6).

Over-representation in both the child protection and the youth detention systems is thus likely to play a key role in the over-representation of Koori people in Victoria's prisons. Among those people captured in the

Council's reoffending database, 7.8% of Koori offenders had received at least one sentence of detention in a youth facility, compared with 2.3% of non-Koori offenders.

Young offenders in detention – both Koori and non-Koori – are some of the most disadvantaged people in the community. Analysis by the Victorian Department of Human Services has shown that, among those in custody in October 2011, 38% had previous child protection involvement and 18% had a current child protection order. Two-thirds (65%) were victims of abuse, trauma or neglect prior to detention, 40% had mental health issues and the vast majority (92%) were alcohol users or drug users (84%). One-third (32%) had a history of self-harm and 39% had issues with poor intellectual functioning (Youth Parole Board and Youth Residential Board of Victoria, 2012, p. 12). Young people in detention therefore present with particularly complex needs and significant levels of disadvantage, both of which are likely to have a substantial impact on their later outcomes in the adult criminal justice system.

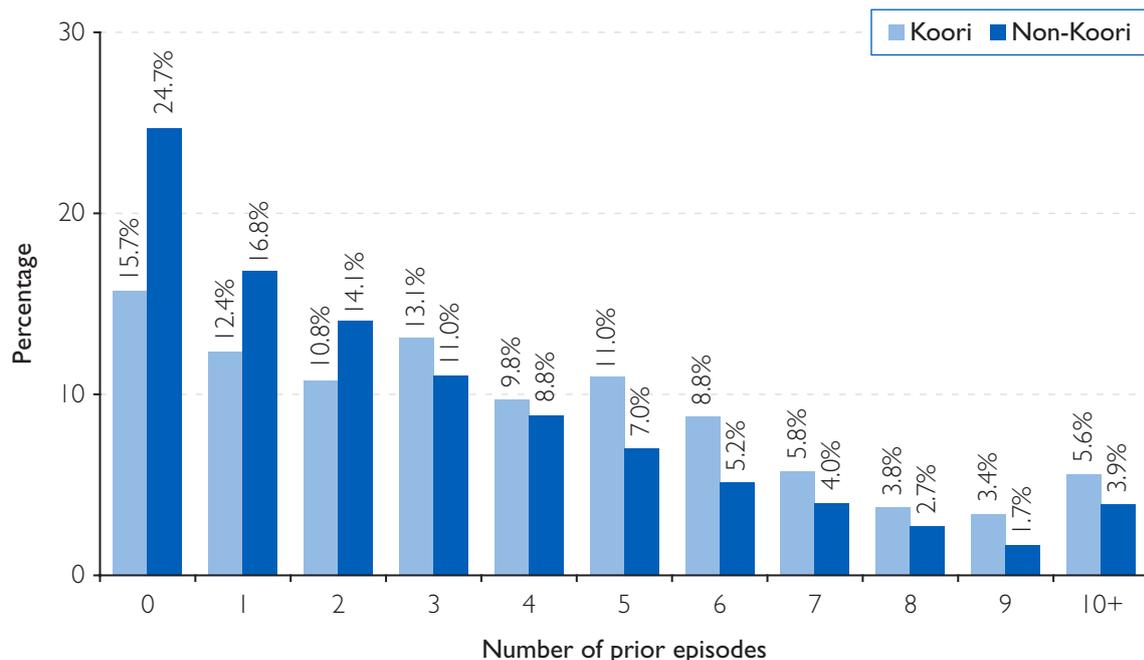
This complexity is seen in data on the links between homelessness, child protection and juvenile justice. The Australian Institute of Health and Welfare has shown that people who are involved in one of these three sectors are more likely to be involved in another of the sectors than the general population. In particular, almost 15% of young people under juvenile justice supervision had received accommodation support in the year prior to their most recent supervision, while 6% of youth with a substantiated child protection notification had received accommodation support in the previous year. This compares with about 3% of youth aged 10 and older in the general population receiving accommodation support in any given year (Australian Institute of Health and Welfare, 2012d, p. vii).

The higher proportion of Koori offenders with a prior history of youth detention may thus play a role in differences in sentencing outcomes for Koori and non-Koori offenders.

Prior sentence

Figure 9 shows the number of recent prior sentencing episodes³¹ for all people sentenced in the Magistrates' Court in 2010–11, while Figure 10 focuses on the number of prior imprisonment episodes.

Figure 9: Number of prior sentencing episodes for people sentenced in the Magistrates' Court, 2010–11



³¹ The term 'recent prior sentence' reflects the fact that the Council's reoffending database covers the period from July 2004. Any sentences imposed before that date are therefore not captured in the analysis.

For almost one-quarter (24.7%) of non-Koori offenders, the sentence imposed in 2010–11 was their first sentencing episode in the reoffending database. In contrast, only 15.7% of Koori offenders had no recent prior sentencing episodes within the reoffending database.

Not only are Koori offenders more likely to have prior sentences, but they also have a greater number of prior sentences, with Koori offenders more likely to have been sentenced three or more times within the reoffending database.

Overall, the average number of recent prior sentences among Koori offenders sentenced in 2010–11 was higher than among non-Koori offenders: among Koori offenders, the average was 3.9 prior episodes (with a median of 3.0) while among non-Koori offenders the average number of recent prior sentences was 2.9 (with a median of 2.0). This difference is indicative of differences in the reoffending profiles of Koori and non-Koori offenders.

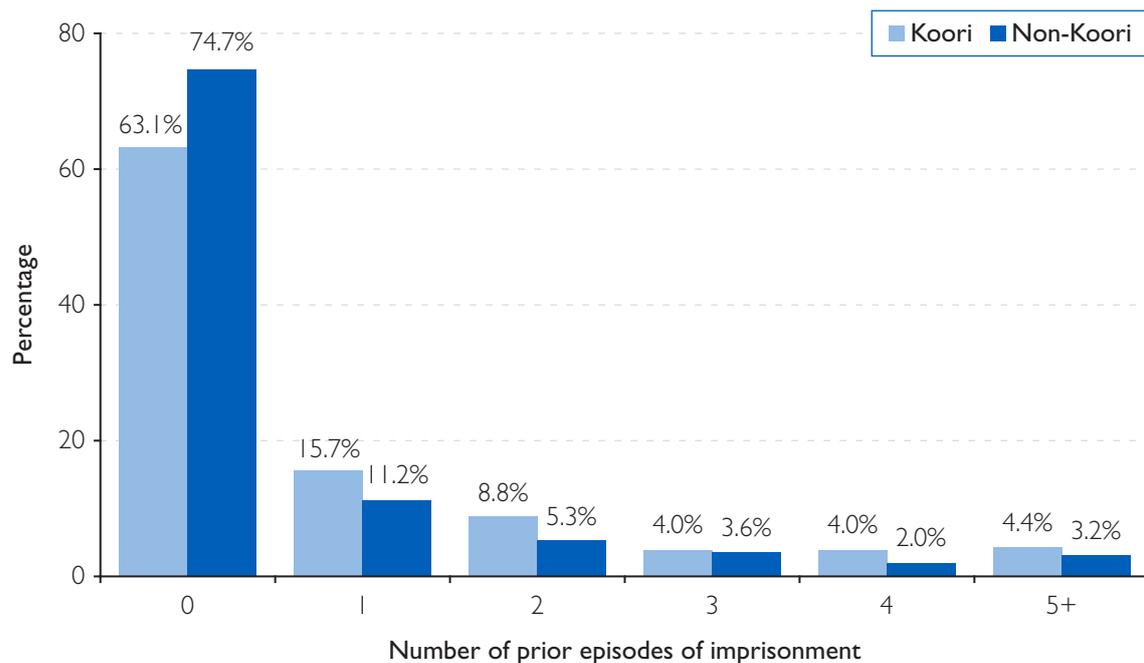
The distribution of number of prior sentencing episodes seen in Figure 9 clearly shows that Koori people are more likely to appear in the groups at the higher end of the graph, while non-Koori offenders are more likely to have zero, one or two prior sentencing episodes.

Consistent with the pattern seen in Figure 9, Koori offenders are also more likely than non-Koori offenders to have a prior episode of imprisonment: 63.1% of Koori offenders have no recent prior episodes of imprisonment compared with 74.7% of non-Koori offenders.

Reference Group members linked these findings on prior sentencing episodes to greater involvement in child protection and youth justice, and ultimately to broader disadvantage. The issue of consolidation of cases was also raised, with the suggestion that Koori people tend to have a large number of consolidations for offences occurring over an extended period.

This is an important issue, as someone with a larger number of co-sentenced offences may be more likely to be imprisoned.

Figure 10: Number of prior episodes of imprisonment for people sentenced in the Magistrates' Court, 2010–11

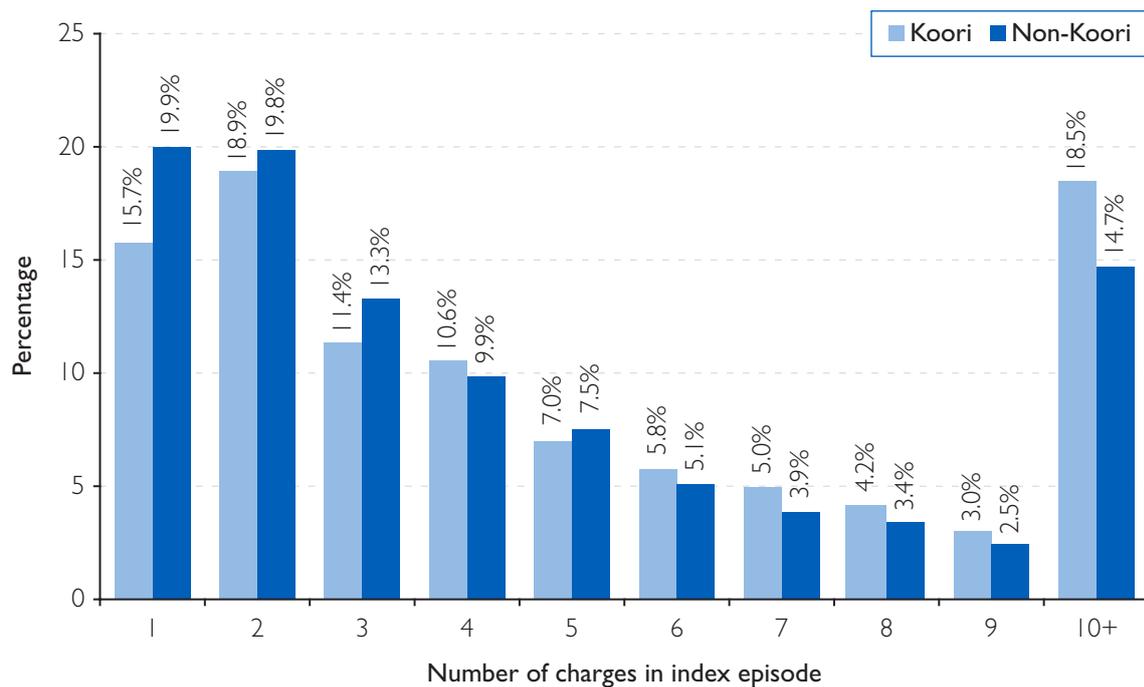


Further analysis found that Koori offenders are more likely to have more co-sentenced charges at their index episode. Figure 11 shows that non-Koori offenders are most likely to have only one charge (19.9%), compared with 15.7% of Koori offenders. Most notably, Koori offenders are more likely to have 10 or more charges, with almost one in five people (18.5%) being sentenced for a large number of charges at the same time. These differences in the highest and lowest categories of number of co-sentenced offences are statistically significant, but the differences in the overall distribution of the number of co-sentenced charges are not.

Despite the lack of statistical significance, it nonetheless remains possible that the larger number of co-sentenced charges for Koori offenders contributes to their increased likelihood of being sentenced to imprisonment.

The increased prevalence of a prior offending history among Koori offenders in the Victorian data is consistent with much of the research literature. For example, Weatherburn, Lind and Hua's study of contact with the New South Wales court and prison systems showed that 'the pattern of court appearance for Indigenous defendants in NSW, however, is very different' (Weatherburn, Lind and Hua, 2003, p. 9). For all defendants given a custodial penalty in 2001, more than 50% had no prior court appearances in the previous five years. For Indigenous people given a custodial penalty in 2001, however, only a minority had no prior court appearance in the previous five years: 17% of Indigenous males and 27% of Indigenous females (Weatherburn, Lind and Hua, 2003, p. 9).

Figure 11: Number of co-sentenced charges for people sentenced in the Magistrates' Court, 2010–11



Sentence type

One of the aims of this project is to examine whether there are meaningful (that is, statistically significant rather than random) differences in sentencing outcomes based on the Indigenous status of the offender.

Figure 12 shows the total effective sentence type at the time of the index episode for all people sentenced in the Magistrates' Court during 2010–11.

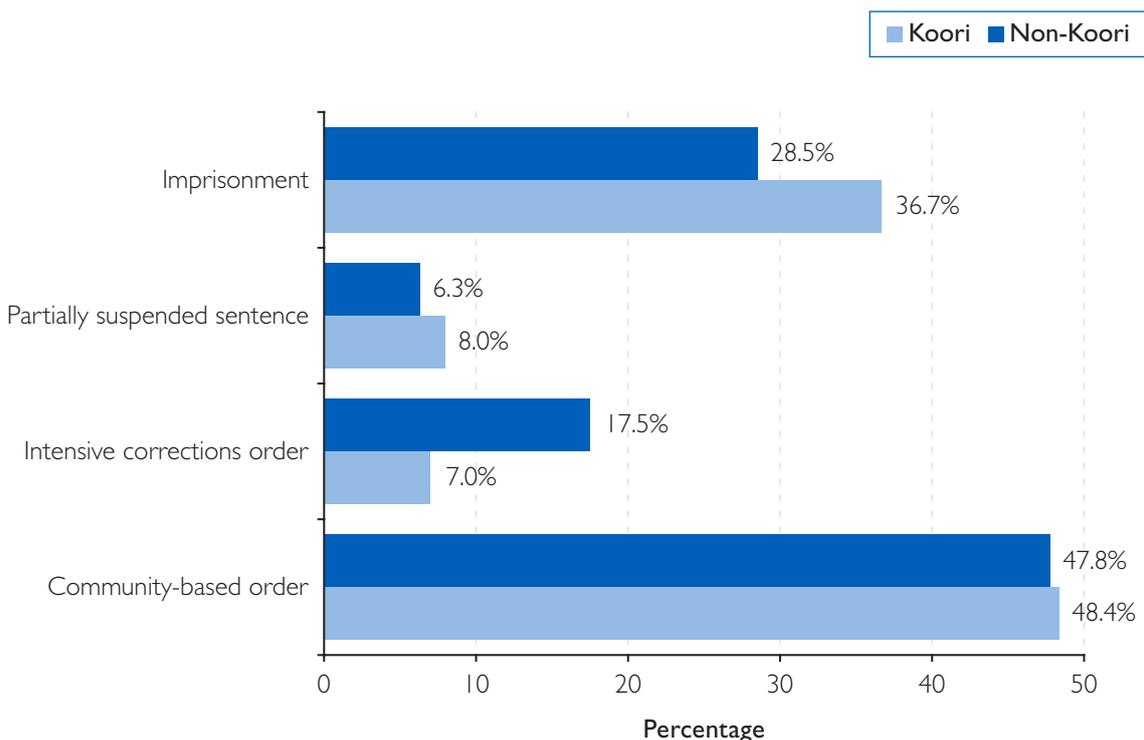
Analysis shows a statistically significantly higher proportion of Koori people being sentenced to imprisonment – 36.7% of Koori offenders (184 of 502 people) versus 28.5% of non-Koori offenders (2,013 of 7,069 people) – and a statistically significantly lower proportion receiving an intensive correction order – 7.0% of Koori offenders (35 people) versus 17.5% of non-Koori offenders (1,235 people). Although the absolute number of Koori offenders in these two categories is not large, the tests of statistical significance show that these differences are unlikely to have occurred by chance.

The Reference Group suggested that the observed differences in imprisonment are likely due to the higher proportion of Koori people being sentenced for injury offences as their most serious (principal proven) offence, which are more likely to attract a period of imprisonment.

The lower proportion of Koori offenders receiving intensive correction orders was seen as consistent with the general understanding in the field that Koori offenders typically have greater difficulty complying with the strict conditions that often apply under this order.

The higher prevalence of imprisonment terms for Koori offenders is also likely to be a function of their higher prevalence of prior sentencing episodes, especially prior episodes of imprisonment (seen in Figures 9 and 10 above). Previous research by the Council on serious injury offences shows that having a recent prior sentence of imprisonment is the strongest predictor of receiving an immediate custodial sentence, increasing the likelihood of a custodial term by a factor of nine (Sentencing Advisory Council, 2011, p. 33).

Figure 12: Total effective sentence type at index episode, Magistrates' Court, 2010–11



Prior criminality is relevant to sentencing in two ways: with regard to the weight to be given to different sentencing purposes and with regard to the assessment of the offender's moral culpability (Judicial College of Victoria, 2013, 10.3.7). Given that the Koori offenders in these data have a higher number of prior sentencing episodes, and specifically prior episodes of imprisonment, the increased likelihood of imprisonment is not unexpected.

In order to test whether Indigenous status is statistically significantly related to the type of sentence imposed even when taking into account such factors as offence type and prior criminality, the Council conducted multivariate analyses on the relationship between sentence type (custodial versus non-custodial sentence) and a number of relevant factors. These factors were chosen based on both the existing literature in the field and the data that were available in the reoffending database, and included the following:

- Indigenous status (Koori versus non-Koori);
- age (less than 25 years versus 25 years and above);
- gender (male versus female);
- current offence profile (person offence versus other type of offence); and
- previous sentencing episode (yes versus no).

Multivariate analysis allows for the examination of the independent effect of each factor in the model, *taking account of* (holding constant) all the other factors in the model. That is, the Council can examine the independent effect of Indigenous status on the likelihood of receiving a custodial sentence, taking account of age, gender, current offence profile and previous sentencing.

The results of the multivariate analysis (given in detail in Appendix B) show that, even when taking account of offence and offender characteristics, Indigenous status is statistically significantly related to the type of sentence imposed: Koori offenders in this dataset³² are more likely to receive a custodial order (an imprisonment term or a partially suspended sentence) than non-Koori offenders. The effect of Indigenous status, while significant (increasing the likelihood of a custodial sentence by between 30% and 92%), is not as strong as the effects of the other factors in the model. Having a previous sentencing episode has the greatest impact on the type of sentence imposed, increasing the likelihood of a custodial sentence sixfold.³³ The next strongest effect is found for gender, with men being 2.5 times more likely to receive a custodial sentence than women. People aged less than 25 years are about half as likely to receive a custodial sentence as people aged 25 years and over, while people sentenced for an offence against the person are slightly less likely to receive a custodial term.³⁴

The relationship between Indigenous status and sentence type may be due to a number of factors. It is possible that Koori offenders are more likely to come before the court with a constellation of characteristics that increase their likelihood of receiving a term of imprisonment. Factors that are not measured in this multivariate analysis, such as substance use and mental illness, may play a role in sentencing outcomes that is not captured in these data. It is also possible that there remains some residual discrimination in the courts, although it is not possible to test this hypothesis with these data.

³² The results of the multivariate analysis should be interpreted with caution, as the data only include the four sentence types administered by Corrections Victoria. If the other sentence types, such as wholly suspended sentence, were included in the data, the results could well be different.

³³ This is consistent with previous Victorian research that found higher rates of return to prison among Koori prisoners than non-Koori prisoners, with the strongest predictors of recidivism being the number of prior terms of imprisonment, age at release and a most serious offence of a property offence. The authors concluded that differences between Koori and non-Koori prisoners were due primarily to differences in age and the number of prior imprisonment terms, with Koori prisoners being significantly younger and having significantly more prior terms of imprisonment (Holland, Pointon and Ross, 2007, pp. 19–20).

³⁴ The category 'offences against the person' is a very broad one, encompassing a wide range of offence types. A large proportion of this group consists of less serious offences, which may account for the slightly lower likelihood of receiving a custodial term for offences against the person. For example, the less serious offences of unlawful assault and recklessly cause injury together account for 39% of all offences in this category.

These findings are consistent with other research in this area, such as Baker's analysis of New South Wales court outcomes. Baker (2001) concluded that over-representation of Indigenous people in New South Wales prisons stemmed initially from higher rates of appearance in court, but was 'amplified' at the point of sentencing, with Indigenous offenders being more likely to receive a term of imprisonment, more likely to have been convicted of a violent offence and more likely to have prior convictions (Baker, 2001, p. 1).

The findings are also consistent with two Australian studies of the relationship between Indigenous status and sentencing in the lower courts, which show that Indigenous offenders are more likely to receive a term of imprisonment than non-Indigenous offenders (Bond and Jeffries, 2012; Bond, Jeffries and Weatherburn, 2011). Of particular note is Bond and Jeffries' multivariate analysis of the decision to imprison. When taking into account relevant sentencing factors, differences in outcome for Indigenous offenders disappeared in the higher courts but remained in the lower courts, with Indigenous offenders more likely to be sentenced to imprisonment, all other factors being equal (Bond and Jeffries, 2012).

Sentence length

Figure 12 shows that Koori offenders are significantly more likely to receive a term of imprisonment than non-Koori offenders. This section focuses on those people who received a term of imprisonment in order to see if there are statistically significant differences between Koori and non-Koori offenders in the length of their imprisonment terms.

Analysis of differences in sentence lengths was only possible with the imprisonment group, as this is the only sentence type that had sufficient variation in sentence lengths across offenders. That is, there tends to be more similarity in sentence lengths among offenders who receive other sentence types. This is especially the case with community-based orders, where offenders are often given orders of six months, 12 months or two years. Without enough variation in lengths, statistical analysis becomes meaningless.

Figure 13 shows differences in the total effective length of imprisonment term between Koori and non-Koori offenders sentenced in the Magistrates' Court in 2010–11.³⁵ Imprisonment terms were imposed on 184 Koori offenders and 2,013 non-Koori offenders.

The clearest findings are that Koori offenders are more likely to be sentenced to a short term of imprisonment, while non-Koori offenders are more likely to be sentenced to a longer term of imprisonment, particularly terms of two years or more.³⁶ This finding is consistent with the results of other studies that show shorter terms of imprisonment for Indigenous offenders (Bond, Jeffries and Weatherburn, 2011; Weatherburn and Holmes, 2010).

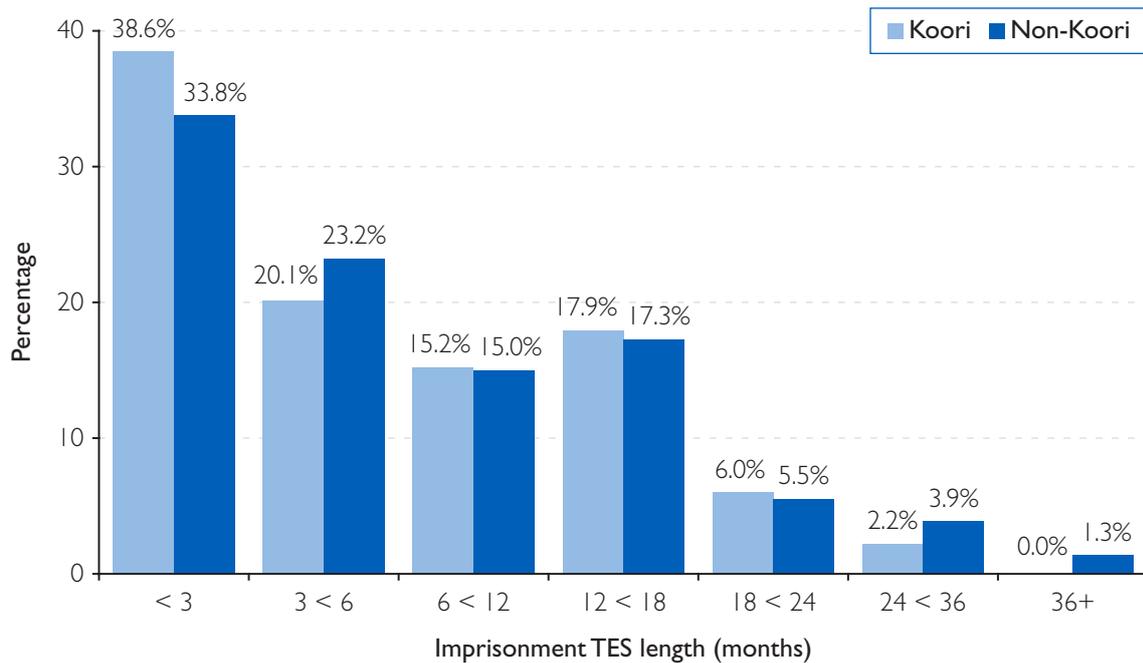
In order to gain a more detailed understanding of any differences between Koori and non-Koori offenders who receive short terms of imprisonment, further data were analysed to examine the profile of offenders who received a sentence of less than three months' imprisonment.

The starkest differences in the principal proven offence for these short-term prisoners were found among three offences: injury offences, traffic offences and justice offences.

³⁵ Analysis of the 33 Koori offenders sentenced in the higher courts during 2010–11 shows that the most common imprisonment term imposed was between five and 10 years, with almost half (46.2%) receiving a term of this length. This was also the most common term imposed for non-Koori offenders, with one in three (29.2%) being sentenced to between five and 10 years in prison. The very small number of Koori offenders, however, means that these results should be interpreted with some caution.

³⁶ The difference in the overall distribution of length of imprisonment terms was not statistically significant, meaning that these differences may have occurred by chance. But further analysis was undertaken to examine whether this finding remained once other factors were taken into account. The results of this further multiple regression analysis are described in the following pages. Thus the findings of the regression analysis should be seen as more refined than the findings of the initial Chi square statistical test.

Figure 13: Total effective term of imprisonment at index episode, Magistrates' Court, 2010–11



Short-term Koori prisoners were far more likely than short-term non-Koori prisoners to have a principal proven offence involving injury (19.7% compared with 11.9%), most commonly unlawful assault or recklessly causing injury. Koori prisoners were also more likely to have a justice offence as their principal proven offence (21.1% compared with 5.6% for non-Koori prisoners), typically contravening a family violence intervention order or failing to answer bail.

Conversely, non-Koori prisoners on terms of less than three months were far more likely to have a traffic offence as a principal proven offence (23.7% for short-term non-Koori prisoners, compared with 5.6% for short-term Koori prisoners), most commonly driving while suspended or disqualified.

For both Koori and non-Koori offenders, the vast majority of offenders had a prior sentence (97% of Koori offenders and 96% of non-Koori offenders), with 15% of Koori offenders and 13% of non-Koori offenders having 10 or more prior sentences. On average, Koori offenders in this group had an average of six prior sentencing episodes, while non-Koori offenders had an average of 5.4 prior sentences. These differences are not statistically significant.

Koori offenders were more likely than non-Koori offenders to have previously been sentenced to imprisonment, a community-based order or a youth justice centre order. Non-Koori offenders were more likely than Koori offenders to receive a wholly suspended sentence, an intensive correction order or a fine.

Although the largest (and the only statistically significant) difference between the two groups was found for prior community-based orders, more than half (52.1%) of the short-term Koori offenders and more than two-thirds (68.1%) of the short-term non-Koori offenders had no recent previous community-based order (in the seven years in which prior offending is measured in the reoffending database).³⁷ Only 8.2% of non-Koori offenders in this group had two or more prior community-based orders, compared with 21.1% of Koori offenders.

Of those people on short sentences of imprisonment who had no recent prior community-based order, the majority had a recent prior imprisonment: 75.7% of Koori offenders and 61.8% of non-Koori offenders had previously been in prison. This history of imprisonment may have played some part in the offenders receiving a short term of imprisonment for the current offence.

³⁷ Given that the database only begins with data from July 2004, it is possible that some offenders did have prior community-based orders imposed earlier than July 2004, but these were not captured in this analysis.

Thus Koori offenders sentenced to a term of imprisonment of less than three months were significantly more likely than non-Koori offenders to have a previous community-based order, and to have more previous community-based orders.

The difference between Koori and non-Koori offenders was not statistically significant for prior episodes of imprisonment, with both groups having low proportions with no previous imprisonment terms (35.2% for Koori offenders and 40.6% for non-Koori offenders). Compared with all people sentenced in the Magistrates' Court during 2010–11 who had no prior imprisonment sentences (63.1% of Koori offenders and 74.7% of non-Koori offenders, as seen in Figure 10 above), the proportion of people with no prior imprisonments in this short-term group is far lower.

The larger proportion of Koori people in the short terms of imprisonment group may also be indicative of differences in remand practices. That is, it is possible that Koori people are less likely to be bailed and more likely to be remanded in custody. Members of the Council's Reference Group suggested that the prominence of Koori people in the short terms of imprisonment group may be due to Koori people being more likely to have served time on remand, and therefore to be sentenced to a term of imprisonment of the same length as the time that they have already served.

Further analysis of this issue has shown that Koori offenders are somewhat more likely to be in prison on remand than all offenders, although the difference is small enough that it is unlikely to be a major driver of differences in the lengths of imprisonment terms. According to the quarterly prisoner data released by the Australian Bureau of Statistics, in the June quarter 2012, one-fifth (20.0%) of the total prisoner population in Victoria was on remand, while 23.0% of Koori prisoners were on remand (Australian Bureau of Statistics, 2012d, pp. 18, 25). These data need to be interpreted with caution as there are no comparable data available for *non-Koori* prisoners separately: the comparison group comprises *all* prisoners.

In order to test whether Indigenous status is statistically significantly related to the length of imprisonment terms, the Council once again used multivariate analysis to examine the relationship between sentence length (above or below the median sentence length) and the same factors that were used in the multivariate analysis of sentence type.

When the full multivariate model is used (shown in detail in Appendix B), there is no statistically significant relationship between Indigenous status and the length of the imprisonment term. That is, there are no meaningful differences in sentence length between Koori and non-Koori offenders – the differences could have occurred by chance. Instead, the strongest predictor of the length of the imprisonment term is having a prior sentencing episode, which doubles the likelihood of receiving a term below the median.³⁸ While the previous multivariate analysis shows that people who have prior sentencing episodes are six times more likely to receive a custodial sentence, this analysis shows that, when they do, the sentence is more likely to be below the median. The impact of prior sentencing is thus greater on the decision to incarcerate.

The next strongest effect on sentence length is found for current offence profile: people who are sentenced for an offence against the person are almost 60% less likely to receive a term below the median. Thus while people sentenced for an offence against the person are slightly less likely to receive a custodial sentence, when they are sentenced to custody, the term is likely to be longer.

People aged less than 25 years are about 50% more likely to receive a sentence below the median than people aged 25 and over, while women are almost 30% more likely to receive a shorter term. The two multivariate analyses combined show that women and younger offenders are both less likely to receive a custodial term and, when they are imprisoned, more likely to receive a shorter sentence.

³⁸ Given the very large effect of prior sentencing episodes on the decision to incarcerate (people having prior sentences being six times more likely to receive a custodial sentence), it is possible that the gravity of the current offence is not as great for those people who have priors compared with those who do not have priors. If this were the case, we would expect that people with prior sentences would be more likely to receive a shorter term for the less serious current offence. While this is a viable hypothesis to explain the results of the multivariate analysis, it is beyond the scope of the current report to examine this thesis in detail.

When considering all the available relevant factors in predicting sentence type and sentence length, the Council's analysis of its reoffending database shows that Koori people are statistically significantly more likely to receive a custodial sentence in the Magistrates' Court than non-Koori people, but that there is no difference in the length of the term that they receive.

Given the higher rates of prior sentencing episodes among Koori offenders (shown in Figures 9 and 10), it is perhaps counterintuitive that there is no statistically significant difference between Koori and non-Koori offenders in the length of imprisonment terms. It is possible that differences in offending profiles contribute to this finding. Figures 7 and 8 show statistically significant differences in the distribution of offence types for Koori and non-Koori offenders. Differences in offending profiles may offset differences in criminal history profiles, such that Koori offenders do not receive longer terms of imprisonment, despite having more extensive prior histories.

Reference Group participants also noted the possibility that sentencers are being left with few options for Koori offenders who have long criminal histories, often with unsuccessful community orders or breaches of parole. Analysis of offenders receiving terms of imprisonment of less than three months showed that short-term Koori prisoners were more likely to have had multiple prior community-based orders. Unsuccessful completion of such orders increases the chances of imprisonment, even if only for a short period, as sentencers escalate outcomes up the sentencing hierarchy. In addition, a short imprisonment term may be imposed in recognition of the possibility that longer terms can disrupt stable accommodation, thus risking a key protective factor in reducing the likelihood of reoffending.

As sentencers run out of options for repeat Koori offenders, it is possible that they seek alternative options that can address the problem of unsuccessful mainstream community orders. One such option is to adjourn the matter. Koori offenders may be more likely to have their sentences adjourned while they undertake treatment or intervention programs. An adjourned sentence delays the sentencing decision, acting to offer offenders the opportunity to address the factors that led to their offending. Successful completion of programs may then result in a shorter sentence being imposed. If Koori offenders are experiencing more adjournments of sentence, once again the longer criminal histories are possibly being offset as they subsequently receive shorter terms.

Use of adjournments for Koori offenders may reflect a greater awareness among sentencers of both the difficulties faced by Koori offenders in completing community orders and the general disadvantage that may lead Koori offenders to criminal behaviour in the first place. Members of the Council's Reference Group proposed that sentencers have become more aware in recent years of the disadvantage faced by Koori communities and of the need to take this disadvantage into account at sentencing. Professional development programs such as those provided by the Judicial College of Victoria and the courts themselves, the implementation and promotion of the various Koori Courts³⁹ and key court decisions⁴⁰ have all created a heightened awareness of the role of disadvantage in offending for Koori offenders. It may be that the disadvantage with which Koori offenders present serves to counteract the effect of longer criminal histories, resulting in no significant difference in the length of imprisonment terms between Koori and non-Koori offenders.

Although the Council's data do not include broader measures of disadvantage, it is likely that the observed differences in prior sentencing reflect the social, personal and economic disadvantage that is more commonly found among Indigenous populations.

The following section uses data from the Victorian Intervention Screening Assessment Tool (VISAT) to illustrate differences in several measures of disadvantage among offenders in Victoria's prisons.

³⁹ Koori Court Divisions now exist in the Victorian Children's Court, the Magistrates' Court and the County Court.

⁴⁰ *R v Fuller-Cust* (2002) 6 VR 496; *Director of Public Prosecutions v Terrick* (2009) 197 A Crim R 474.



Social, personal and economic disadvantage

This section provides a brief analysis of data on offenders' social, personal and economic needs and their levels of risk, as assessed by Corrections Victoria. The purpose of this analysis is to provide greater insight into the complex circumstances with which prisoners – especially Koori prisoners – present when they enter the corrections system.

Victorian Intervention Screening Assessment Tool

The Victorian Intervention Screening Assessment Tool (VISAT) is a tool employed by Corrections Victoria at the beginning of a prisoner's sentence. It is an individually administered risk assessment tool that is designed to measure both the risk of general reoffending and the person's offence-related treatment needs. The tool is used for both male and female offenders aged 18 years and over.

The purpose of the VISAT is to ensure that the goals and strategies developed for each person are suitable to the level of risk and are appropriate for the person's learning style and ability.

The VISAT contains a number of modules that cover diverse areas of social, personal and economic circumstances. There are specific modules that ask prisoners about their current offence and their criminal history, including information on violent and sexual offending, and others that ask about substance use, social integration, education and vocational experience, family relationships and whether there are any physical or mental health issues.

The data used in this analysis are indicative only. A single year of data (July 2010 to June 2011) has been analysed with the purpose of highlighting the high levels of complex needs and disadvantage among Koori people in Victorian prisons.

During this year, a total of 3,273 valid VISAT assessments were completed. Within that figure, 222 assessments identified the prisoner as a Koori person and 3,023 identified the prisoner as a non-Koori person.⁴¹ Although the number of women in the sample was small, there was a higher proportion of Koori women (24 women, or 10.8% of all Koori prisoners) than non-Koori women (216 women, or 7.1% of all non-Koori prisoners).

⁴¹ The data presented in this section reflect the number of VISAT assessments made, not the number of distinct individuals. As people may have entered prison more than once during 2010–11, there may be some degree of double-counting. Although the discussion in this section is presented, for ease of reading, in terms of the number of people, it should be understood that the data actually reflect the number of assessments made.

Substance use

Measures

The VISAT measures both alcohol and drug use. The measure of alcohol treatment need is comprised of questions about the frequency of alcohol use, the frequency of excessive alcohol use, blacking out after drinking, illnesses related to drinking, others' concerns about the drinking and whether anyone has been injured as a result of the alcohol use.

Drug use is measured with two separate scales: a measure of drug-related harm and a measure of drug treatment need.

VISAT measures drug-related harm by asking about injecting drugs, sharing a syringe, overdosing and the presence of blood-borne diseases such as hepatitis C.

VISAT measures drug treatment need by asking about the number of different drugs used, the frequency of use, whether the offending is related to drug use and whether there is drug dependence.

Both measures are scored on a scale, with people being classified as low need, moderate need or high need.

Levels of substance use

The following graphs (Figures 14, 15 and 16) compare scores on the alcohol treatment scales and on the drug harm and drug treatment scales for Koori and non-Koori prisoners.

For all three measures, Koori prisoners are more likely to be found in the high need group than non-Koori prisoners. The difference is most prominent in the first of the three graphs, with more than double the proportion of Koori offenders than non-Koori offenders in the high need group for alcohol treatment. The differences in all three graphs are statistically significant with Koori prisoners being statistically significantly more likely to be in the high need group (that is, these differences are unlikely to have happened by chance). The difference is statistically greatest for the alcohol treatment score.

The prominence of Koori people in the high need group for alcohol treatment has significant implications for the criminal justice system. Members of the Council's Reference Group noted the impact of foetal alcohol syndrome disorder among Koori communities, and the difficulties of sentencing people whose ongoing alcohol abuse has led to cognitive impairment, a lack of executive functioning and an absence of consequential thinking. Under these circumstances, tailoring an appropriate sentence becomes especially problematic.

A higher prevalence of substance abuse is common among prisoner populations. For example, data from the 2009 New South Wales Inmate Health Survey found much higher rates of risky alcohol consumption and use of illicit drugs than in the general community (for example, 84% of inmates had used illicit drugs, compared with 38% in the general community). More broadly, the survey found that prisoners were more likely to report both physical and mental health problems, such as heart problems, disability, head injury, depression, attempted suicide and self-harm (Indig et al., 2010, pp. 16–17).

Differential involvement in drug and alcohol use and abuse may be a key factor underlying differential involvement of Indigenous offenders in the criminal justice system. Substance abuse has been shown to be strongly related to involvement in criminal behaviour. The work of Weatherburn, Snowball and Hunter (2006) showed that substance abuse – both illicit drugs and alcohol – were both strong predictors of the likelihood of having been imprisoned in the previous five years.

Cunneen (2005–2006) notes that the Race Discrimination Commissioner (1995) argued that there is indeed a direct link between alcoholism and unemployment, poverty, lack of education and high rates of imprisonment. However, he also points out that it is not alcohol use per se that is the problem: the 1995 report showed that the proportion of Indigenous people who did not consume alcohol (32%) was twice as large as the proportion of non-Indigenous people who abstained (16%). Instead, the problem lies in the proportion of Indigenous people who drink at harmful levels, with the 1995 report showing that 22% of Indigenous people and 10% of non-Indigenous people abuse alcohol. Such harmful drinking behaviour was found to start at an earlier age among the Indigenous population (Race Discrimination Commissioner, 1995, p. 12: cited in Cunneen, 2005–2006, p. 338).

This is particularly problematic among Indigenous women: not only does substance abuse compromise a mother's health and therefore parenting capacity, but it also leads to behavioural and cognitive deficits among children (Steering Committee for the Review of Government Service Provision, 2011).

Recent research has highlighted the over-representation of people, both offenders and victims, with mental health disorders and cognitive disability in the criminal justice system. Indigenous people in particular are even more over-represented in the justice system, especially in prisons. Baldry, Dowse and Clarence (2012) questioned why such vulnerable people are so concentrated in a system designed primarily for punishment when Australia has sophisticated health and support systems. To answer this question, the authors examined the pathways into the criminal justice system of more than 2,700 prisoners with mental health disorders and cognitive disability in New South Wales. They found that people with complex cognitive disability (that is, comorbidity) were significantly more likely to have been clients of juvenile justice, to have had earlier contact with police, to report more police episodes and to have experienced more episodes in prison. People with complex needs were significantly more likely to have more offences, convictions and imprisonments both as juveniles and adults, to have poor educational attainment and to have experienced homelessness (Baldry, Dowse and Clarence, 2012, pp. 14–15).

Figure 14: Alcohol treatment score, Victorian prisoners, 2010–11

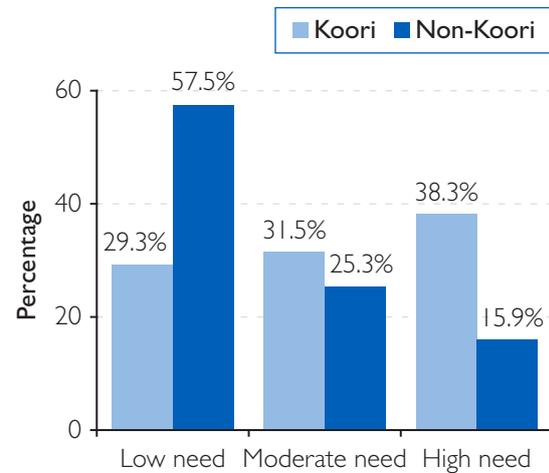


Figure 15: Drug harm score, Victorian prisoners, 2010–11

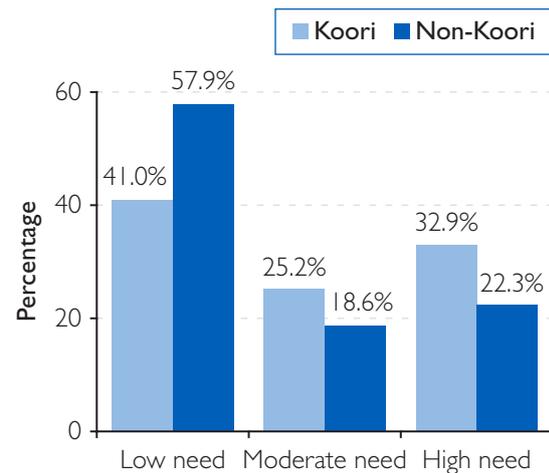
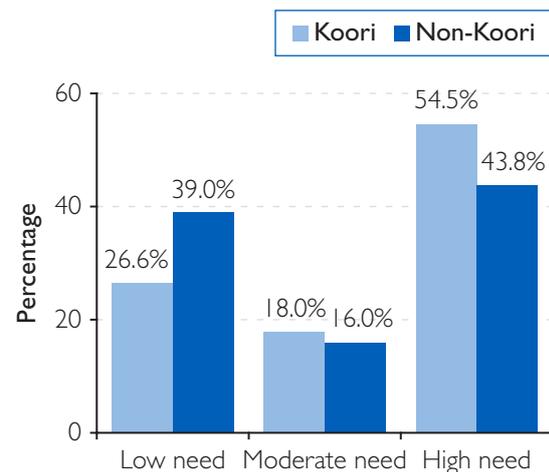


Figure 16: Drug treatment score, Victorian prisoners, 2010–11



Of particular note from this research is that fully 91% of the Indigenous group identified as having mental health disorders and cognitive disability, most of whom had complex needs (Baldry, Dowse and Clarence, 2012, p. 14).

In response to the initial question that they posed, Baldry, Dowse and Clarence theorise about why such vulnerable people are so concentrated in the criminal justice system. They suggest (Baldry, Dowse and Clarence, 2012, p. 15) that:

many in these groups with complex needs become locked, early in their lives, into cycling around in a liminal, marginalised community/criminal justice space, a space that is neither fully in the community [nor] fully in the prison. They do not fall through cracks, they are directed into the criminal justice conveyor belt.

The high level of substance abuse seen among Koori prisoners therefore has profound implications for their ongoing movement in a 'marginalised community/criminal justice space'. This would seem to be a critical factor in helping to understand the observed differences in sentencing outcomes for Koori offenders. Indeed, the National Indigenous Drug and Alcohol Committee of the Australian National Council on Drugs has identified greater investment in drug and alcohol treatment outside prison as a primary way of reducing the increasing number of Indigenous people in prisons. Diverting Indigenous people away from prison and into residential rehabilitation services was estimated to save approximately \$111,000 per offender per year, leading to financial savings, reductions in recidivism and improvements in health and mortality (Deloitte Access Economics, 2012, p. xi).

The VISAT data therefore go some way in helping to understand this study's findings on differential sentencing outcomes for Koori offenders: as Koori prisoners seem to be more likely than non-Koori offenders to have experienced problems with both drug and alcohol abuse, it is likely that this factor contributes, at least partially, to the observed differences in sentencing outcomes.

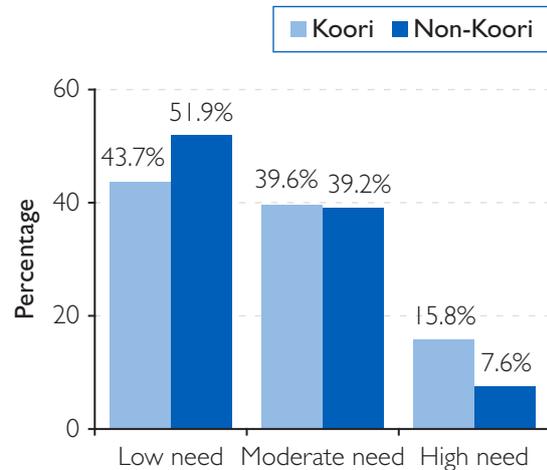
Education and employment

Measures

The VISAT includes a large number of questions on people's educational background and their employment history. The final scale for education and employment covers areas including whether the person has basic language and literacy skills, the number of years of schooling completed, recent employment status and whether there are significant barriers to education and employment.

As with other measures in the tool, this measure is scored on a scale, with people being classified as low need, moderate need or high need.

Figure 17: Education and vocation score, Victorian prisoners, 2010–11



Levels of education and employment

Figure 17 compares scores on the education and employment scale for Koori and non-Koori prisoners. While the proportion of Koori and non-Koori prisoners assessed as moderate need is almost identical, there are statistically significant differences at the high and low ends of this measure. Koori prisoners are twice as likely as non-Koori prisoners to be classified as having high education and employment needs, and are less likely to be classified as having low needs in this area.

The differences among Victorian prisoners reflect differences found in Indigenous populations across Australia. The 2011 Australian population census showed poorer educational and employment outcomes for all Indigenous people compared with the non-Indigenous population (Australian Bureau of Statistics, 2012b).

Census data show that Indigenous people are less likely to have completed high school: one-quarter (25%) of Aboriginal and Torres Strait Islander peoples aged 15 years and over reported Year 12 or equivalent as the highest year of school completed, compared with about half (52%) of non-Indigenous people. Of those who did not complete high school, one-quarter (25%) of Aboriginal and Torres Strait Islander peoples reported their highest year of school completed as Year 9 or below, which was almost double the proportion for non-Indigenous people (13%).

Perhaps partly because of their lower educational attainment, Indigenous people were less likely to be employed than non-Indigenous people. Census data show that about half (51%) of Aboriginal and Torres Strait Islander peoples aged 15 years and over were employed, compared with 64% for non-Indigenous people. When the population is restricted to people aged 15 to 64 years in order to adjust for the larger proportion of older people in the non-Indigenous population (with their lower participation rates), the difference in labour force participation rates between the Indigenous population and the non-Indigenous population increases: 53% of Indigenous people were employed, compared with 76% of non-Indigenous people. Indigenous people were about three times more likely than non-Indigenous people to be unemployed (17% compared with 5%).

Finally, census data also show that Indigenous people have lower incomes than non-Indigenous people. Over half (56%) of the Indigenous population reported a weekly household income of between \$200 and \$799. In contrast, 51% of non-Indigenous people reported a weekly household income at double those levels, between \$400 and \$1,249.

The high levels of educational and vocational need evident among Koori prisoners are thus found more broadly across the Australian Indigenous population as a whole.

Previous contact with the juvenile and adult justice systems

Measures

The VISAT includes a number of questions that identify people's prior experience with the justice system, both as a young offender and as an adult. These measures include the number of prior sentences to a youth training centre, the number of prior imprisonment sentences, the number of prior breaches of parole and the number of prior breaches of a community order.

These measures of previous criminal history provide a more complete picture of prior offending than do the sentencing data for two reasons. First, the VISAT asks about any instance of prior contact, without any time limit. In contrast, the Council's reoffending database can only measure prior sentencing episodes to July 2004, when the database begins. Any sentencing episodes prior to that time simply are not captured in the data. Secondly, the VISAT questionnaire asks about types of offending that are not collected by the courts. In particular, breach behaviour, such as breaching parole or breaching a community order, are not captured in court data unless a person is convicted of a new offence, meaning that the reoffending database does not contain data on such breaches.

While the Council's analysis of VISAT data is restricted only to prisoners, the data nonetheless provide more detailed and extensive information than is available from the Council's sentencing data. The more complete count of all prior episodes of detention and imprisonment is of particular value in understanding sentencing outcomes for Koori prisoners.

Levels of previous contact

The following graphs compare levels of previous contact with the justice system for Koori and non-Koori prisoners, according to each of the four measures.

The first (Figure 18) presents data on the number of times that Koori and non-Koori prisoners have previously been sentenced to a term of detention in a youth training centre, at any time during their offending histories.

Evident in Figure 18 are substantial differences in prisoners' previous experiences of detention in a youth justice centre. Only 21.8% of non-Koori prisoners in 2010–11 have previously been sentenced to detention in a youth training centre, compared with almost half (44.1%) of Koori prisoners. Koori prisoners are more than twice as likely to be found among those who have the most extensive history of detention (10.4% have five or more previous detention sentences, compared with 4.7% of non-Koori prisoners).

These data are reflected across Australia and are seen in the findings of the Australian Institute of Health and Welfare's annual research, showing that Indigenous youth are grossly over-represented in youth detention.

Figure 19, relating to adult imprisonment, presents the number of times that Koori and non-Koori prisoners have been sentenced to a term of imprisonment at any time.

Figure 18: Number of times previously sentenced to a youth training centre, Victorian prisoners, 2010–11

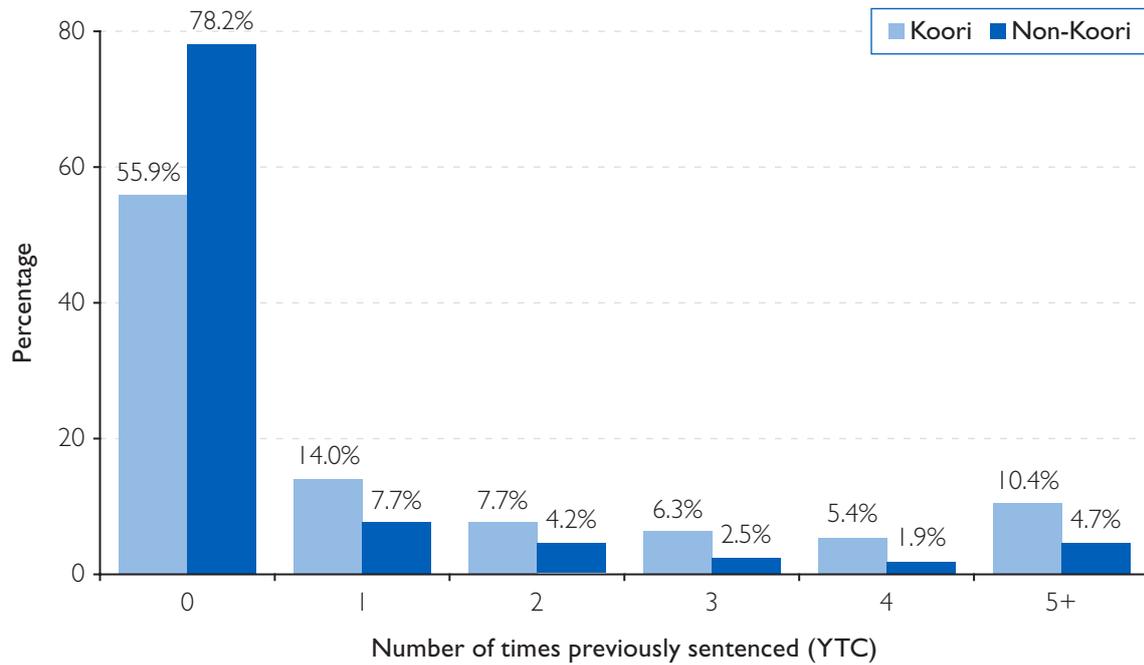
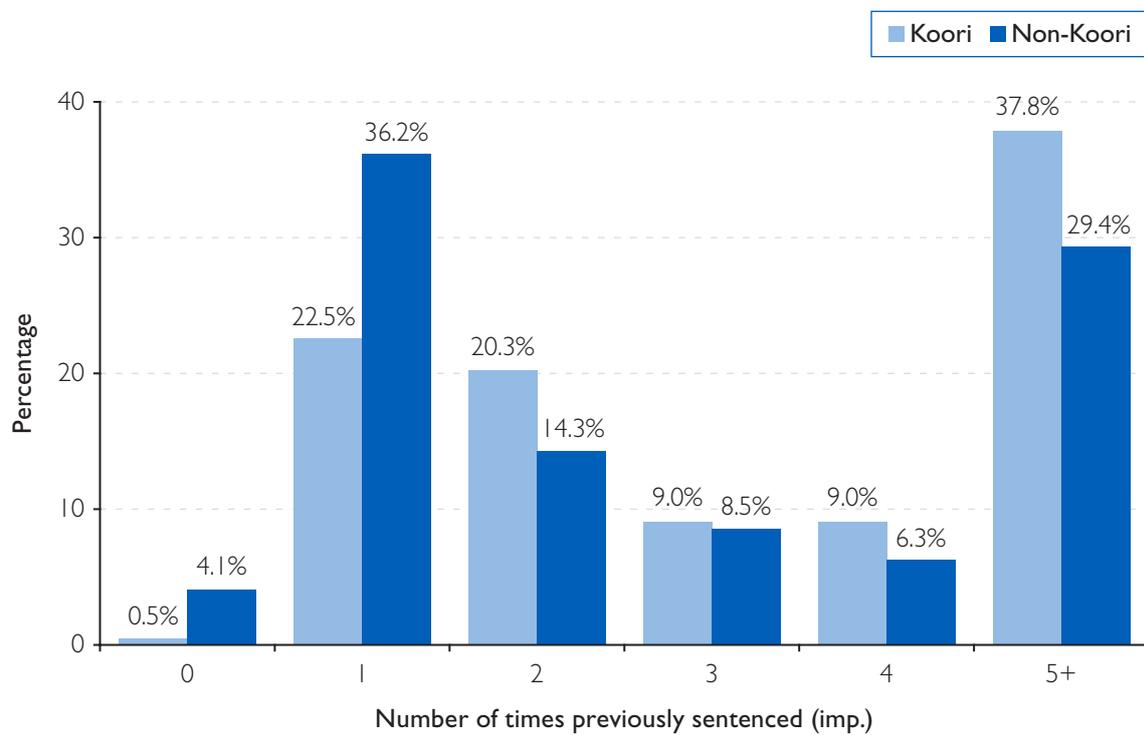


Figure 19: Number of times previously sentenced to imprisonment, Victorian prisoners, 2010–11



The most noticeable features in Figure 19 are the proportions of prisoners who have had five or more previous sentences of imprisonment. Koori prisoners are most commonly found in this group, with 37.8% of all Koori prisoners in 2010–11 having had five or more prior imprisonment sentences. Koori prisoners are more likely than non-Koori prisoners to be in this group: in contrast, non-Koori prisoners have most commonly been sentenced to imprisonment only once previously (36.2%) – a much higher proportion than the 22.5% of Koori prisoners who have only been to prison once before.

The differences between Koori and non-Koori prisoners seen in these data are much starker than those seen in Figure 10, where the primary difference was a higher proportion of non-Koori offenders (74.7%) than Koori offenders (63.1%) having no recent prior episodes of imprisonment.

It is not unexpected that people in prison are likely to have had at least one prior episode of imprisonment. For Koori and non-Koori offenders alike, having previously been in prison increases the risk of future episodes in prison. This is likely to be a function of two different factors: the relevance of prior criminality to sentencing and the potentially criminogenic effect of imprisonment. As Koori offenders in these data are more likely to have more previous episodes of imprisonment, the impact of these priors on sentencing outcomes explains a substantial part of the observed differences in sentencing outcomes (particularly with regard to the length of imprisonment terms, as seen in the results of the regression analysis discussed above).

In addition to highlighting prior episodes of imprisonment, analysis of the VISAT data is also able to highlight differences between Koori and non-Koori prisoners in their history of breaching prior orders. Figure 20 shows the number of times Koori and non-Koori prisoners report having breached adult parole orders, while Figure 21 shows the number of times Koori and non-Koori prisoners report having breached some kind of community order.

Non-Koori prisoners are more likely to report no previous breaches of adult parole (71.2%), while fewer than six in 10 Koori prisoners (59.0%) report having no prior parole breach. The Reference Group noted the difficulties that Koori people often face in complying with the conditions of their parole orders, such as regularly reporting to the supervising community corrections officer or undertaking educational or training programs. It is possible that Koori people are more likely to have a previous breach of parole as they are more likely to have experienced prior episodes in prison. The higher parole breach rates may be a consequence of higher rates of prior imprisonment.

These breaches may help explain at least a small part of the higher rates of prior imprisonments observed in Figure 19 above, as at least some of these breaches may have resulted in parole cancellation and a return to prison. However, the role of parole breaches in subsequent imprisonment for Koori offenders remains unclear.

Figure 20: Number of times previously breached adult parole, Victorian prisoners, 2010–11

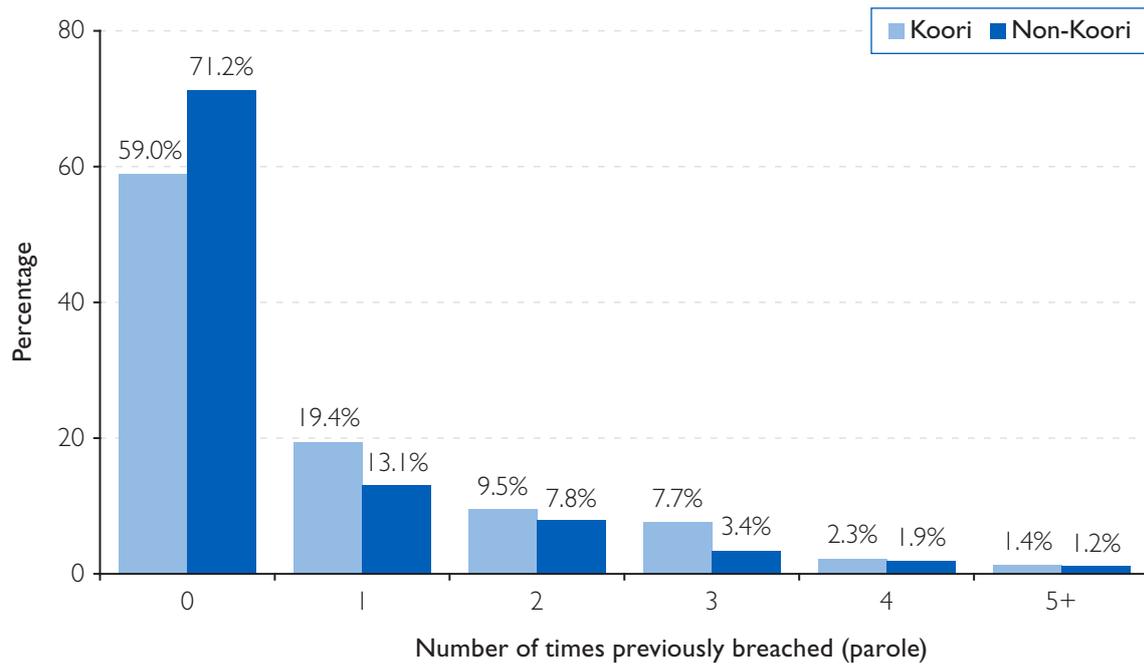
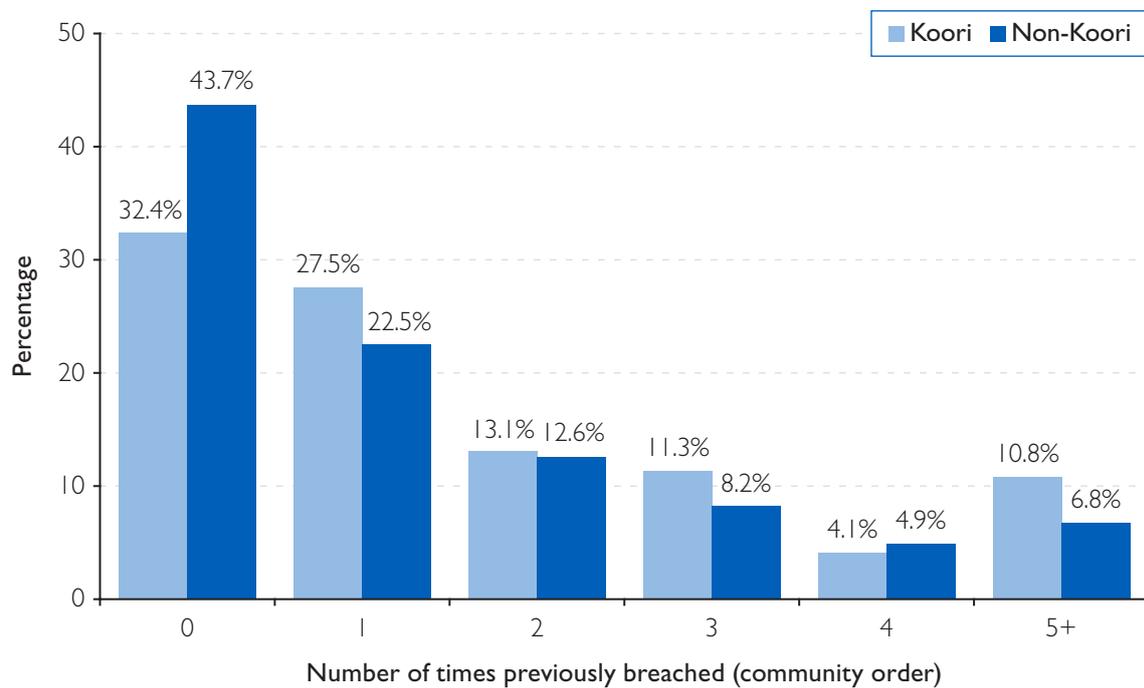


Figure 21: Number of times previously breached a community order, Victorian prisoners, 2010–11



While the Adult Parole Board of Victoria does not present data separately for Koori and non-Koori prisoners, overall the majority of parole cancellations in 2011–12 (552 out of 659) were for breaching conditions rather than for further conviction and sentence (Adult Parole Board of Victoria, 2012, p. 4). Given the complex comorbidities seen among Koori prisoners in the VISAT data and the difficulties faced by Koori people in complying with conditions that the Reference Group members noted, it is likely that a large proportion of the breaches of parole orders seen among Koori prisoners were breaches of conditions rather than breaches by further offending. Parole breaches may thus account for only a small proportion of imprisonment terms among Koori offenders; without relevant data, however, this proposition remains untested.

As is the case with parole breaches, Koori offenders are also more likely to report previous instances of breaching a community order. Among those who have prior breaches, there is a substantial difference in the profiles of people with five or more prior breaches: 6.8% of non-Koori prisoners have breached a community order five times or more, while 10.8% of Koori offenders have an extensive history of breaching community orders.

The higher proportion of breaches among Koori prisoners may reflect a higher proportion of Koori prisoners who have a prior community order.

Although the number of Koori offenders in the VISAT data is small, this difference in prior breaches of community orders may partly explain the differences in sentencing outcomes seen for Koori offenders, as a history of prior breaches may lead to an increased likelihood of imprisonment and/or a longer term of imprisonment for Koori offenders.

General risk of reoffending

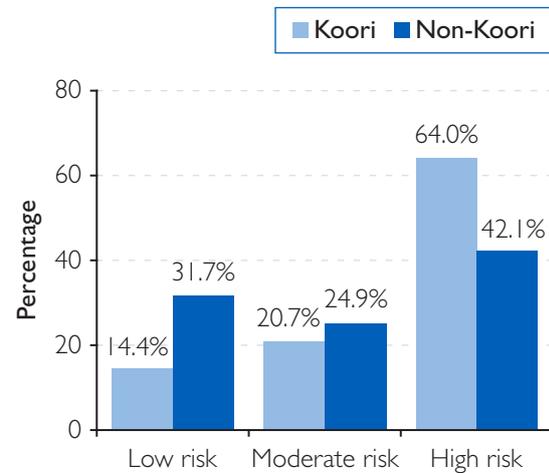
Figure 22: General risk of reoffending, Victorian prisoners, 2010–11

Measures

The VISAT provides a score for each person that represents the general risk of reoffending. This risk level is then considered when developing treatment goals and strategies that are tailored to each individual prisoner. The risk score is based on the assessments made in the various VISAT modules.

Levels of risk of reoffending

Figure 22 compares the general risk of reoffending for Koori and non-Koori prisoners.



Given the data seen in the previous VISAT graphs, it is not surprising that there are statistically significant differences in the distribution of people in the high and low risk groups. While the high risk group is the most common categorisation for both Koori and non-Koori prisoners, Koori prisoners are more likely to be in the high risk group and non-Koori prisoners are more likely to be in the low risk group.

Generally, the risk factors associated with offending (and with reoffending) are similar for Indigenous and non-Indigenous offenders. Thus the higher proportion of Koori prisoners seen in the high risk group in Figure 22 is unlikely to be indicative of greater criminality as such; nor is it likely to be indicative of any systemic racism inherent in the sentencing process. Rather, it seems most likely that differences in the classification of Koori prisoners, and in their sentencing outcomes, are due to the higher prevalence among Koori populations of factors associated with higher rates of offending. In addition to a younger age profile (and therefore higher rates of crime) among the Koori population, Koori people are also more likely to have a complex constellation of factors that, of themselves, are associated with an increased risk of crime. These factors – in particular, a high prevalence of child abuse and neglect, poor school performance, unemployment and widespread substance abuse – have been shown to play a significant role in the onset, seriousness, duration and frequency of involvement in crime. And it is these four factors that are associated with the broader historical disadvantage experienced by Indigenous peoples around Australia.



Discussion

Cunneen has pointed out the limits to which one can rely on data and statistical analysis for understanding complex social situations (Cunneen, 2005–2006, p. 343):

There is also a need to understand the limitations of statistical data in terms of analysing racial discrimination (particularly indirect discrimination) and institutional racism. The phenomenon of institutional racism is much deeper than statistics are likely to reveal, although data may show important trends in access and equity.

This study has attempted to highlight such trends in sentencing outcomes for Koori and non-Koori offenders sentenced in the Magistrates' Court of Victoria. The explanatory model used in this research has been designed to account for complexity both in offending behaviour and in Victoria's criminal justice responses to the criminal behaviour of Indigenous offenders, taking care to acknowledge the contextual differences in levels of disadvantage faced by Indigenous communities and to consider some of the possible explanations for observed differences in sentencing outcomes.

Although this study has examined a variety of relevant factors in measuring sentencing outcomes, there will inevitably be many that cannot be quantified. At its core, this study has only been able to examine data for those offenders who are sentenced in the Magistrates' Court to orders administered by Corrections Victoria; no analysis has been possible for offenders who receive other orders such as fines, wholly suspended sentences or adjourned undertakings or offenders sentenced in the higher courts. The regular collection of reliable data on Indigenous status throughout the criminal justice system as a whole remains a difficult but important issue.

The two primary findings of this research are that, when taking into account all the available relevant factors, Koori people are statistically significantly more likely to receive a custodial sentence in the Magistrates' Court than non-Koori people, but there is no difference in the length of the term that they receive. For both Koori and non-Koori offenders, the strongest predictor of the sentence type and the length of the imprisonment term is whether the person has a prior sentencing episode: people with prior episodes are more likely to receive a custodial sentence but be sentenced to a shorter term of imprisonment. The impact of prior sentencing is thus greater on the decision to incarcerate.

These findings are consistent with the existing body of research in this field.

The causes of over-representation of Koori people in Victoria's prisons are multifaceted and complex. The findings of this report show that the over-representation of Koori people in prisons is partly influenced by an increased likelihood of being given a custodial sentence. While the analysis cannot definitively identify the reasons for this difference, and hence cannot conclusively rule out the possibility of racial discrimination in sentencing, it is feasible that Koori sentencing outcomes are influenced by Koori over-representation in the youth justice system, which in turn is influenced by Koori over-representation in the child welfare system. This, in turn, may be part of the ongoing consequences of the historical disadvantage that began with colonisation, with the economic and social impacts that followed.

But despite the historical disadvantage that separates Koori Victorians from non-Koori Victorians, the nature of the risk factors that lead to offending behaviour is no different for Koori communities. Risk factors for offending among Koori people are the same as they are the world over: being young and male, being of low socio-economic status, having poor education and being unemployed, abusing drugs and alcohol and experiencing poor parenting, often in the form of child abuse and neglect. The risk factors themselves are no different. What is different is that there is a higher prevalence of each of these among Indigenous communities in Australia. As Allard (2010) concludes in research undertaken for the Indigenous Justice Clearinghouse, 'the higher incidence of these risk factors in Indigenous populations may explain much of the high rates of offending' (Allard, 2010, p. 4).

Definitive conclusions about the causes of Indigenous over-representation cannot be obtained through an analysis of sentencing outcomes alone. The complexity of physical and mental health issues with which Koori prisoners present in prison – particularly in terms of alcohol use – suggests that the issue is a broader one, requiring an appreciation of the high levels of disadvantage faced by Koori people across a number of domains.

Appendices

Appendix A – Reference Group members

The Council convened a Reference Group on two occasions – on 20 November 2012 and on 4 February 2013. The group included the following members:

Ann Collins	Magistrate, Magistrates' Court of Victoria
Antoinette Gentile	Deputy Director, Koori Justice Unit, Department of Justice Victoria
Judge Paul Grant	President, Children's Court of Victoria
Sherril Handley	Acting Sergeant, Research and Training Unit, Victoria Police
Shasta Holland	Acting Manager, Forecasting and Statistical Analysis, Corrections Victoria
Chris Michell	Legal Prosecution Specialist – Sentencing, Office of Public Prosecutions
Jelena Popovic	Deputy Chief Magistrate, Magistrates' Court of Victoria
Terrie Stewart	Koori Court Officer, Broadmeadows Koori Court
Gina Squatrito	Senior Adviser, Strategic Projects, Victorian Equal Opportunity and Human Rights Commission
Annette Vickery	Deputy Chief Executive Officer, Victorian Aboriginal Legal Service

Appendix B – technical appendix

Table B1: Logistic regression for sentence type (custodial versus non-custodial)

Predictor	B	Standard error	Wald	Significance	Odds ratio	95% confidence interval	
						Lower	Upper
Indigenous status Koori (1) versus non-Koori (0)	0.456	0.100	20.839	0.000	1.578	1.297	1.919
Gender Male (1) versus female (0)	0.908	0.084	115.577	0.000	2.480	2.102	2.927
Age Less than 25 years (1) versus 25 years and above (0)	-0.790	0.062	162.505	0.000	0.454	0.402	0.512
Current offence profile Person offence (1) versus other type of offence (0)	-0.255	0.055	21.731	0.000	0.775	0.696	0.863
Previous sentencing episode Yes (1) versus no (0)	1.810	0.081	495.155	0.000	6.110	5.209	7.165
Intercept	-3.426	0.124	767.446	0.000	0.033		

Nagelkerke R Square (pseudo R2) = 0.180

Hosmer and Lemeshow Test of significance = 0.078

Table B2: Logistic regression for sentence length (below the median versus at or above the median)

Predictor	B	Standard error	Wald	Significance	Odds ratio	95% confidence interval	
						Lower	Upper
Indigenous status Koori (1) versus non-Koori (0)	0.137	0.160	0.736	0.391	1.147	0.838	1.570
Gender Male (1) versus female (0)	-0.339	0.159	4.567	0.033	0.712	0.522	0.972
Age Less than 25 years (1) versus 25 years and above (0)	0.385	0.117	10.757	0.001	1.469	1.167	1.848
Current offence profile Person offence (1) versus other type of offence (0)	-0.900	0.102	78.098	0.000	0.407	0.333	0.497
Previous sentencing episode Yes (1) versus no (0)	0.784	0.189	17.225	0.000	2.191	1.513	3.173
Intercept	0.020	0.256	0.006	0.937	1.021		

Nagelkerke R Square (pseudo R2) = 0.072

Hosmer and Lemeshow Test of significance = 0.915

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