



sentencing
ADVISORY
COUNCIL

SENTENCING APPEALS IN TASMANIA

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About this Research Paper

This paper provides information about the operation of appeals against sentence for offenders sentenced under the *Sentencing Act 1997* (Tas) from both decisions of magistrates in the Magistrates Court to the Supreme Court (called motions to review), and decisions of single judges in the Supreme Court to the Court of Criminal Appeal (called appeals).

Information on the Sentencing Advisory Council

The Sentencing Advisory Council was established in June 2010 by the Attorney-General and Minister for Justice, the Hon Lara Giddings MP. The Council was established, in part, as an advisory body to the Attorney-General. Its other functions are to bridge the gap between the community, the courts and the government by informing, educating and advising on sentencing issues in Tasmania. At the time that this research paper was concluded, the Council members were Emeritus Professor Arie Freiberg AM (Chair), Mr Scott Tilyard, Mr Peter Dixon, Ms Kim Baumeler, Ms Rochelle Mainwaring, Ms Jill Maxwell, Professor Rob White, Associate Professor Terese Henning, Ms Kate Cuthbertson, Dr Isabelle Bartkowiak-Théron and Ms Linda Mason SC.

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CONTENTS

Glossary.....	v
Executive Summary.....	vii
1 Introduction	1
1.1 Background to this paper.....	1
1.2 Scope of the paper and research questions.....	2
2 Sentencing Appeals in Tasmania	4
2.1 The appeal framework.....	4
2.1.1 Appeals in indictable matters	4
2.1.2 Appeals in summary matters	4
2.2 Legal aid funding for appeals	5
2.3 The principles applicable to sentencing appeals	6
2.3.1 Specific error.....	7
2.3.2 Non-specific error – manifest excess or inadequacy	7
2.3.3 Crown appeals	9
2.3.4 Provision of guidance.....	12
3 Trends in sentence appeals for Supreme Court sentences: Court of Criminal Appeal decisions.....	14
3.1 Number of sentences appealed and success rate	14
3.2 Who initiated the appeals?	16
3.3 Offender appeals against sentence.....	17
3.3.1 Success rates of offender appeals.....	17
3.3.2 Grounds of appeal	20
3.3.3 Offence types	22
3.3.4 Sentence types	22
3.3.5 Changes to sentences in successful offender appeals.....	23
3.4 Crown appeals against sentence	24
3.4.1 Success rates of offender appeals.....	24
3.4.2 Grounds of appeal	25
3.4.3 Offence types of sentences appealed.....	25
3.4.4 Sentence type in sentence appeals	25
3.4.5 Changes to sentences in successful Crown appeals.....	26

4 Trends in sentence appeals from Magistrates Court sentences: Supreme Court decisions.....	28
4.1 Number of sentences appealed and success rate	28
4.2 Who initiated the motions to review?.....	30
4.3 Offender initiated motions to review	31
4.3.1 Success rates of offender appeals.....	31
4.3.2 Grounds of appeal	32
4.3.3 Offence types	32
4.3.4 Sentence types	33
4.3.5 Changes to sentences in successful offender appeals.....	34
4.4 Crown appeals against sentence	35
4.4.1 Success rates of Crown appeals	35
4.4.2 Grounds of appeal	35
4.4.3 Offence types of sentences appealed.....	36
4.4.4 Sentence type in sentence appeals	36
4.4.5 Changes to sentences in successful Crown appeals.....	37
5 Conclusion.....	38
Appendix A: Data sources and methodology	43
Appendix B: List of sentencing appeal decisions 2013–18 relating to sentences imposed 2013–14 to 2016–17.....	45

Glossary

Acquittal: A finding that a person is 'not guilty' on a charge in a criminal case.

Appeal: A review of a decision of a lower court by a higher court. If an appeal is successful, the higher court can change the lower court's decision or send it back to the lower court to reconsider.

Case: A collection of one or more charges against a person finalised at one time.

Charge: A single instance of an offence.

Community service order: The offender is required to carry out community service under the supervision of Community Corrections.

Conviction: A conviction can refer to a finding that an accused is guilty of the offence charged. It can also refer to the recording of a conviction as a sentencing option.

Custodial sentence: A sentence imposed by the court that involves imprisonment. This includes suspended sentences (see below).

Global sentence: One sentence imposed for all offences when an offender is convicted of multiple offences.

Good behaviour bond: This describes a less serious sentencing outcome in which the court releases the offender on the condition that they be of good behaviour for a period of time. Under Tasmanian legislation, this is called an undertaking. If the offender is of good behaviour for that period there is no further punishment.

Imprisonment: This sentence requires the offender to spend time in prison. However, the period of imprisonment may be suspended. The magistrate (Magistrates Court) or judge (Supreme Court) also determines whether or not the offender will be allowed to apply for parole. If there is a non-parole period, after that period has expired the offender will be eligible to apply to be paroled to serve the remainder of their sentence under supervision in the community. If no non-parole period is set, the offender will not be eligible to apply for parole.

Non-custodial sentence: A sentence imposed by the court that does not involve imprisonment.

Non-parole period: The part of a prison sentence during which a prisoner cannot be released on parole.

Order: The command or direction by a court or tribunal.

Parole: The conditional release of a prisoner before the end of the sentence of imprisonment imposed by the court.

Partially suspended sentence: A suspended sentence where a person serves part of the imprisonment term immediately and then is released with the remaining part of the sentence suspended as long as the offender does not offend again within a given period and complies with any other conditions of the order.

Probation order: The offender is required to undergo supervision by a Probation Officer. This may include a variety of activities to reduce their risk of reoffending.

Sentence: The penalty imposed by the court on a person found guilty of an offence.

Suspended sentence: A sentence of imprisonment that is imposed on a person, but the person is not required to serve all or part of the period of imprisonment as long as the offender does not offend again within a given period and complies with any other conditions of the order.

Wholly suspended sentence: A suspended sentence where a person is not required to serve any of the period of imprisonment as long as the offender does not offend again within a given period and complies with any other conditions of the order.

EXECUTIVE SUMMARY

Background

An appeal is a review of the finding of a lower court by a higher court. An appeal may be made against:

- a finding in relation to a person's criminal responsibility; ie an appeal against a conviction (by the offender if the offender is found guilty) or an acquittal (by the Crown if the offender is found not guilty); or
- the penalty imposed on the person found guilty of an offence; ie an appeal against sentence.

This Research Paper deals only with appeals against sentence. It provides an overview of the appeal framework in Tasmania applicable to appeals against sentence for Supreme Court and Magistrates Court matters. This overview includes the basis of appellate review for appeals from both offenders and the Crown and an outline of Court of Criminal Appeal authority in relation to the principles that apply to sentencing appeals

Appeals against sentence provide the mechanism for reviewing sentences in the criminal justice system. They allow errors in sentencing in a particular case to be corrected and, more broadly, can

also provide guidance on sentencing by setting out the relevant principles.

The Court of Criminal Appeal is the existing and effective forum for reviewing sentences in Tasmania from decisions of the Supreme Court. Currently, it is performing this role in the context of legislative steps to both increase penalties for particular offences and to introduce mandatory minimum sentencing.¹

A key role of the Court of Criminal Appeal is to provide guidance to lower courts in relation to sentencing, and research conducted by the Council has observed that there had been indications from the Court that heavier sentences were required for driving offences causing death, including manslaughter offences² and sexual offences involving children.³ Similarly, in recent years the Court of Criminal Appeal has considered the principles to be applied to sentencing for other offence types, including domestic violence offences and drug offences.⁴

However, there have been questions raised about the operation of the Court of Criminal Appeal in the context of offender appeals. In particular, it has been suggested that the structure of the Court of Criminal Appeal 'invited apprehension' from offenders about the

¹ Tasmanian Sentencing Advisory Council ('TSAC'), *Mandatory Sentencing for Serious Sex Offences Against Children* (Final Report No 7, 2016).

² TSAC, *Sentencing of Driving Offences that Result in Death or Injury* (Final Report No 8, 2017).

³ See TSAC, *Sentencing for Serious Sex Offences Against Children* (Research Paper No 3, 2018).

⁴ See [2.3.4].

possibility of success of appeals and that there is a low rate of allowed appeals in Tasmania.⁵ In *Hodgetts v State of Tasmania*,⁶ Wood J observed that:

It may be interesting for some scholarly work to explore any differences in rates of successful outcomes between jurisdictions to see whether they are tied to the structure of the courts or other considerations, such as statutory provisions which operate as a filter on appeals, the percentage of appeals in each jurisdiction that assert specific error as opposed to the high threshold test of manifest excess or inadequacy, or practical considerations such as the availability of legal aid and the number of unrepresented appellants who pursue appeals in the respective jurisdictions.⁷

While the Court of Criminal Appeal (for appeals from the Supreme Court) and the Supreme Court (for motions to review from the Magistrates Court) are crucial components of the Tasmanian criminal system, there is little research that has examined the operation of appeals against sentence in Tasmania.

This Research Paper provides an empirical analysis of appeals against sentence in Tasmania. It provides an overview of the appeal framework in Tasmania applicable to appeals against sentence for Supreme Court and Magistrates Court matters. It includes the basis of appellate review for offender and Crown appeals as well as an outline of Court of Criminal Appeal authority in relation to the principles that apply to sentencing appeals. It draws on the methodology and research questions

from previous research conducted by the Sentencing Advisory Council, Victoria ('VSAC')⁸ and answers the following questions:

- What proportion of cases sentenced in the Supreme Court and Magistrates Court in the index years resulted in an appeal against sentence finalised during the reference period?
- What proportion of appeals were initiated by the offender or the Crown?
- What proportion of appeals against sentence finalised during the reference period were allowed or dismissed?
- What were the grounds of appeal?
- What original sentence types were most likely to be appealed?
- Which offence types were most likely to be involved in a sentence appeal?
- What was the change made to the original sentence after a successful appeal?

It also compares success rates for appeals against sentence in Tasmania with those in New South Wales and Victoria. Further, it considers the number of offenders in Tasmania who were legally represented in relation to their sentence appeal.

These data only include matters sentenced under the *Sentencing Act 1997* (Tas) and exclude sentences imposed for Commonwealth offences and matters sentenced under the *Youth*

⁵ R Inglis, 'Former Tasmanian DPP Tim Ellis Questions Appeal Court Process', *The Examiner* (Launceston, 29 May 2018).

⁶ [2018] TASSCA 15 ('*Hodgetts*').

⁷ *Ibid* [61].

⁸ VSAC, *Sentence Appeals in Victoria: Second Statistical Research Report* (2018); VSAC, *Sentencing Appeals in Victoria: Statistical Research Report* (2011).

Justices Act 1997 (Tas). They also exclude matters where the appeal involved a sentencing decision in relation to the breach of an order (such as suspended sentence or a probation order). They also do not include appeals in relation to ancillary orders such as sex offender registration or restricted licences.

Key findings

This Research Paper identifies all cases that were originally sentenced in the Supreme Court and the Magistrates Courts from 1 July 2013 to 30 June 2017 (the index years) and identifies the number of those sentences that were appealed and finalised in the period 1 July 2013 to 31 October 2018 (the reference period). Using these data to address the research questions identified above, key findings are as follows:

The proportion of cases sentenced in the Supreme Court and Magistrates Court resulting in an appeal against sentence

- In relation to Supreme Court sentences, there were 68 finalised appeals against sentence in relation to 1114 cases (6.1%).
- In relation to Magistrates Court sentences, there were 61 motions to review sentence (0.15% of defendants proven guilty).

The proportion of appeals were initiated by the offender or the Crown

- In relation to Supreme Court sentences, there were 48 offender appeals (70.6%) and 20 Crown appeals (29.4%).
- In relation to sentences imposed in the Magistrates Court, there were

42 offender appeals (68.9%) and 19 Crown appeals (31.1%).

The proportion of appeals against sentence that were allowed or dismissed

- In relation to Supreme Court sentences, there were 23 successful appeals against sentence, which represented 33.8% of the 68 finalised appeals and 2.1% of the offenders sentenced in the reference period. Crown appeals against sentence were more successful than offender appeals against sentence as 80% of Crown appeals were successful (16 of 20 finalised appeals) compared to 14.6% of offender appeals (seven of 48 appeals).
- In relation to Magistrates Court sentences, there were 31 successful motions to review sentence determined by the Supreme Court which represented 50.8% of finalised motions to review and 0.08% of defendants proven guilty in the reference period.
- Unlike appeals from sentences imposed in the Supreme Court where the success rate of offender appeals against sentence was much lower than the success rate of Crown appeals against sentence, the success rate for offender and Crown appeals against sentences imposed in the Magistrates Court were similar. In relation to sentences imposed in the Magistrates Court, 47.4% of Crown appeals were successful (nine of 19 finalised appeals) and 52.4% of offender appeals were successful (22 of 42 appeals).

Grounds of appeal

- In relation to Supreme Court sentences, nearly all offenders relied on the ground that the sentence was manifestly excessive in the circumstances (95.8% of offenders). There were only two offenders who did not rely on this ground of appeal. An argument that the sentence was manifestly excessive was the only effective ground of appeal in 33 out of 48 offender appeals (68.75%).
- In relation to Crown appeals against sentences imposed in the Supreme Court, in all but one case the only ground of appeal was that the sentence imposed was manifestly inadequate (19 out of 20 cases). This was successful in 16 of the 19 cases where it was raised (84% of cases).
- In relation to Magistrates Court sentences, a majority of offenders relied on the ground that the sentence was manifestly excessive in the circumstances (85.7% of offenders). This was the only effective ground of appeal in 31 out of 42 offender appeals (73.8%). However, it is noted that there were a greater proportion of offenders who did not rely on this ground of appeal (14.3% compared to 4.2% of offenders in relation to sentences imposed in the Supreme Court).
- In relation to Crown appeals against sentences imposed in the Magistrates Court, in all but two cases the only ground of appeal relied on by the Crown was that the sentence imposed as manifestly inadequate (17 out of 19 cases).

Offence types most likely to be involved in a sentence appeal

- In relation to Supreme Court sentences, the most common offences in sentence appeal proceedings (as a proportion of all cases where that offence was the most serious offence type) were homicide offences (19.4%); robbery (9.6%); and sexual offences (8.3%).
- In relation to offender appeals against sentence from a sentence imposed in the Supreme Court, the most common most serious offence types were non-sexual offences against the person and sexual offences (20.8% or 10 out of 48 appeals for both offence types), and drug offences and robbery (14.6% or seven out of 48 appeals for both offence types). In offender sentence appeals that were successful, the most common most serious offence type was robbery (28.6% or two out of seven appeals), followed by homicide and offences involving fraud and dishonestly (25% or one out of four appeals for both offence types), and then sexual offences (20% or two out of 10 appeals).
- In relation to Crown appeals against a sentence imposed in the Supreme Court, the most common most serious offence types in Crown sentence appeals were non-sexual offences against the person (40% or eight out of 20 appeals) and drug offences and robbery (20% or four out of 20 appeals). In Crown sentence appeals that were successful, the most common most serious offence types were robbery (four out of four appeals), sexual offences (two out of two appeals) and offences involving fraud and dishonestly (one out of one appeal).

- In relation to motions to review sentences initiated by offenders, the most common most serious offence type was the category of traffic offences (19 cases). There were six cases where the most serious offence was an act intended to cause injury.
- In relation to Crown initiated motions to review sentences imposed in the Magistrates Court, the most common most serious offence type in Crown sentence appeals was the category of acts intended to cause injury (typically assault) in 10 out of 19 appeals (52.6%) followed by traffic offences in six out of 16 appeals (31.6%).

Change to original sentence after a successful appeal

- In relation to Supreme Court sentences, most of the sentences appealed by offenders were immediate terms of imprisonment (79% or 38 of 48 offender appeals). In five of the successful offender sentence appeals involving sentences of immediate imprisonment, none resulted in the offender being resentenced to a different sentence type (such as a suspended sentence or a non-custodial sentence). In three cases the non-parole period was varied, and in two cases the head sentence was also reduced. In the remaining two cases the appeal was allowed but the sentence imposed by the sentencing judge was unaltered, except that imprisonment commenced one day earlier.
- In relation to Crown appeals against sentences imposed in the Supreme Court, as with offender appeals, the most common sentence type that was the subject of a sentence appeal by the Crown was a sentence of an immediate term of imprisonment (55% or 11 of 20 Crown appeals). In relation to successful Crown sentence appeals there were seven cases where the sentence type was changed (44%), and in appeals involving immediate sentences of imprisonment there were significant increases in the sentence imposed.
- In relation to Magistrates Court sentences, most of the sentences appealed by offenders involved a sentence of imprisonment that was to be served immediately — either as a sentence of full-time imprisonment (15 cases) or as partially suspended sentence (14 cases).
- In relation to Crown appeals against sentences imposed in the Magistrates Court, the most common sentence types that were the subject of a sentence appeal by the Crown were an adjourned undertaking without recording a conviction under the *Sentencing Act 1997* (Tas) s 7(f) and wholly suspended sentences. These were the original sentence types imposed that were the subject of a Crown appeal in five cases each. However, none of these appeals in relation to adjourned undertakings were successful and two of the appeals in relation to wholly suspended sentences were successful.

Legal representation

- In relation to appeals heard in the Court of Criminal Appeal, there were 12 out of 48 offenders who were unrepresented in relation to their

sentence appeal (25%). All of these appeals were unsuccessful.

- In relation to offender appeals from the Magistrates Court to the Supreme Court, a higher proportion of offenders were represented by counsel at the hearing of the appeal. There were only five offenders (11.9%) who were not represented, and in one of those cases the notice of appeal and papers were prepared by counsel.

Jurisdictional comparison

- There were proportionately more appeals against sentence in Victoria than in Tasmania. In relation to sentences imposed in the Supreme Court of Tasmania, as noted, there were 68 finalised appeals against sentence in relation to 1114 cases (6.1%). In Victoria, of the 1910 cases sentenced in the higher courts in 2013–14, there were 183 appeals against sentence (9.5%).
- There were more Crown appeals and fewer offender appeals against sentence as a proportion of appeals in Tasmania as compared to Victoria. In relation to appeals heard by the Tasmanian Court of Criminal Appeal, there were 48 offender appeals (70.6%) and 20 Crown appeals (29.4%). In Victoria, there were 153 offender appeals in relation to sentence (86.9%) and 23 Crown appeals in relation to sentence (13.1%).
- Success rates for appeals were similar in Tasmania and Victoria. In Tasmania, there were 23 successful appeals against sentence, which represented 33.8% of the 68 finalised appeals. In Victoria, there were 60 successful appeals against

sentence, which represented 32.8% of the appeals.

- Offender appeals against sentence were less successful than Crown appeals against sentence in both Tasmania and Victoria. In Tasmania, 80% of Crown appeals against sentence heard by the Court of Criminal Appeal were successful compared to 14.6% of offender appeals. In Victoria, 69.6% of Crown appeals against sentences imposed by higher courts in 2013–14 were successful compared to 28% of offender appeals.
- Offender appeals against sentence were less successful in Tasmania than in Victoria or New South Wales. In Tasmania, of the 48 offender appeals against sentence, only 14.6% of appeals were successful (seven of 48 finalised appeals). This can be contrasted with research in Victoria, which found that 28.8% of offender appeals against sentence for sentences imposed in the higher courts in 2013–14 were ultimately successful (44 cases out of 153 cases). In 2016, in New South Wales there were 176 applications for leave to appeal against sentence and 59 of these were successful (33.3%).
- Crown appeals against sentence were more successful in Tasmania than in Victoria. In Tasmania, Crown appeals were successful in 80% of cases (16 of 20 finalised appeals). In Victoria, Crown appeals were successful in 69.6% of cases (16 of 23 appeals).

The Council has considered the reasons for the disparity in the success rate of offender sentence appeals in the Court

of Criminal Appeal and makes the following observations:

- Fewer judges in Tasmania may have resulted in a greater degree of consistency in sentencing than in other states. A smaller judiciary has been identified in judicial comments as a factor relevant to consistency of sentencing.⁹ Further, research conducted by the Tasmania Law Reform Institute in 2008, which examined sentences imposed by judges for the most frequent offences of robbery and assault, did not find any statistically significant differences in sentencing patterns for Supreme Court judges in Tasmania.¹⁰
- Differences in legislation that provide for appeal as a right (as in Tasmania) and the need for leave to appeal (Victoria and New South Wales) would not appear to provide an explanation for the difference as VSAC and NSW Judicial Commission figures reflect successful leave applications that led to successful appeals against sentence.
- While the number of unrepresented appellants who pursue sentencing appeals in other jurisdictions is not known, in Tasmania, the Council's analysis of appeals finalised by the Court of Criminal Appeal found that there were 12 out of 48 offenders who were unrepresented in relation to their sentence appeal (25%). All of these appeals were unsuccessful. Legal Aid is only granted to initiate an appeal against sentence if there is a reasonable prospect of success, and the prospect of a substantial reduction in sentence or a substantial advantage to the accused. While it is not known if any of the unrepresented defendants had applied for aid, it is plausible that a reason why at least some of these offenders were not represented on appeal was because the basis of the appeal did not meet the criteria for the grant of aid based on the prospects of success of their appeal. In Tasmania, there is no threshold test for initiating an appeal against sentence. It is noted that if unrepresented defendants are excluded from a consideration of the success rate of offender appeals, then the success rate for offender initiated appeals is 19.5% (seven out of 36 finalised appeals).
- In Tasmania, offenders predominately rely on manifest excess rather than a specific error made by the sentencing judge. It was raised in 46 out of 48 sentencing appeals (96%). Although caution must be taken in comparing research given the small number of cases involved, an analysis of offender sentence appeals in Victoria from 2010 found that manifest excess was raised in 82.4% of offender appeals.
- Sentences of imprisonment in Tasmania are generally shorter than those imposed in Victoria and New South Wales.
- Sentencing legislation in Tasmania has traditionally been less complex than sentencing legislation in comparable jurisdictions (and so gives rise to fewer appealable errors). For example, as a general

⁹ See *Wong v The Queen* (2001) 207 CLR 584 ('Wong').

¹⁰ Tasmania Law Reform Institute ('TLRI'), *Sentencing* (Final Report No 11, 2008) 22.

rule, Tasmanian legislation has not, to date, sought to restrict judicial discretion through the use of mandatory sentencing, mandatory minimum non-parole periods, standard non-parole periods or statutory lists of aggravating and mitigating factors. Further, in Tasmania it is the practice of the court to impose a global sentence rather than individual sentences for each offence (where an offender is sentenced for multiple counts) and this limits arguments to be made on the basis that one particular sentence was erroneous or that an

error was made in relation to cumulation or concurrency of sentences.

- Judges have ready access to information about sentences imposed for particular offences (including access to the comments on passing sentence) via an online database used by judges. This allows comparable sentences to be readily identified given the small number of sentences imposed in Tasmania.

1 INTRODUCTION

1.1 Background to this paper

Appeals against sentence provide the mechanism for reviewing sentences in the criminal justice system both in terms of correcting errors in sentencing in a particular case and also by providing guidance more broadly on sentencing by setting out sentencing principles.

The Court of Criminal Appeal is the existing and effective forum for reviewing sentences in Tasmania from decisions of the Supreme Court. Currently, it is performing this role in the context of legislative steps to both increase penalties for particular offences and to introduce mandatory minimum sentencing.¹¹ A key role of the Court of Criminal Appeal is to provide guidance to lower courts in relation to sentencing and research previously undertaken by the Council has observed that there had been indications from the Court that heavier sentences were required for driving offences causing death, including manslaughter offences,¹² and sexual offences involving children, as well as statements of principle to apply in these cases.¹³ Similarly, in recent years, the Court of Criminal Appeal has considered the principles that apply to sentencing in the context of other offences such as domestic violence offences and drug offences.¹⁴

However, there have been questions raised about the operation of the Court of Criminal Appeal in the context of offender appeals. In particular, it has been suggested that the structure of the Court of Criminal Appeal ‘invited apprehension’ from offenders about the possibility of success of appeals and that there is a low rate of allowed appeals in Tasmania.¹⁵ This view was advanced in *Hodgetts*,¹⁶ where Mr Ellis SC compared data in relation to appeal outcomes for offender sentencing appeals in Tasmania with figures published by the Judicial Commission of New South Wales and the Victorian Sentencing Advisory Council (‘VSAC’). In the decision of the Court of Criminal Appeal in this case, the judges considered possible explanations for this disparity and her Honour Wood J observed that:

It may be interesting for some scholarly work to explore any differences in rates of successful outcomes between jurisdictions to see whether they are tied to the structure of the courts or other considerations, such as statutory provisions which operate as a filter on appeals, the percentage of appeals in each jurisdiction that assert specific error as opposed to the high threshold test of manifest excess or inadequacy, or practical considerations such as the

¹¹ TSAC (n 1).

¹² TSAC (n 2).

¹³ See TSAC (n 3).

¹⁴ See [2.3.4].

¹⁵ Inglis (n 5).

¹⁶ *Hodgetts* (n 6).

availability of legal aid and the number of unrepresented appellants who pursue appeals in the respective jurisdictions.¹⁷

While the Court of Criminal Appeal (for appeals from the Supreme Court) and the Supreme Court (for motions to review from the Magistrates Court) are crucial components of the Tasmanian criminal system, there is little research that has examined the operation of appeals against sentence in Tasmania. This Research Paper goes some way to providing an empirical analysis of appeals against sentence in Tasmania.

1.2 Scope of the paper and research questions

An appeal is a review of the finding of a lower court by a higher court. An appeal may be made against:

- a finding in relation to a person's criminal responsibility; ie an appeal against a conviction (by the offender if the offender is found guilty) or an acquittal (by the Crown if the offender is found not guilty); or
- the penalty imposed on the person found guilty of an offence; ie an appeal against sentence.

This Research Paper deals only with appeals against sentence. It provides an overview of the appeal framework in Tasmania applicable to appeals against sentence for Supreme Court and Magistrates Court matters. This overview includes the basis of appellate review for appeals from both offenders and the Crown and an outline of Court of Criminal Appeal authority in relation to the principles that apply to sentencing appeals.

In relation to sentences imposed by a judge in the Supreme Court, there is a right of appeal both for an accused and for the Crown to the Court of Criminal Appeal. A right of appeal means that there is no need to obtain leave or permission to appeal. Similarly, in relation to sentences imposed by a magistrate in the Magistrates Court, there is a right of appeal (called a motion to review) to the Supreme Court.¹⁸

This Research Paper identifies all cases that were originally sentenced in the Supreme Court and the Magistrates Courts from 1 July 2013 to 30 June 2017 (the index years) and identifies the number of those sentences that were appealed and finalised in the period 1 July 2013 to 31 October 2018 (the reference period).¹⁹ Appeal judgments were identified from judgments published on the AUSTLII website as well as crosschecked with data provided by the Supreme Court.

In relation to the identification of cases that were sentenced in the index years in the Supreme Court, the analysis conducted by the Council used data contained in the Tasmania Law Reform Institute ('TLRI') Sentencing database, which covers the period 1 January 2001 to 30 June 2017. Appeal judgments were identified using Australasian Legal Information Institute (AUSTLII) database for Tasmanian Court of Criminal Appeal decisions and matched to the data from the TLRI Sentencing database.

¹⁷ Ibid [61].

¹⁸ This is discussed further at [2.1].

¹⁹ See Appendix B for a list of the appeal cases identified in the reference period.

In relation to the identification of cases that were sentenced in the Magistrates Court in the index years, the Council has used data obtained in the Australian Bureau of Statistics ('ABS'), *Criminal Courts*²⁰ to determine the number of cases and the offence categories sentenced in the relevant period. Appeal judgments were identified using the AUSTLII database for Tasmanian Supreme Court decisions, as well as data provided by the Supreme Court. However, unlike the Supreme Court dataset, the Council did not have access to sentencing details in relation to individual offenders (only the de-identified information contained in the ABS publication) and so it was not possible to match the two datasets.

This Research Paper draws on the methodology and research questions from previous research conducted by the Sentencing Advisory Council, Victoria ('VSAC')²¹ and answers the following questions:

- What proportion of cases sentenced in the Supreme Court and Magistrates Court in the index years resulted in an appeal against sentence finalised during the reference period?
- What proportion of appeals were initiated by the offender or the Crown?
- What proportion of appeals against sentence finalised during the reference period were allowed or dismissed?
- What were the grounds of appeal?
- What original sentence types were most likely to be appealed?
- Which offence types were most likely to be involved in a sentence appeal?
- What was the change made to the original sentence after a successful appeal?

It also compares success rates for appeals against sentence in Tasmania with those in New South Wales and Victoria. Further, it considers the number of offenders in Tasmania who were legally represented in relation to their sentence appeal.

These data only include matters sentenced under the *Sentencing Act 1997* (Tas) and exclude sentences imposed for Commonwealth offences and matters sentenced under the *Youth Justices Act 1997* (Tas). They also exclude matters where the appeal involved a sentencing decision in relation to the breach of an order (such as suspended sentence or a probation order). They also do not include appeals in relation to ancillary orders such as sex offender registration or restricted licences. Further information about the methodology is set out in Appendix A.

²⁰ Australian Bureau of Statistics ('ABS'), *Criminal Courts, Australia, 2016–17* (Catalogue No 4513.0, 28 February 2018).

²¹ VSAC (2018) (n 8); VASAC (2011) (n 8).

2 SENTENCING APPEALS IN TASMANIA

This Chapter provides an overview of the appeal framework in Tasmania and the principles applicable to sentencing appeals.

2.1 The appeal framework

2.1.1 Appeals in indictable matters

The origins of the right to appeal against sentence are discussed in Warner's, *Sentencing in Tasmania*. At common law, there was no ability to appeal against sentence.²² In indictable matters, the *Criminal Code 1924* (Tas) ('*Criminal Code*') established the Court of Criminal Appeal and gave a convicted person and the Crown the ability to seek leave to appeal against sentence.²³ In 1996, the requirement to obtain the leave of the court for appeals against sentence was removed and now both the Crown and the accused may appeal against sentence as of right.²⁴

Section 401 of the *Criminal Code* provides for a right of appeal in relation to the sentence imposed both for an accused²⁵ and the Crown from the Supreme Court to the Court of Criminal Appeal.²⁶ If the Court of Criminal Appeal allows the appeal against sentence, it must quash the sentence and pass another sentence in substitution for the original sentence.²⁷ However, the court may, if it thinks it is appropriate and in the interest of justice to do so, quash the sentence passed at the trial and remit the matter to the trial judge for sentence.²⁸

2.1.2 Appeals in summary matters

In relation to summary matters, the *Justice Procedures Act 1919* (Tas) s 152 made provision for a motion to review to the Supreme Court 'any order' of a justice including a justice's discretion in imposing sentence.²⁹ This legislation was replaced by the *Justices Act 1959* (Tas) ('*Justices Act*'), which retained the motion to review under s 107 as the primary avenue of appeal from orders of justices.³⁰ The motion to review under s 107 of the *Justices Act* is heard by a single judge of the Supreme Court unless the judge reserves the motion, or any point arising from it, for the Full Court.³¹ If the motion to review sentence is allowed, the orders may be set aside or quashed and either remitted

²² Kate Warner, *Sentencing in Tasmania* (Federation Press, 2nd ed, 2002) 432.

²³ *Ibid*.

²⁴ The requirement for leave was removed by the *Criminal Code Amendment (Appeals) Act 1996* (Tas).

²⁵ *Criminal Code 1924* (Tas) s 401(1)(c) ('*Criminal Code*').

²⁶ *Ibid* s 401(12)(c).

²⁷ *Ibid* s 402(4).

²⁸ *Ibid* s 402(4C).

²⁹ Warner (n 22) 432 referring to *Burns v Knowles* [1956] Tas SR 105.

³⁰ Warner (n 22) 432.

³¹ *Justice Act* s 110(1); See *Wilkie v Taylor* [2015] TASFC 7.

to the original magistrate or a new sentence substituted.³² Since 1974, it is also possible for a party to a notice to review to apply to the Supreme Court for an order that the complaint to which the notice relates be heard *de novo*.³³ This means that the matter is heard afresh. However, this is not available in relation to orders made upon a plea of guilty.³⁴

There is a right of appeal from the Supreme Court by a party to a motion to review to the Full Court of the Supreme Court on a point of law.³⁵

2.2 Legal aid funding for appeals

As noted, the availability of legal aid was a matter raised by Wood J in *Hodgetts*,³⁶ as a possible explanation for the low success rate of offender initiated sentencing appeals. *Legal Aid Guidelines* indicate that aid may be granted for an offender appeal against sentence:

- A ...where there exists:
- I. a reasonable prospect of success;
 - II. a substantial advantage to the applicant such as regaining his or her liberty, livelihood or employment; or a substantial reduction in the sentence.
- B Aid for appeals on a matter of principle, which would not give rise to a substantial benefit to the applicant can only be granted by the Director or a Legal Aid Committee.³⁷

Information provided by the Grants Officers at the Legal Aid Commission of Tasmania in relation to the grant of legal aid to initiate appeals against sentence from the Magistrates Court and the Supreme Court indicates that:

Grants Officers must determine whether each application has merit to receive funding in all the circumstances of each case. We must exercise sound judgement in deciding what is the prudent use of limited public funds. There is always a discretion in relation to the funding of appeals. ...

We need to determine whether the appeal has a reasonable chance of success. There must be a reasonable chance of success to pass the merit test. We also consider the 'public interest' aspect of each case.³⁸

In relation to Crown appeals against sentence, legal assistance may be granted to respond to a Crown appeal without regard to the merit test.³⁹ It is noted that aid will

³² *Justices Act* ss 111(2)(b)–(c).

³³ *Ibid* s 111.

³⁴ *Ibid* s 111(3)(b).

³⁵ *Ibid* s 123.

³⁶ *Hodgetts* (n 6) [61].

³⁷ Legal Aid Commission of Tasmania, *Guidelines for Grants* (2018) 42.

³⁸ Email from Rochelle Mainwaring, 1 April 2019.

³⁹ Legal Aid Commission of Tasmania (n 37) 42.

always be granted to fund a response to a Crown appeal against sentence.⁴⁰ In addition, for an offender who does not have legal representation in connection with an appeal against a sentence imposed in the Supreme Court, there is power under the *Criminal Code* s 410 for an order to be made by the Court or judge that the offender be given legal assistance if it appears to be in the interests of justice and the person has insufficient means to enable him or her to obtain that assistance.

A further requirement for a grant of legal aid is that the applicant must satisfy the means test (that is, financial eligibility for aid).

2.3 The principles applicable to sentencing appeals

Appeals against sentence provide the mechanism for reviewing sentences in the criminal justice system. They allow errors in sentencing in a particular case to be corrected and, more broadly, can also provide guidance on sentencing by setting out the relevant principles.

Under the *Criminal Code* s 402, the test to be applied in relation to the determination of an appeal against sentence is to require the court to be 'of opinion that some other sentence, whether more or less severe, is warranted by law and should have been passed'. On its face, this provision appears to provide the Court of Criminal Appeal with an unfettered power to interfere in a sentence if it is of the view that a different sentence should have been imposed.⁴¹ However, this provision has been interpreted more narrowly by the Court of Criminal Appeal to require either a specific or non-specific error to be demonstrated.⁴² Similarly, in relation to motions to review (lower court appeals), 'it must be shown that in some way the magistrate erred specifically in the exercise of his [or her] discretion or that the sentence imposed on the applicant is so manifestly excessive that error can be imputed'.⁴³ Further, in relation to Crown appeals, the

⁴⁰ Email from Rochelle Mainwaring, 1 April 2019.

⁴¹ For a discussion of this argument, see Warner (n 22) 440–442.

⁴² See *ibid* 440–443.

⁴³ *Ibid* 460. This has been accepted in many decisions of the Supreme Court including *Barrett v Wilson* [2015] TASSC 3 where Pearce J stated that '[a] court determining a motion to review a sentence imposed by a magistrate on the grounds of manifest excess or inadequacy must not interfere unless a clear case of error is shown. The appellate court may not substitute its own opinion for that of the sentencing magistrate merely because it would have exercised the sentencing discretion in a different way: *Whittle v McIntyre* [1967] Tas SR (NC 6) 263; *Lowndes v The Queen* (1999) 195 CLR 665 at [15]. A ground contending that the sentence was manifestly excessive can only succeed if it is established that the sentencing order is so manifestly wrong that it could only be the result of some undefinable error in the exercise of the judicial discretion: *Bresnehan v The Queen* (1992) 1 Tas R 234 at [13]; *Visser v Smart* [1998] TASSC 151; *Lusted v Kenway* (2008) 50 MVR 533 at [38]. This Court must be persuaded of error of the second type referred to in *House v The King* (1936) 55 CLR 499 at 505, that is, that the sentence imposed by the sentencing judge is "unreasonable or plainly unjust". The applicant must show that the sentence is so obviously excessive that the sentencing discretion must have miscarried; or to put it another way, the sentence is plainly outside the proper limits of the wide discretion vested in the magistrate: *Allen v Kerr* (2009) 19 Tas R 132; (2009) 193 A Crim R 262. A sentencing court has a wide measure of latitude that is to be viewed with respect and restraint by appeal courts: *Postiglioni v The Queen* (1997) 189 CLR 295 per Kirby J at 336–337': at [9].

prosecution also needs to ‘negate any reason why [the] Court’s residual discretion not to interfere should be exercised’.⁴⁴

2.3.1 Specific error

A specific error is where there is an identifiable error in the sentencing process. Warner observes that the error usually involves one of (or a variation of) the following errors by the trial judge:

- acting on an erroneous principle of law;
- making a mistake as to facts;
- taking into account a matter that should not have been taken into account;
- failing to take into account matters that should have been taken into account.⁴⁵

As discussed, a specific error is less frequently relied on as a ground of appeal than the general ground of manifest excess or inadequacy (both for offender and Crown appeals against sentence).⁴⁶

2.3.2 Non-specific error – manifest excess or inadequacy

A non-specific error arises when there is no specific error identified in the sentencing process but an error is inferred from the manifest excess or the manifest inadequacy of the sentence.⁴⁷ This may relate to the head sentence imposed and/or the non-parole period specified by the sentencing judge (or a failure to make an allowance for parole).⁴⁸ In *Cowen v Tasmania*,⁴⁹ Estcourt J stated that:

The legal principles applicable to appeals against sentence on the ground of manifest excess are clear and well settled. They can be found succinctly stated in *Braslin and Cowen v Tasmania* [2010] TASCCA 1 at [31]–[34], per Porter J, and in *Director of Public Prosecutions (Acting) v Pearce* [2015] TASCCA 1 at [8], per Pearce J. It must be established that the sentencing order is so manifestly wrong that it could only be the result of some undefinable error in the exercise of the judicial discretion. The sentence must be

⁴⁴ *Director of Public Prosecutions v Harington* [2017] TASCCA 4, [96] (Pearce J) (*‘Harington’*). This is discussed further at [2.3.3].

⁴⁵ Warner (n 22) 442–443. These factors are taken from the High Court judgment in *Griffiths v The Queen* (1977) 137 CLR 293, 308, 309. Warner also referred to giving excessive or insufficient weight to some matter taken into account as an example of a specific error, however, the Court of Criminal Appeal has indicated that the weight to be attached to a relevant sentencing factor (as opposed to failing to give any weight to a matter that should have been taken into account or giving weight to a matter that should not have been taken into account) is relevant to the question of manifest excess or inadequacy and not as a specific error: see *Cooper v Tasmania* [2017] TASCCA 3, [4] (Estcourt J); *TAP v Tasmania* [2014] TASCCA 5, [30] (Porter J); *Mulholland v Tasmania* [2017] Tas CCA 2, [17] (Pearce J); *JWM v Tasmania* [2017] TASCCA 22, [68] (Brett J).

⁴⁶ See [3.3.2], [3.4.2], [4.3.2], [4.4.2].

⁴⁷ VSAC (2011) (n 8) 22. See Sarah Krasnostein and Arie Freiberg, ‘Manifest Error: Grounds for Review?’ (2012) 36 *Australian Bar Review* 54 for a critique of this ground of appeal.

⁴⁸ See *Groenewege v Tasmania* [2013] TASCCA 7; *Devine v Tasmania* [2015] TASCCA 19.

⁴⁹ [2018] TASCCA 17.

unreasonable or plainly unjust so as to give rise to the inference that there has been an error in the exercise of the discretion.⁵⁰

Similarly, in relation to manifest inadequacy, Pearce J wrote in *Director of Public Prosecutions (Acting) v Pearce* ('Pearce'),⁵¹ that the sentence imposed by the sentencing judge must be 'unreasonable or plainly unjust'.⁵² Further, that:

It is not to the point that the sentence may be regarded by some as too lenient or too harsh. It must be established that the sentencing order is so manifestly wrong that it could only be the result of some undefinable error in the exercise of the judicial discretion: *Bresnehan v The Queen* (1992) 1 Tas R 234 at 242. A court of criminal appeal may not substitute its own opinion for that of the sentencing judge merely because the appellate court would have exercised its discretion in a manner different from the manner in which the sentencing judge exercised his or her discretion: see *Lowndes v The Queen* (1999) 195 CLR 665 at [15], and the other cases referred to by this Court in *Director of Public Prosecutions v CSS* [2013] TASCCA 10.⁵³

In *Butt v Tasmania*,⁵⁴ Estcourt J restated the words of Porter J in *Braslin and Cowen v Tasmania*, that 'the Court of Criminal Appeal has no charter to tinker with sentences'.⁵⁵ Accordingly, as Wood J observed in *Hodgetts*, the sentence imposed by the sentencing judge 'may not be a sentence that the judges composing the appellate court would have imposed if they had been in the position of the sentencing judge, and yet the appellant may not succeed'.⁵⁶ This is illustrated in the case of *Sclater v Tasmania*,⁵⁷ Estcourt J observed that:

Given the appellant's antecedents and character, including his mental health issues, and given his independently confirmed indications of remorse and the very real prospects of rehabilitation clearly evidenced by the number of significant steps the appellant had already taken towards rehabilitation since the offending behaviour, it may well have been open to the sentencing judge to have suspended the whole of the appellant's sentence, or to have ordered that the appellant not be eligible for parole until he had served half of the 12 months operative period of his sentence. In my view however, his Honour, having recognised the steps taken by the appellant towards rehabilitation, and having recognised all of those other relevant considerations, including the corrupting environment of prison, did not err in the sentence he imposed. His Honour was entitled to give precedence to the deterrent aspect of punishment to the extent that he did.⁵⁸

In making an assessment of whether a sentence is manifestly excessive or inadequate in all the circumstances, the range of sentences previously imposed by the court for a

⁵⁰ Ibid [8].

⁵¹ [2015] TASCCA 1 ('Pearce').

⁵² Ibid [8] citing *House v The King* (1936) 55 CLR 499, 505.

⁵³ *Pearce* (n 51) [8].

⁵⁴ [2018] TASCCA 3 [4].

⁵⁵ [2010] TASCCA 1 [31]. See also *Aherne v R* 20/1982, [2] (Nettlefold J); *Farhat v Tasmania* [2017] TASCCA 20, [39] (Estcourt J).

⁵⁶ *Hodgetts* (n 6) [58].

⁵⁷ [2015] TASCCA 26.

⁵⁸ Ibid [47].

particular offence is particularly relevant: ‘the essential question being whether the sentence was outside the range of sentences reasonably available in the exercise of a sound discretionary judgment: *Director of Public Prosecutions v Pearce* [2015] TASCCA 1 at [8]–[9]; *TGW v Tasmania* [2017] TASCCA 10 at [31]’.⁵⁹ A sentencing range has been ‘linked to one of the main functions of an appeal court: ensuring consistency and certainty of sentence by reducing disparities in sentencing standards while still preserving as much as possible the discretion given to sentencing judges’.⁶⁰ Previous sentences have been said to ‘stand as a “yardstick” by which a sentencing court can attempt to achieve consistency in sentencing and in the application of the relevant sentencing principles’.⁶¹ However, the ‘existence of a range does not mean that every sentence must fall within it. ... Where a sentence is outside the range of comparable offending, it is not determinative of the issue; but merely serves to increase the level of scrutiny’.⁶² As stated by Pearce J in *Read v Tasmania*, ‘[p]revious sentences give some pointer towards excess or inadequacy but do not fix a boundary within which the sentencing judge must sentence’.⁶³

2.3.3 Crown appeals

Traditionally, Crown appeals against sentence have been considered to be rare and exceptional and limited to establishing a point of principle.⁶⁴ Courts have subsequently recognised that ‘principle’ includes ‘the avoidance of manifest inadequacy or inconsistency in sentencing standards’.⁶⁵ The Court of Criminal Appeal has recognised that the primary purpose of a Crown appeal against sentence is to lay down principles for the guidance of other courts. This was stated in the *Director of Public Prosecutions v Bradford* by Pearce J:

⁵⁹ *Upston v Tasmania* [2018] TASCCA 4, [5] (Porter J) (*‘Upston’*).

⁶⁰ VSAC (2011) (n 8) 22 referring to *R v Alinson* (1987) 49 NTR 38, 39.

⁶¹ *Upston* (n 59) [17] (Porter J) citing *Le v Tasmania* [2017] TASCCA 2, [4] (Wood J).

⁶² *Upston* (n 59) [176] (Porter J) referring to *Director of Public Prosecutions (Acting) v Poole* [2015] TASCCA 5, [15]; *Connolly v Tasmania* [2015] TASCCA 15, [5]; *Director of Public Prosecutions (Acting) v CBF* [2016] TASCCA 1, [24], [26]; *TGW* [2017] TASCCA 10, [36].

⁶³ [2016] TASCCA 6, [18].

⁶⁴ See Warner (n 22) 447–449. These principles were set out in *Griffiths v The Queen* (1977) 137 CLR 293. It is noted that the High Court in *Director of Public Prosecutions (Vic) Dalgliesh (a Pseudonym)* (2017) 91 ALJR 1063 noted that the case was ‘not the occasion to reconsider the bases on which it has been said in the part that Crown appeals on sentence should be a “rarity”’. In particular, this case does not require this Court to come to a concluded view of the reservations expressed by Gleeson CJ in *Wong v The Queen* (2001) 207 CLR 584 as to the ongoing validity of the reasons previously given for treating Crown appeals on sentence as exceptional’: at [61] (Kiefel CJ, Bell and Keane JJ). See also S Thomson, ‘Griffiths and the “Spike”: “Rarity” and “Restraint” in Crown Sentencing Appeals Re-assessed’ (2011) 85 *Australian Law Journal* 761. Note that in Victoria, the Court of Appeal indicated that ‘the notion that Crown appeals should be “rare and exceptional” no longer applies as a sentencing principle to which this Court must have regard’: *Director of Public Prosecutions v Karazisis*; *Director of Public Prosecutions v Bogtstra*; *Director of Public Prosecutions v Kontoklotsis* (2010) 206 A Crim R 14, 42.

⁶⁵ *Director of Public Prosecutions v Karklins* [2018] TASCCA 6, [36] (Geason J) (*‘Karklins’*) citing *Everett v The Queen* (1994) 181 CLR 295, 300.

The underlying principle is that a primary purpose of Crown appeals is to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons: *Green v The Queen*; *Quinn v The Queen* [2011] HCA 49, 244 CLR 462 at 465-466 [1]-[2]. It is not the function of the Court to overturn a sentence merely because it is light or lenient. The sentence must be shown to be manifestly inadequate to the point of clear error. Appellate courts should exercise deference and restraint. However, when appropriate cases are brought on appeal, it is for this Court to maintain sentencing standards and levels: *Director of Public Prosecutions v P* [2007] TASSC 51 per Crawford J (as he then was) at [18]. Crown appeals serve also to maintain public confidence in the administration of justice by the intervention of this Court in the case of a manifestly inadequate sentence: *Everett v The Queen* [1994] HCA 49, 181 CLR 295 at 306; *R v Stoupe* [2015] NSWCCA 175 at [115]-[116].⁶⁶

The role of Crown appeals in the maintenance of sentencing standards and public confidence in the administration of justice has also been recognised in other cases such as *Director of Public Prosecutions v Swan*,⁶⁷ *Director of Public Prosecutions v Karklins*,⁶⁸ *Director of Public Prosecutions v Broad*,⁶⁹ and *Director of Public Prosecutions v Harington*.⁷⁰

Additionally, Crown appeals against sentence were restrained by the operation of the principle of double jeopardy. However, legislative changes have addressed the operation of this principle. While it operated, the principle of double jeopardy required the court 'to take into account the fact that the offender had already faced a sentencing court'⁷¹ at two stages of a Crown sentencing appeal: (1) in deciding whether or not to allow a Crown appeal and (2) in resentencing an offender on a successful Crown appeal.⁷² This meant that in Crown appeals against sentence there was a 'higher threshold test for error' in relation to allowing an appeal so that Crown appeals were less readily allowed than defence appeals. And then on resentencing, a more lenient sentence was generally imposed to reflect the double jeopardy of having been sentenced a second time and any associated anxiety and stress.⁷³

The double jeopardy rule was abolished by legislative reform in relation to appeals to the Court of Criminal Appeal in 2008, and in relation to the powers of the Supreme Court in determining a motion to review in 2013.⁷⁴ There has since been case law in Tasmania that has considered the extent to which these reforms have altered the pre-existing law in relation to double jeopardy. It is clear that the statutory changes have abolished the principle of double jeopardy so far as it applies to re-sentencing under the *Criminal Code*

⁶⁶ [2016] TASCOS 14, [14].

⁶⁷ [2016] TASCCA 9, [24].

⁶⁸ [2018] TASCCA 6, [34]-[36] (Geason J).

⁶⁹ [2018] TASCCA 5, [14] (Estcourt J).

⁷⁰ [2017] TASCCA 4, [95]-[96] (Pearce J).

⁷¹ VSAC (2011) (n 8) 25.

⁷² Warner (n 22) 447. See *DPP (Tas) v Chatters* (2011) 218 A Crim R 156, 159 ('Chatters').

⁷³ *Chatters* (n 72) 159.

⁷⁴ *Criminal Code* s 402(4B); *Justices Act 1959* (Tas) s (2AB).

and the *Justice Act 1959* (Tas).⁷⁵ This means that the court, on re-sentencing after a successful appeal, is not to take into account any element of double jeopardy so as to impose a less severe sentence.⁷⁶ However, the pre-existing position in relation to double jeopardy and the initial decision of the appellate court to allow or reject a Crown sentence appeal has not been changed to remove the consideration of double jeopardy for motions to review from the Magistrates Court.⁷⁷

In relation to Crown Appeals from sentencing decisions in the Supreme Court, there is uncertainty as to whether double jeopardy principles remain relevant to the decision to allow or reject a Crown sentence appeal. In *DPP (Tas) v Chatters*,⁷⁸ the Court of Criminal Appeal considered the effect of the 2008 amendments to the *Criminal Code*.⁷⁹ In this case it, was held that the prior case law of double jeopardy no longer applied and, consequently, an appellate court could not rely on an accused's presumed distress and anxiety as a basis for not intervening in a Crown sentencing appeal (that is, the decision whether to allow an appeal or not) or for imposing a sentence less than that which it would otherwise consider appropriate (that is, in deciding the appropriate sentence on re-sentencing). Further, it was held that the Court could not have regard to the frequency of Crown appeals as a sentencing principle.⁸⁰ However, since this decision, changes have been made to the structure and wording of the relevant provisions and the Court of Criminal Appeal has expressed uncertainty about whether this has altered the position in relation the decision of the appellate court to intervene in a Crown sentencing appeal.⁸¹

Regardless of the changes to the principle of double jeopardy, the Crown still has an additional hurdle to meet in order for its appeal against sentence to be successful. The Court has a residual discretion to refuse an appeal despite error or inadequacy of sentence where it would be unfair to increase the penalty.⁸² This means that the Crown has to establish an appealable error in the exercise of the sentencing judge's discretion and also negate any reason why the residual discretion not to interfere should be exercised.⁸³ Factors relevant to the residual discretion include 'delay, parity, the totality principle, rehabilitation, and fault on the part of the Crown'.⁸⁴

The need for restraint in the exercise of the Crown's right to appeal continues to be recognised in the Director of Public Prosecution's *Prosecution Policy and Guidelines* ('*DPP Guidelines*') where it states that the '[t]he prosecution's right to appeal against sentence should be exercised sparingly and it is the policy of the Director of Public

⁷⁵ *Chatters* (n 72); *DPP v Swan* (1996) 26 Tas R 32 ('*Swan*'); *Lyons v Bakes* [2015] TASSC 37 ('*Lyons*').

⁷⁶ *Chatters* (n 72); *Swan* (n 75); *Lyons* (n 75).

⁷⁷ *Lyons* (n 75); *Parker v Hall* [2015] TASSC 60.

⁷⁸ *Chatters* (n 72).

⁷⁹ The amendment was initially made in s 402(4A) and then in 2013, s 402(4A) as amended and s 402(4B) was inserted.

⁸⁰ See *Swan* (n 75) [26] (Pearce J).

⁸¹ *Ibid* [27].

⁸² *Karklins* (n 65) [40] (Geason J); *Harington* (n 44) [96] (Pearce J). See also *Warner* (n 22) 450.

⁸³ *Harington* (n 44) [96] (Pearce J).

⁸⁴ VSAC (2011) (n 8) 26 quoting *Director of Public Prosecutions v Karazisis*; *Director of Public Prosecutions v Bogtstra*; *Director of Public Prosecutions v Kontoklotsis* (2010) 206 A Crim R 14, 40.

Prosecutions not to institute such an appeal unless it can be asserted with some confidence that the appeal will be successful'.⁸⁵ This approach is evident in the relatively small number of Crown appeals against sentence and the high level of success rate of those appeals compared to offender appeals against sentence.⁸⁶

The rarity of Crown appeals against sentence succeeding has been stressed by the Supreme Court in relation to motions to review sentences imposed in the Magistrates Court. In *Parker v Hall*, Wood J stated that:

As a Crown appeal, special considerations apply. There are well-settled principles that Crown appeals are less readily allowed than defence appeals against sentence. ... The principles are tied to concerns about unfairness and that the appeal process exposes the offender to an element of double jeopardy. The principles operate so that such appeals should be a rarity (*Griffiths* (1977) 137 CLR 293 at 310; *Everett v The Queen* (1994) 181 CLR 295 at 299; *Malvaso* (1989) 168 CLR 227 at 234), there is a higher threshold test for error, and the Crown needs to demonstrate very clearly the error of which it complains: *Dinsdale v The Queen* (2000) 202 CLR 321 at [62]. Additionally, it is recognised that an appeal court has a 'residual discretion' to dismiss a Crown appeal, even if the sentence is determined to be manifestly inadequate. In this regard, the conduct of the Crown at the original sentencing proceedings may be a matter of significance.⁸⁷

As discussed above, in relation to Crown appeals against sentence from the Magistrates Court to the Supreme Court, the principle of double jeopardy still applies in relation to whether or not to allow the appeal. Accordingly, Wood J identified the issue to be determined by the Court as follows: 'is the sentence manifestly inadequate ... and is this a rare set of circumstances where a Crown appeal should succeed?'⁸⁸ The higher threshold that applies to Crown appeals was also identified in *Lyons v Bakes*, where Pearce J observed that 'Crown appeals should be brought only in limited circumstances, such as where a sentence reveals such manifest inadequacy as to constitute an error in principle, or where a sentence is so disproportionate to the seriousness of the crime as to shock the public conscience'.⁸⁹

Although there are only a small number of Crown appeals and so caution must be used in interpreting the data, it appears that that Crown appeals against sentence from the Magistrates Court to the Supreme Court are much less likely to be successful than appeals against sentence from decisions of the Supreme Court to the Court of Criminal Appeal.

2.3.4 Provision of guidance

In addition to correcting sentencing errors in an individual case, appeals have a role in providing guidance to lower courts. As Warner has observed:

⁸⁵ *DPP Guidelines* 94.

⁸⁶ See [3.2].

⁸⁷ *Parker v Hall* (n 77) [12].

⁸⁸ *Ibid* [16].

⁸⁹ *Lyons* (n 75) [12].

In reviewing the exercise of sentencing discretion, the Court of Criminal Appeal and the Supreme Court have a role in providing guidance for sentencers by formulating sentencing principles and policy and by contributing to the process of standardisation of penalty for particular offences.⁹⁰

Similarly, Freiberg and Sallmann have written that:

Moving from the particular case or cases before it, an appellate court may state broadly the underlying principle that provides coherence to conflicting contentions or rules and which will settle not only the instant conflict, but provide future decision-makers with a framework within which to make a decision in a similar case.⁹¹

In this way, appeals have a ‘supervisory or “public” purpose, which is generally to maintain confidence in the justice system ... and to clarify and develop a body of law which provides predictability, coherence, consistency, generality, equality and certainty’.⁹²

Previous research conducted by the Council has observed that there have been statements of principle from the Court of Criminal Appeal in relation to sentences for driving offences causing death (including manslaughter) and sexual offences involving children, as well as indications from the Court that heavier sentences were required for these offences.⁹³ Similarly, in the context of family violence, the Court of Criminal Appeal has acknowledged that changing community attitudes have necessitated changes in sentencing practices, not only to emphasise general deterrence as a significant consideration in sentencing for domestic abuse, but to also denounce the conduct of the perpetrator and provide vindication for the victim.⁹⁴ The Court of Criminal Appeal has also stressed the need for general deterrence and denunciation to be predominate sentencing factors for drug trafficking offences.⁹⁵

⁹⁰ Warner (n 22) 433.

⁹¹ Arie Freiberg and Peter Sallman, ‘Courts of Appeal and Sentencing: Principles, Policy and Politics’ (2008) 26 *Law Context: A Socio-legal Journal* 43, 46.

⁹² Ibid.

⁹³ See TSAC (n 2); TSAC (n 3).

⁹⁴ See for example, *Karklins* (n 65); *Gregson v Tasmania* [2018] TASCRA 14.

⁹⁵ See for example, *Sweetman v Tasmania* [2016] TASCRA 5; *Stebbins v Tasmania* [2016] TASCRA 6; *Director of Public Prosecutions v Swan* [2016] TASCRA 9; *Deakin v Tasmania* [2016] TASCRA 19.

3 TRENDS IN SENTENCE APPEALS FOR SUPREME COURT SENTENCES: COURT OF CRIMINAL APPEAL DECISIONS

This Chapter sets out trends in sentence appeals for Supreme Court sentences imposed in the period 2013–14 to 2016–17. It examines the overall number of sentences appealed and the success rate of those appeals. It also looks at the number of offender and Crown appeals against sentence, the success rate of those appeals and the grounds of those appeals.

3.1 Number of sentences appealed and success rate

In the period 2013–14 to 2016–17, there were 1114 offenders sentenced in the Supreme Court in relation to approximately 3414 proven charges,⁹⁶ and there were 68 finalised appeals against sentence in relation to 1114 cases (6.1%).⁹⁷ There were 23 successful appeals against sentence, which represented 33.8% of the 68 finalised appeals and 2.1% of the offenders sentenced in the period. These appeals against sentence involved the imposition of a single sentence by the sentencing judge — either in respect of one offence or a global sentence to cover multiple offences. In Tasmania, when an offender is convicted of multiple offences, a judge has the power to impose one sentence for all offences (a global sentence). Tasmanian courts also have the power to impose separate sentences for each offence, but in practice, when an offender is convicted of multiple offences, a global order is usually made. Consequently, in most cases it is not possible to determine the proportion of the total sentence that relates to each individual count.

Comparisons can be made with the proportion of sentences appealed in Victoria, where of the 1910 cases sentenced in the higher courts in 2013–14, there were 183 appeals against sentence (9.5%).⁹⁸ There were 60 successful appeals against sentence, which represented 32.8% of the appeals and 3.1% of offenders sentenced in the period. In relation to these appeals against sentence, there were 153 offender sentence appeals — leave was granted in 77 cases and the appeal against sentence was allowed in 44 of those cases.⁹⁹ There were 23 Crown sentence appeals of which 16 were allowed.¹⁰⁰

⁹⁶ It is noted that this excludes one case where the offender was sentenced for multiple offences but it was not possible to determine the precise number of counts in that case from the comments on passing sentence.

⁹⁷ It is noted that three appeals against sentence were decided in the same case: *Director of Public Prosecutions (Acting) v Crosswell, Bradford and Coles* [2015] TASCRA 22.

⁹⁸ VSAC (2018) (n 8) 15–16, 22.

⁹⁹ *Ibid* 16.

¹⁰⁰ *Ibid* 22.

Figure 3.1 sets out a comparison of offenders sentenced, appeals against sentence and successful appeals against sentence for each year in Tasmania. It shows that in comparison to the total number of offenders sentenced, there is a small number of appeals and even fewer successful appeals. The proportion of appeals and successful appeals are shown in Figure 3.2.

Figure 3.1: Comparison of offenders sentenced, appeals against sentence and successful appeals against sentence 2013–14 to 2016–17, Supreme Court sentencing decisions

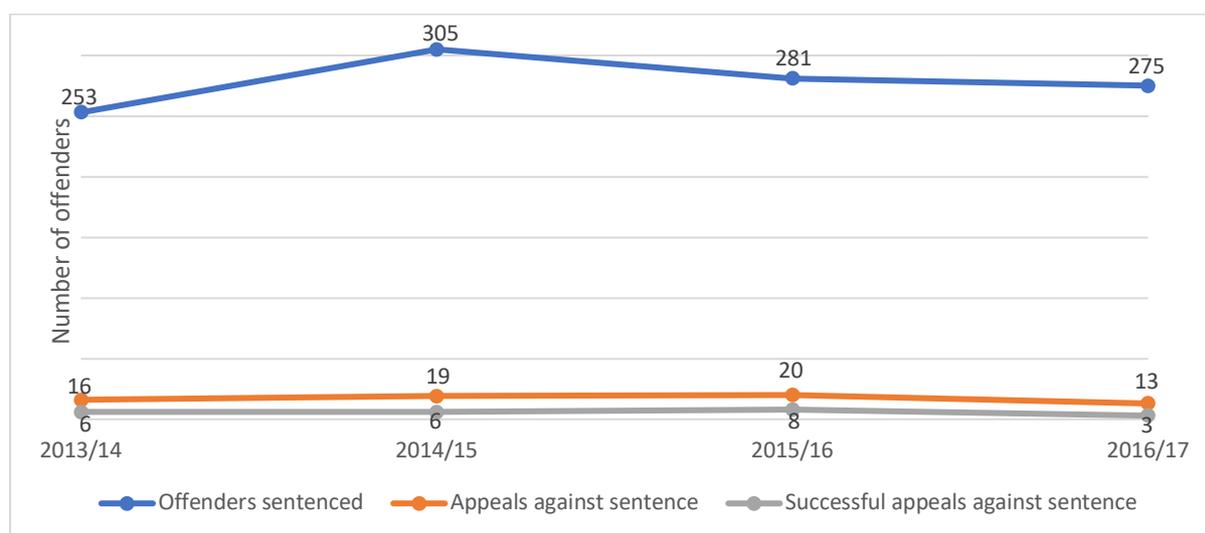


Figure 3.2: Proportion of sentences where there were appeals against sentence and successful appeals against sentence for offenders sentenced 2013–14 to 2016–17, Court of Criminal Appeal

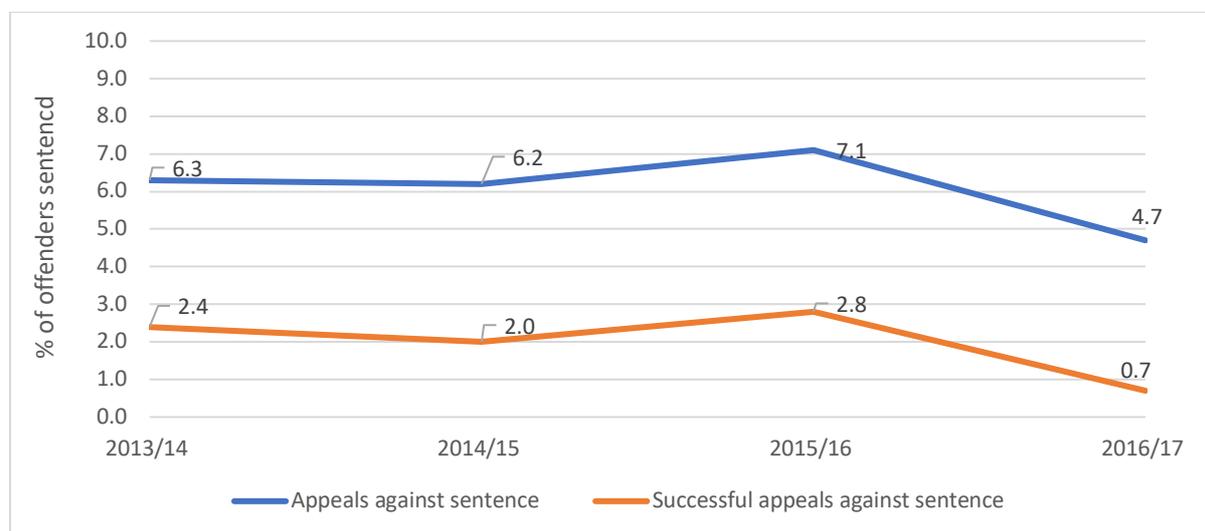


Table 3.1 provides a breakdown by offence category on the basis of the most serious offence for which an offender has been sentenced. As can be seen in Table 3.1, the most serious offence for which an offender has been sentenced, the most common offence sentenced in the Supreme Court in the review years was non-sexual offences against the person (281 cases or 25.2%). This offence category includes assault, wounding and grievous bodily harm. This was followed by drug offences (225 cases or 20.2%) and then sexual offences (145 cases or 13%).

The most common offence type in appeal proceedings in the Court of Criminal Appeal (based on the most serious offence for which an offender was sentenced) in terms of volume were:

- non-sexual offences against the person (18 cases);
- sexual offences (12 cases);
- robbery (11 cases).

Generally, this reflects the most common offence types and can be contrasted with the proportion of each of these offence types (based on the most serious offence for which an offender was sentenced) that were part of appeal proceedings. The most common offences in appeal proceedings (as a proportion of all cases where that was the most serious offence type) were:

- homicide offences (19.4%);
- robbery (9.6%);
- sexual offences (8.3%).

Table 3.1: Number and proportion of offenders in appeals in the Court of Criminal Appeal by offence type 2013–14 to 2016–17

Offence type	Number of offenders	Number and percentage of all offenders in appeal proceedings	
Homicides	31	6	19.4%
Robbery	114	11	9.6%
Sexual offences	145	12	8.3%
Non-sexual offences against the person	281	18	6.4%
Other	18	1	5.6%
Offences involving fraud or dishonesty	106	5	4.7%
Burglary	67	3	4.5%
Drug offences	225	10	4.4%
Property damage	94	2	2.1%
Offences against good order	31	0	0%
Unknown	2	0	0%
Total	1115	66	5.9%

3.2 Who initiated the appeals?

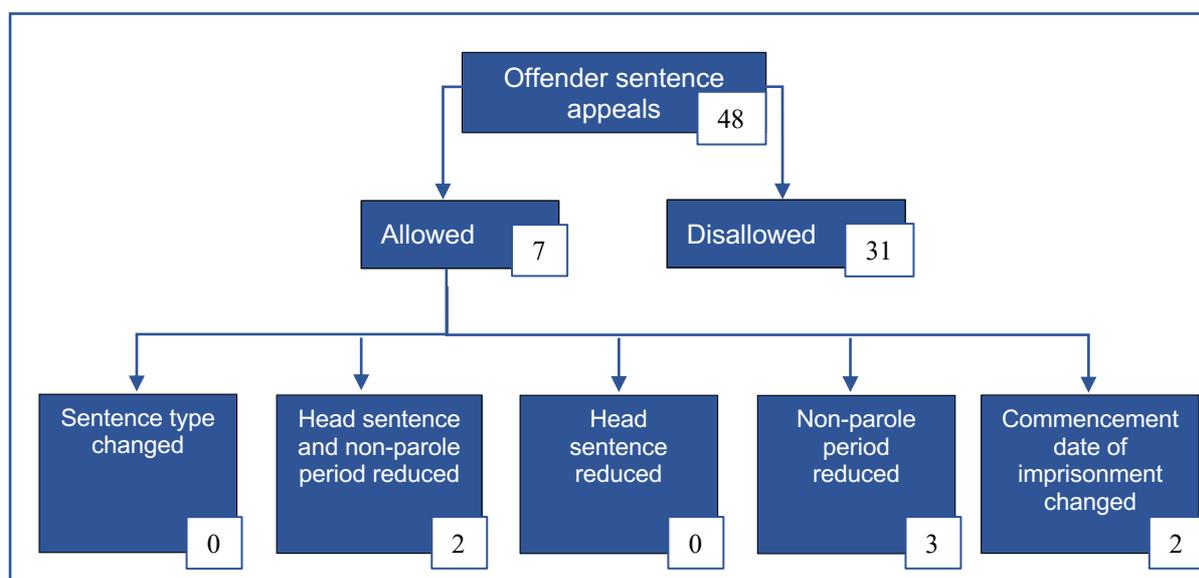
In relation to the 68 appeals against sentence identified in the reference period, there were 48 offender appeals (70.6%) and 20 Crown appeals (29.4%). Although offender appeals against sentence were more common, Crown appeals against sentence were

more successful, as 80% of Crown appeals were successful (16 of 20 finalised appeals) compared to offender appeals against sentence where only 14.6% of appeals were successful (seven of 48 appeals). This is discussed further at [3.3.1] and [3.4.1].

3.3 Offender appeals against sentence

As indicated, in relation to the 68 appeals against sentence identified in the reference period, 48 of these were offender appeals (70.6%). An overview of the outcome of the appeals is provided in Figure 3.3.

Figure 3.3: Result of offender appeals in cases sentenced in the Supreme Court from 1 July 2013 to 30 June 2017 and appealed and finalised by 31 October 2018



3.3.1 Success rates of offender appeals

As indicated, of the 48 offender appeals against sentence, only 14.6% of appeals were successful (seven of 48 finalised appeals). This can be contrasted with research in Victoria which found that 28.8% of offender appeals against sentence for sentences imposed in the higher courts in 2013–14 were ultimately successful (44 cases out of 153 cases).¹⁰¹ In New South Wales, statistics from the Judicial Commission of New South Wales indicate that in 2016 there were 176 applications for leave to appeal against sentence pursuant to the *Criminal Appeal Act 1912* (NSW) and 59 of these were successful (33.5%).¹⁰²

¹⁰¹ VSAC (2018) (n 8) 17. It is noted that in Victoria an offender files a notice of application for leave to appeal against sentence and the Court of Appeal, normally constituted by a single judge, may grant or refuse leave to appeal: at 2–4. In cases sentenced in the year 2013–14 (and appealed and finalised by 31 December 2016), there were 153 offender appeal applications lodged with 73 refused and 77 granted. In relation to the 77 leave applications to appeal against sentence that were granted, 44 were allowed: at 16.

¹⁰² Judicial Commission of New South Wales, *Sentencing Bench Book* (2018) [70-010] <<https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/appeals.html>>.

As noted at [1.1], the low success rate for offender appeals has been the subject of comment by defence counsel who suggested that the composition of the Supreme Court and the Court of Criminal Appeal 'invites apprehension that [the Court of Criminal Appeal] might be reluctant to overturn its colleagues' decisions'.¹⁰³ In Tasmania, the same judges sit as trial judges and as members of the Court of Criminal Appeal and so it was suggested that the 'judges are "a small coterie" who sit in judgment on each other's judgments' and 'are possibly prone to the fallibilities of "groupthink" and protecting each other's decisions'.¹⁰⁴ In response to these concerns, the Court of Criminal Appeal has considered the factors that might explain the disparity in success rate for offender sentencing appeals between Tasmania and other jurisdictions (other than the reasons suggested by defence counsel). It was suggested by Blow CJ that one of the reasons why offender sentencing appeals succeed less frequently in Tasmania than in Victoria or New South Wales was that 'because there are so few judges in Tasmania, and because we all sit on sentencing appeals as well as sentencing offenders, we have achieved a greater degree of consistency in sentencing than judges in other States'.¹⁰⁵ It was said that 'this consistency in sentencing should be regarded as a positive type of "groupthink"'.¹⁰⁶

This observation would certainly accord with observations made in other jurisdictions that an increase in sentencing appeals (and the success of those appeals) can be attributed to an increase in the size of the judiciary which has led to greater inconsistency and the need for appellate guidance. This was recognised by Gleeson CJ in *Wong v The Queen* where his Honour wrote that '[i]n the days when criminal justice was administered by a relatively small group of judges, it was easier to maintain consistency'.¹⁰⁷ Consistency in sentencing in Tasmania may also be enhanced by ready access to information about sentences imposed for particular offences (including access to the comments on passing sentence) via an online database used by judges. This allows comparable sentences to be readily identified given the small number of sentences imposed in Tasmania. Further, research conducted by the TLRI in 2008, which examined sentences imposed by judges for the most frequent offences of robbery and assault, did not find any statistically significant differences in sentencing patterns for Supreme Court judges in Tasmania.¹⁰⁸ In contrast, in other jurisdictions, an explanation provided to explain the increase in the number of sentencing appeals are the judgments of a small minority of judges who regularly impose sentences that are manifestly inadequate or excessive.¹⁰⁹

It has also been suggested that the difference in the number of successful appeals may be explained by the differing legislative provisions that apply in other jurisdictions. As noted, in Tasmania offenders have a right of appeal against sentence whereas in New

¹⁰³ *Hodgetts* (n 6) [45] (Blow CJ).

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid* [51].

¹⁰⁶ *Ibid.*

¹⁰⁷ *Wong* (n 9) [10]. See also Thomson (n 64) 769.

¹⁰⁸ TLRI (n 10) 22.

¹⁰⁹ Thomson (n 64) 769. See also Don Weatherburn, *Sentencing Disparity and Its Impact on the NSW District Criminal Court* (NSW Bureau of Crime Statistics and Research, 1994).

South Wales and Victoria offenders need to obtain leave to appeal.¹¹⁰ However, as VSAC and NSW Judicial Commission figures reflect successful leave applications that led to successful appeals against sentence, this does not appear to provide an explanation for the difference. It has also been suggested that jurisdictional differences may be attributed to differences in the percentage of appeals that assert specific error as opposed to the high threshold test of manifest excess and/or the number of unrepresented appellants who pursue appeals.¹¹¹ While the number of unrepresented appellants who pursue sentencing appeals in other jurisdictions is not known, in Tasmania, the Council's analysis of appeals finalised by the Court of Criminal Appeal found that there were 12 out of 48 offenders who were unrepresented in relation to their sentence appeal (25%). All of these appeals were unsuccessful.

As shown at [3.3.2], in Tasmania, offenders predominately rely on manifest excess (in nearly 70% of sentencing appeals) rather than a specific error made by the sentencing judge. It was raised in 46 out of 48 sentencing appeals (96%). The grounds of appeal relied on in offender appeals have also been examined in research conducted in Victoria. An analysis of offender sentence appeals in Victoria from 2010 found that manifest excess was raised in 82.4% of offender appeals.¹¹² Although caution must be taken in comparing this research given 'that identifying and classifying grounds of appeal are complex exercises that can involve a degree of interpretation'.¹¹³ The basis of offender appeals against sentence in New South Wales is not known.

The Council has also considered other possible explanations for the disparity in success rates including that sentences of imprisonment in Tasmania are generally shorter than those imposed in Victoria and New South Wales. This explanation accords with VSAC research, which showed that the likelihood of an offender appealing an imprisonment sentence increased with length of sentence as did likelihood of the offender successfully appealing their imprisonment sentence. This research found that the length of imprisonment sentences most successfully appealed by an offender were between 10 and less than 15 years and between nine and less than 10 years.¹¹⁴ Another possible explanation may be that sentencing legislation in Tasmania has traditionally been less complex than sentencing legislation in comparable jurisdictions (and so gives rise to fewer appealable errors). For example, as a general rule, sentencing legislation in Tasmania has not, to date, sought to restrict judicial discretion through the use of mandatory sentencing, mandatory minimum non-parole periods, standard non-parole

¹¹⁰ See *Hodgetts* (n 6) [52] (Blow CJ), [61] (Wood J).

¹¹¹ *Ibid* [61].

¹¹² It is noted that there are similarities in the methodology used in the Tasmania study and in the Victorian study for 2010 appeals, where it was stated that a ground of appeal has been counted once as having been raised where the matter was argued as a separate ground of appeal or the matter was argued as a separate ground of appeal and raised as part of another ground of appeal, such as manifest excess. Where a matter was only raised under another ground of appeal, namely manifest excess and not as a separate ground of appeal, it has not been coded as having been raised: VSAC (2011) (n 8) 94.

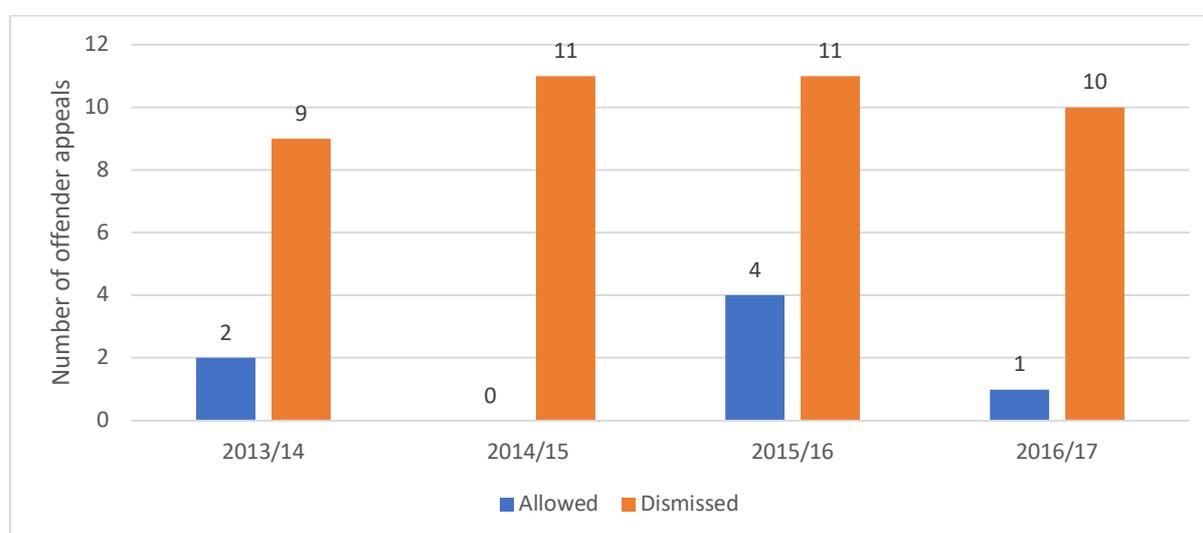
¹¹³ *Ibid* 106.

¹¹⁴ VSAC (2018) (n 8) 19, 20.

periods, and statutory lists of aggravating and mitigating factors.¹¹⁵ As Thomson writes, 'if sentencing becomes more complex, or more sentencing options are made available, there will be a greater chance of the sentencing courts making appealable errors'.¹¹⁶ Further, in Tasmania it is the practice of the court to impose a global sentence rather than individual sentences for each offence (where an offender is sentenced for multiple counts) and this limits arguments that can be made on the basis that one particular sentence was erroneous or that an error was made in relation to cumulation or concurrency of sentences.

Figure 3.4 sets out the number of offender appeals against sentence allowed and dismissed by the Tasmanian Court of Criminal Appeal in relation to the cases identified in the reference period for each year.

Figure 3.4: Number of offender appeals against sentence allowed and dismissed by the Court of Criminal Appeal 2013–14 to 2017–18



3.3.2 Grounds of appeal

Appeal decisions determined by the Court of Criminal Appeal in the reference period have been analysed according to the grounds of appeal relied upon by offenders in sentencing appeals. Table 3.2. sets out the grounds of appeal based on this analysis. It is noted that the total in Table 3.2 exceeds the number of offender appeals (n = 48) as offenders may rely on multiple grounds in relation to sentencing appeals. It shows that nearly all offenders relied on the ground that the sentence was manifestly excessive in the circumstances (95.8% of offenders). There were only two offenders who did not rely on this ground of appeal.¹¹⁷ There were 30 cases where manifest excess was the sole ground of appeal and a further three cases where appellant relied on manifest excess

¹¹⁵ See *R v JW* (2010) 77 NSWLR 7 [116] (Spigelman CJ); Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Lawbook Company, 3rd ed, 2014) 1006–7.

¹¹⁶ Steven Thomson, 'Doing Justice: The Error Principle and Sentencing Appeals' (2011) 85 *Australian Law Journal* 761, 768.

¹¹⁷ In *MJK*, the appellant was unrepresented and the notice of appeal relied on the ground that the sentence imposed was manifestly excessive but at the hearing of the appeal this ground was not pursued. Instead, the appellant asserted factual error by the sentencing judge and in *Sullivan* the appeal relied on the issue of parity).

and asserted a specific error in relation to the weight attached to a relevant sentencing factor and the Court of Criminal Appeal subsumed these grounds into a consideration of whether the sentence was manifestly excessive. Accordingly, an argument that the sentence was manifestly excessive was the only effective ground of appeal in 33 out of 48 offender appeals (68.75%).

Table 3.2: Number and percentage of grounds raised in offender sentencing appeals 2013–14 to 2016–17

Ground raised	Offender sentence appeals (n=48)	
	No.	% of offender appeals
Manifest excess	46	95.8
Approach to parity	1	2.1
Approach to totality	2	4.2
Error of law in relation to standard of proof at sentencing	1	2.1
Approach to cumulation	1	2.1
Mistook facts	6	12.5
Conduct of defence counsel	1	2.1
Approach to relative severity of sentences for state and commonwealth offences	1	2.1
Approach to 'worst category' of offence	1	2.1
Technical error in calculation of sentence	2	4.2
Approach to historical sentencing standards	1	2.1
Approach to use of victim impact statement	1	2.1
Allowed irrelevant facts	1	2.1

In four of the seven successful offender sentencing appeals, the offender relied only on the ground that the original sentence was manifestly excessive. In one other case, the offender relied on specific errors of fact, which were said to have led to a sentence which was manifestly excessive in all the circumstances. Accordingly, in five of the seven successful appeals, manifest excess was successfully relied on (71.4% of successful offender appeals). In the remaining two cases, there was a technical error in relation to the start date of the sentence (by one day).

In relation to offender sentencing where a ground of the appeal was that the sentence imposed was manifestly excessive, the Council has further analysed the judgments of the Court of Criminal Appeal to identify any sentencing factors that were commonly raised in relation to this argument.¹¹⁸ Factors that were most commonly raised were the weight attached to prior good character or criminal history (10 cases), the weight attached to rehabilitation or the unlikelihood of reoffending (six cases), weight attached to cooperation with authorities or entering a guilty plea (six cases) and the weight attached to remorse (five cases).

¹¹⁸ This was determined by whether there was particular focus on the matter by defence counsel (as evident from the judgment of the Court of Criminal Appeal) rather than the matter being part of a general discussion of the factors relevant to the exercise of the sentencing discretion and the sentencing range for the offence.

3.3.3 Offence types

During the reference period, analysing offence type in sentence appeals by the most serious offence in each case, the most common most serious offence types in offender sentence appeals were non-sexual offences against the person and sexual offences (20.8% or 10 out of 48 appeals for both offence types), and drug offences and robbery (14.6% or seven out of 48 appeals for both offence types).

In offender sentence appeals that were successful, the most common most serious offence type was robbery (28.6% or two out of seven appeals), followed by homicide and offences involving fraud and dishonestly (25% or one out of four appeals for both offence types), and then sexual offences (20% or two out of 10 appeals). There were no successful offender appeals for the offence types of burglary (three appeals), drug offences (10 appeals) and property damage (two appeals).

3.3.4 Sentence types

Most of the sentences appealed by offenders were immediate terms of imprisonment (79% or 38 of 48 offender appeals). The remaining sentences were mostly suspended sentences of imprisonment, including eight partially suspended sentences and one wholly suspended sentence). As VSAC has observed, 'this is to be expected as a sentence that affects an offender's liberty tends to provide a strong incentive to appeal'.¹¹⁹ Of the 38 cases where a sentence of imprisonment was appealed, three (7.9%) were successful, representing less than 1% of all imprisonment sentences (not just sentences that were appealed). There were no partially suspended sentences that were successfully appealed and less than 1% of all fully suspended sentences were successfully appeal.

Table 3.3: Sentence types originally sentenced in the Supreme Court in 2013–14 to 2016–17 and involved in offender sentence appeals during the reference period

Sentence type	Number and percentage of successful offence sentence appeals according to sentence type	
	As a proportion of all offender sentence appeals	As a proportion of all sentenced cases
Imprisonment	5 of 38 (13.1%)	5 out of 434 (1.6%) ¹²⁰
Partially suspended sentence	0 of 8 (0%)	0 out of 217 (0%)
Wholly suspended sentence	1 of 1 (100%)	1 out of 360 (<1%)
Community service order ¹²¹	1 of 1 (100%)	1 out of 42 (2.4%)

¹¹⁹ VSAC (2018) (n 8) 18.

¹²⁰ It is noted that in two appeals, the sentence was allowed and the only change in the sentence imposed was that the term of imprisonment commenced one day earlier.

¹²¹ This relates to community service orders that were not imposed in combination with or as a condition of a suspended sentence.

3.3.5 Changes to sentences in successful offender appeals

In five of the successful offender sentence appeals involving sentences of immediate imprisonment, none resulted in the offender being resentenced to a different sentence type (such as a suspended sentence or a non-custodial sentence). In three cases the non-parole period was varied, and in two cases the head sentence was also reduced. In the remaining two cases the appeal was allowed but the sentences imposed by the sentencing judge was unaltered, except that imprisonment commenced one day earlier.¹²²

In *TGW v Tasmania*,¹²³ the offender's sentence of two years and six months' imprisonment with a non-parole period of 20 months for one count of indecent assault was set aside and the offender was resentenced to 18 months' imprisonment with a non-parole period of 10 months. This was a 40% reduction in the original head sentence and the non-parole period changed from 66.7% of the total sentence to 55.5%. This meant the offender would be eligible for parole after serving a smaller proportion of the total sentence of imprisonment imposed.

In *Baldock v Tasmania*,¹²⁴ the offender was originally sentenced to nine years' imprisonment with a non-parole period of five and half years for rape and aggravated burglary. On appeal, this was reduced to six years' imprisonment (a 33% reduction) with a non-parole period of three years (a reduction in the non-parole period as a proportion of the total sentence from 61% to 50%).

In *Connelly v Tasmania*,¹²⁵ the offender was sentenced to 20 years' imprisonment with a non-parole period of 15 years (75% of the total sentence) for two counts of attempted murder. On appeal, the head sentence was not changed but the non-parole period was reduced to 12 years (60% of the total sentence).

In *Summers v Tasmania*,¹²⁶ the sentencing judge recorded a conviction and sentenced the offender to a 140 hours community service order following her plea of guilty for one count of unlawfully setting fire to property and one count of attempting to dishonestly acquire a financial advantage. On appeal, this was quashed and an order was substituted that the proceedings were adjourned for two years on the appellant giving an undertaking to be of good behaviour for two years.¹²⁷

In *Read v Tasmania*,¹²⁸ the offender was originally sentenced to nine months imprisonment with seven months suspended and 100 hours community service following his guilty plea to wounding. On appeal, his sentence was reduced to 37 weeks imprisonment wholly suspended for two years. The community service order was not changed.

¹²² See *Streets v Tasmania* [2016] TASCCA 13.

¹²³ [2017] TASCCA 10.

¹²⁴ [2015] TASCCA 3.

¹²⁵ [2015] TASCCA 15.

¹²⁶ [2015] TASCCA 23.

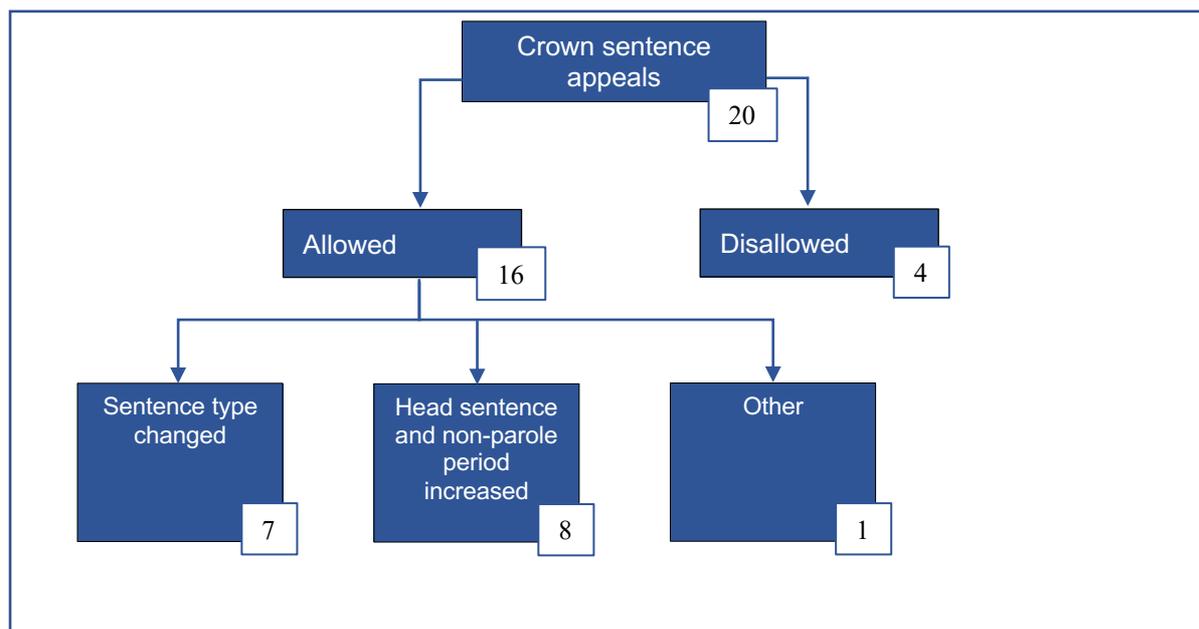
¹²⁷ This was the same sentence as was imposed on her co-accused.

¹²⁸ [2016] TASCCA 8.

3.4 Crown appeals against sentence

As indicated, in relation to the 68 appeals against sentence identified in the reference period, 20 of these were Crown appeals (29.4%). An overview of the outcome of the appeals is provided in Figure 3.5.

Figure 3.5: Result of Crown sentence appeals in cases sentenced in the Supreme Court from 1 July 2013 to 30 June 2017 and appealed and finalised by 31 October 2018

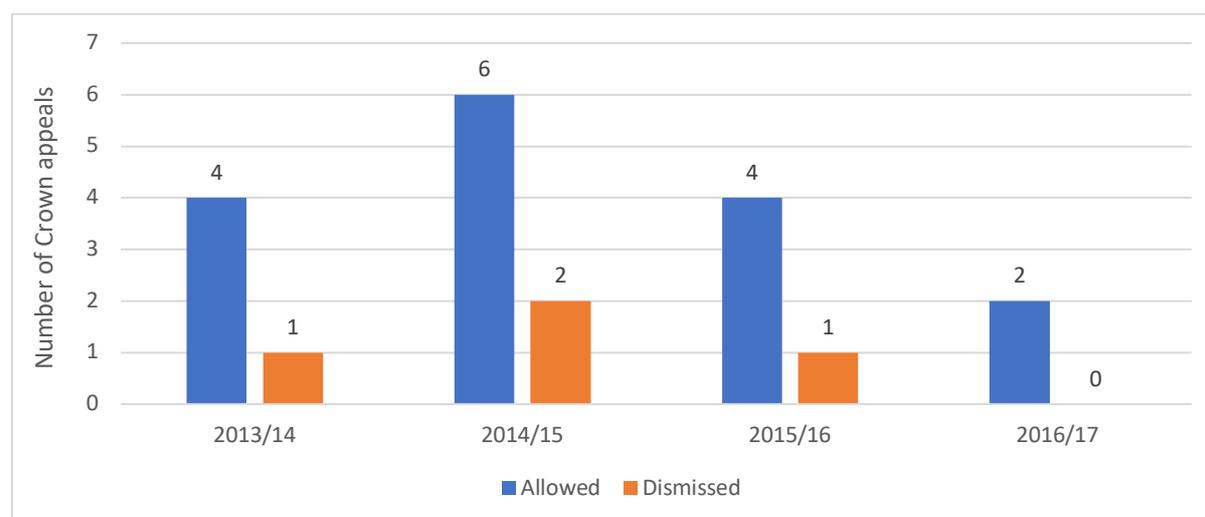


3.4.1 Success rates of offender appeals

As indicated, 80% of Crown appeals were successful (16 of 20 finalised Crown appeals against sentence). This is a higher proportion of success for Crown appeals compared to Victoria, where 70% of Crown appeals against sentence imposed in 2013–14 were successful.¹²⁹

Figure 3.6 sets out the number of Crown appeals against sentence allowed and dismissed by the Tasmanian Court of Criminal Appeal for each year in the reference period.

¹²⁹ VSAC (2018) (n 8) 22.

Figure 3.6: Number of Crown appeals against sentence allowed and dismissed by the Court of Criminal Appeal 2013–14 to 2017–18

3.4.2 Grounds of appeal

Appeal decisions determined by the Court of Criminal Appeal in the reference period have been analysed according to the grounds of appeal relied upon by the Crown in sentencing appeals. In all but one case the only ground of appeal relied on by the Crown was that the sentence imposed was manifestly inadequate (19 out of 20 cases). This was successful in 16 of the 19 cases where it was raised (84% of cases). In the only case where manifest inadequacy was not relied upon, the Crown argued that the sentencing judge had made a specific error in relation to the backdating of the sentence to take account of time already spent in custody. This was not successful.¹³⁰

3.4.3 Offence types of sentences appealed

During the reference period, analysing offence type in sentence appeals by the most serious offence in each case, the most common most serious offence types in Crown sentence appeals were non-sexual offences against the person (40% or eight out of 20 appeals) and drug offences and robbery (20% or four out of 20 appeals).

In Crown sentence appeals that were successful, the most common most serious offence types were robbery (four out of four appeals), sexual offences (two out of two appeals) and offences involving fraud and dishonestly (one out of one appeal). Crown appeals against sentence were successful in six out of eight appeals for non-sexual offences against the person (75%), two out of three appeals for drug offences and one out of two appeal cases for homicide offences.

3.4.4 Sentence type in sentence appeals

As with offender appeals, the most common sentence type that was the subject of a sentence appeal by the Crown was a sentence of an immediate term of imprisonment (55% or 11 of 20 Crown appeals).

¹³⁰ See *Director of Public Prosecutions (Acting) v Gardner* [2015] TASCCA 4.

Table 3.4: Sentence types originally sentenced in the Supreme Court in 2013–14 to 2016–17 and involved in Crown sentence appeals during the reference period

Sentence type	Number and percentage of successful offence sentence appeals according to original sentence type	
	As a proportion of all Crown sentence appeals	As a proportion of all sentenced cases
Imprisonment	8 of 11 (72.7%)	8 out of 434 (1.8%)
Partially suspended sentence	3 of 3 (100%)	3 out of 217 (1.4%)
Wholly suspended sentence	2 of 3 (66.7%)	2 out of 360 (<1%)
Non-custodial sentence ¹³¹	3 of 3 (100%)	3 out of 42 (7.1%)

3.4.5 Changes to sentences in successful Crown appeals

In relation to successful Crown sentence appeals, there were seven cases where the sentence type was changed (44%):

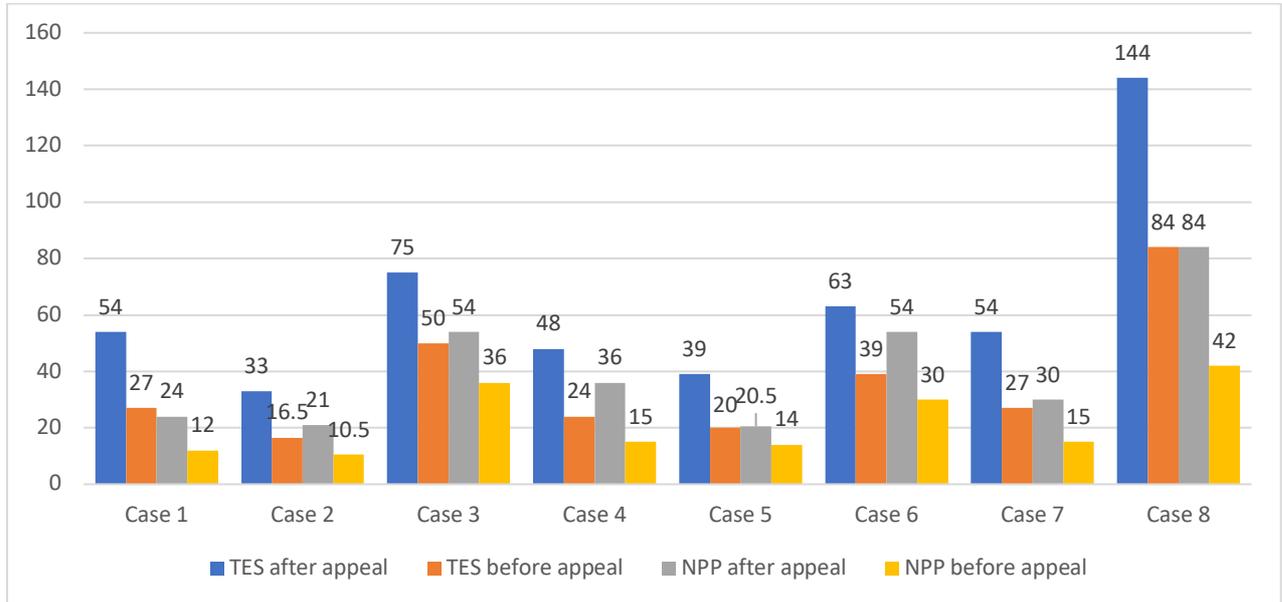
- in three cases, the sentence was changed from a partially suspended sentence to an immediate sentence of imprisonment;
- in one case, the sentence was changed from a wholly suspended sentence to an immediate sentence of imprisonment; and
- in three cases, an adjourned undertaking was changed to a partially suspended sentence (one case) or a wholly suspended sentence (two cases).

As shown in Figure 3.7, in the eight successful Crown appeals involving a sentence of immediate imprisonment, there were significant increases in the total sentence with the largest increase in raw numbers being 60 months (Case 8) and the smallest increase being 16.5 months (Case 2). The average increase was 28 months. In Cases 1, 2, 4 and 7, the average increase in the total sentence resulting from a Crown appeal was an additional 100% of the original sentence. Across the cases, the average increase in the total sentence resulting from successful Crown appeals was an additional 84.7% of the original sentence.

In relation to non-parole periods, there were four cases in which there was no change in the non-parole period as a proportion of the head sentence (Cases 1, 2, 4 and 7). In three cases, even though there was an increase in the head sentence, there was a reduction in the length of the non-parole period as a proportion of the head sentence (Cases 3, 5, 6) and in one case (Case 8) there was an increase in the length of the non-parole period as a proportion of the head sentence.

¹³¹ This includes adjourned undertakings, community service and probation orders.

Figure 3.7: Imprisonment sentences imposed in the Supreme Court 2013-14 to 2016-17 and appealed by the Crown, by changes in total effective sentences and non-parole period



4 TRENDS IN SENTENCE APPEALS FROM MAGISTRATES COURT SENTENCES: SUPREME COURT DECISIONS

This Chapter sets out trends in sentence appeals for Magistrates Court sentences imposed in the period 2013–14 to 2016–17. It examines the overall number of sentences appealed and the success rate of those appeals. It also looks at the number of both offender and Crown appeals against sentence as well as the success rate of, and the grounds for, those appeals.

4.1 Number of sentences appealed and success rate

The Council identified 61 Supreme Court decisions finalised in the reference period that involved a motion to review a sentence imposed in the Magistrates Court in the index years. In relation to the 61 Supreme Court sentencing appeal decisions, 53 cases involved a review of the single sentence by the magistrate at first instance — either as the sentence imposed for a single offence or as a global sentence imposed to cover multiple offences. In contrast, eight Supreme Court sentencing appeals involved the review of separate sentences by the magistrate to cover different offence(s) that were considered by the Supreme Court in the sentencing appeal. It is noted that in relation to these cases where several sentences were imposed by the magistrate and determined in a single appeal by the Supreme Court, the sentence could be challenged on the basis that there was an error in relation to each sentence imposed (or some of the individual sentences) and/or that the total sentence imposed was in error.

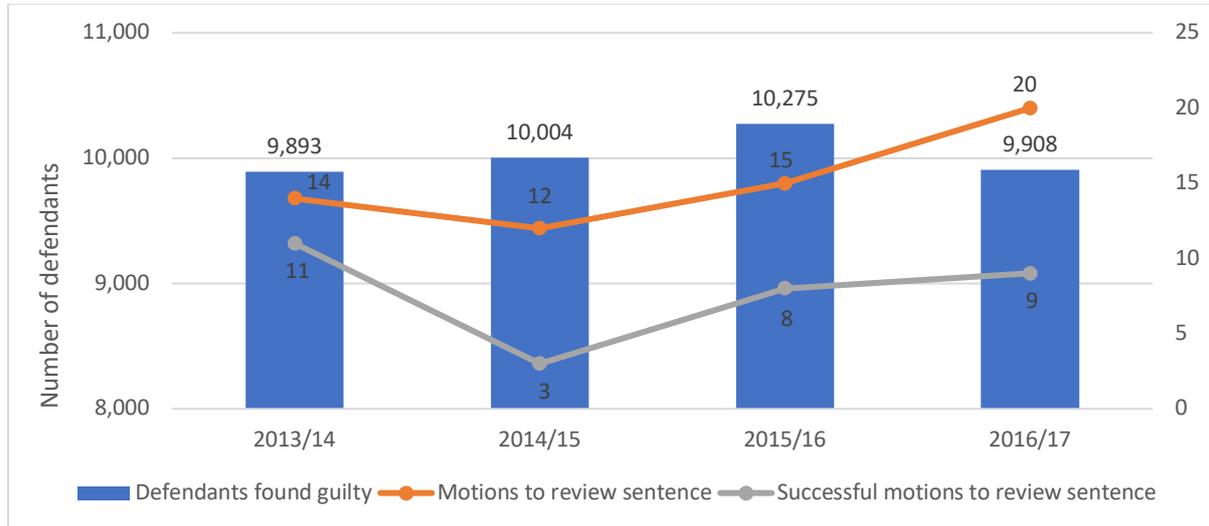
Generally, the Council has conducted its analysis on the basis that each appeal decision of the Supreme Court is only counted once regardless of whether or not the appeal concerned a single sentence or several sentences imposed by the Magistrate. However, for the purposes of determining the offence types relevant to the appeal, the eight cases that involved multiple sentences have been coded according to most serious offence for each sentence imposed. So, for example, if an offender was sentenced for a series of driving offences and also a series of assault offences, and separate sentences were imposed by the magistrate for the driving offences and the assault offences, then the appeal has been categorised as an appeal against sentence for traffic offences and an appeal against sentence for acts intended to cause injury. This means that these eight cases are counted more than once in Table 4.1.

In the period 2013–14 to 2016–17, there were 40,080 defendants proven guilty in the Magistrates Court and 48,290 principal offences for which defendants were sentenced.¹³² As noted, in this period there were 61 finalised motions to review sentence (0.15% of defendants proven guilty) and 31 of these were successful (0.08% of defendants proven guilty).

¹³² ABS (n 20) Table 35.

Figure 4.1 sets out a comparison of defendants found guilty and appeals against sentence for each year. It shows that in comparison to the total number of defendants found guilty in the Magistrates Court each year, there are very few appeals against sentence (motions to review) determined by the Supreme Court.

Figure 4.1: Comparison of defendants found guilty and motions to review in relation to sentence 2013–14 to 2016–17, Magistrates Court¹³³



Using ABS *Criminal Court* data, Table 4.1 provides a breakdown by offence category on the basis of the principal offence for which an offender has been sentenced. Based on the principal offence for which an offender has been sentenced, the most common offences sentenced in the Magistrates Court in the review years were traffic and vehicle regulatory offences (21,841 offences or 45.2%). This was followed by acts intended to cause injury (6544 offences or 13.6%) and then offences against justice procedures (4226 offences or 8.8%).

The most common offence type in appeal proceedings in the Supreme Court (based on the principal offence) in terms of volume were:

- Traffic and vehicle regulatory offences (29 cases);
- Acts intended to cause injury (17 cases);
- Unlawful entry with intent (five cases);
- Offences against justice procedures (four cases);
- Illicit drugs (three cases).

Particularly in relation to traffic offences and acts intended to cause injury, this reflects the most common principal offence type and can be contrasted with the proportion of each of these offence types that were part of appeal proceedings (based on the principal offence). This is shown in Table 4.1. The most common offences in appeal proceedings (as a proportion of all cases where that was the principal offence) were:

¹³³ The data in relation to the defendant finalised is sourced from the ABS (n 20) and the data in relation to the Supreme Court motions to review is sourced from AUSTLII and from the Supreme Court.

- Sexual assault and related offences (0.52%);
- Unlawful entry with intent (0.47%);
- Prohibited weapons (0.36%);
- Acts intended to cause injury (0.26%).

Table 4.1: Number and proportion of offences in motions to review in the Supreme Court by offence type 2013–14 to 2016–17

Offence type	Number of offences finalised in Magistrates Court	Number and percentage of all offences in appeal proceedings	
		Number	Percentage
Homicide and related offences ¹³⁴	48	0	0%
Acts intended to cause injury	6544	17	0.26%
Sexual assault and related offences	382	2	0.52%
Dangerous or negligent acts endangering persons	1778	2	0.11%
Abduction, harassment and other offences against the person	16	0	0%
Robbery, extortion and related offences	160	0	0%
Unlawful entry with intent/burglary, break and enter	1057	5	0.47%
Theft and related offences	3405	2	0.06%
Fraud, deception and related offences	1001	2	0.2%
Illicit drug offences	2749	3	0.11%
Prohibited and regulated weapons and explosives offences	842	3	0.36%
Property damage and environmental pollution	1218	1	0.08%
Public order offences	2581	3	0.12%
Traffic and vehicle regulatory offences	21841	29	0.13%
Offences against justice procedures, government security and government operations	4226	4	0.09%
Miscellaneous offences	442	0	0%

4.2 Who initiated the motions to review?

In relation to the 61 Supreme Court decisions finalised in the reference period that involved a motion to review a sentence imposed in the Magistrates Court, there were 42 offender appeals (68.9%) and 19 Crown appeals (31.1%). Unlike appeals from

¹³⁴ In relation to matters sentenced in the Magistrates Court, this category refers to offences relating to driving causing death (that is, negligent driving causing death): ABS, *Australian and New Zealand Standard Offence Classification 2011* (Catalogue No 1234.0, 2 June 2011) 27.

sentences imposed in the Supreme Court, where the success rate of offender appeals against sentence was much lower than the success rate of Crown appeals against sentence, the success rates for offender and Crown appeals against sentences imposed in the Magistrates Court were similar. In relation to sentences imposed in the Magistrates Court, 47.4% of Crown appeals were successful (nine of 19 finalised appeals) and 52.4% of offender appeals were successful (22 of 42 appeals). Offender appeals against sentences were more likely to be successful in relation to sentences imposed in the Magistrates Court than from sentences imposed in the Supreme Court. This is discussed further at [4.3.1].

4.3 Offender initiated motions to review

As indicated, in relation to the 61 appeals against sentences imposed in the Magistrates Court identified in the reference period, 42 of these were offender appeals (68.9%).

4.3.1 Success rates of offender appeals

As noted above, of the 42 offender appeals against sentence, 52.4% of appeals were successful (22 of 42 finalised appeals). This can be contrasted with the proportion of offender sentencing appeals in relation to sentences imposed in the Supreme Court that were successfully appealed to the Court of Criminal Appeal (14.6%). Another difference that can be identified in relation to offender appeals from the Magistrates Court to the Supreme Court is the higher proportion of offenders who were represented by counsel at the hearing of the appeal. There were only five offenders (11.9%) who were not represented, and in one of those cases, the notice of appeal and papers were prepared by counsel. This contrasts with offender appeals in the Supreme Court where 25% of offenders were unrepresented. It is also noted that two of the unrepresented offenders were successful in their motion to review to the Supreme Court.

Figure 4.2 sets out the number of offender motions to review sentence allowed and dismissed by the Supreme Court for each year in the reference period.

Figure 4.2: Number of offender appeals against sentence allowed and dismissed by the Supreme Court 2013–14 to 2017–18



4.3.2 Grounds of appeal

Motions to review determined by the Supreme Court in the reference period have been analysed according to the grounds of appeal relied upon by offenders in sentencing appeals. Table 4.2 sets out the grounds of appeal relied on in offender sentencing appeals based on an analysis of the Supreme Court judgments. It is noted that the total in Table 4.2 exceeds the number of offender appeals (n = 42) as offenders may rely on multiple grounds in relation to sentencing appeals.¹³⁵

As with appeals to the Court of Criminal Appeal, it shows that a majority of offenders relied on the ground that the sentence was manifestly excessive in the circumstances (85.7% of offenders). However, there was a greater proportion of offenders who did not rely on this ground of appeal (14.3% compared to 4.2%). There were 26 cases where manifest excess was the sole ground of appeal and a further five cases where appellant relied on manifest excess and asserted a specific error in relation to the weight attached to a relevant sentencing factor and the Supreme Court subsumed these grounds into a consideration of whether the sentence was manifestly excessive. Accordingly, an argument that the sentence was manifestly excessive was the only effective ground of appeal in 31 out of 42 offender appeals (73.8%).

Table 4.2: Number and percentage of grounds raised in offender sentencing appeals 2013–14 to 2016–17

Offender sentence appeals (n = 41)	Ground raised			
	No	% of offender appeals	No successful	% successfully raised
Manifest excess	36	86	17	47.2
Approach to parity	1	2.4	0	0
Approach to mental illness	1	2.4	0	0
Error of law in relation to application of penalty provisions	9	21.7	7	77.8
Impermissible reasoning	1	2.4	1	100
Approach to penalty provisions when sentences imposed for state and commonwealth offences	1	2.4	1	100

In 14 of the 22 successful offender sentencing appeals, the offender relied only on the ground that the original sentence was manifestly excessive. In four other cases, the offender relied on a specific error and manifest excess and both grounds were successful. Accordingly, in 18 of the 22 successful appeals, manifest excess was successfully relied on (81.8% of successful offender appeals).

4.3.3 Offence types

During the reference period, analysing offence type in sentence appeals by the most serious offence in each case, the most frequent proven most serious offence type in

¹³⁵ It is also noted that in seven cases, the motions to review also involved issues in relation to the activation of a previously imposed suspended sentence. However, the issue of appeals in relation to the activation of sentences imposed following breach proceedings are not addressed in this paper.

offender sentence appeals was the category of traffic offences (19 cases). There were four further cases where a separate sentence was imposed for a traffic offence (but this was not the most serious offence category in the case). There were six cases where the most serious offence was an act intended to cause injury and one further case where this was an offence category but not the most serious offence category in the case.

As shown in Table 4.3, in offender sentence appeals that were successful, the most common principal offence types in the case were:

- Public order offences (animal cruelty) (one out of one case);
- Illicit drugs (two out of two cases);
- Unlawful entry (three out four cases);
- Acts intended to cause injury (three out of six cases);
- Prohibited weapons (one out two cases);
- Fraud, deception and related offences (one out of two cases);
- Offences against justice procedures (two out of four cases).

Table 4.3: Principal offence by case originally sentenced in the Magistrates Court in 2013–14 to 2016–17 and involved in offender motions to review during the reference period

Offence type	No	No of successful appeals
Acts intended to cause injury	6	3
Sexual assault and related offences	2	0
Dangerous or negligent acts endangering persons	2	0
Unlawful entry with intent/burglary, break and enter	4	3
Fraud, deception and related offences	2	1
Illicit drug offences	2	2
Prohibited and regulated weapons and explosives offences	2	1
Public order offences	1	1
Traffic and vehicle regulatory offences	19	9
Offences against justice procedures, government security and government operations	4	2
Theft	1	0

As these data relate to very few matters, it is not possible to identify any trend or make any observation in relation to the likelihood of a successful appeal against sentence in any particular offence category.

4.3.4 Sentence types

Most of the sentences appealed by offenders involved a sentence of imprisonment that was to be served immediately — either as a sentence of full-time imprisonment (15

cases) or as partially suspended sentence (14 cases). There were four appeals against wholly suspended sentences and three of these were successful.

Table 4.4: Sentence types originally sentenced (by most serious sentence) in the Magistrates Court in 2013–14 to 2016–17 and involved in offender motions to review during the reference period

Sentence type	Number of all offender motions to review (n = 42)	Number of successful offender motions to review (n = 22)
Imprisonment	15	7
Partially suspended sentence	14	8
Wholly suspended sentence	4	3
Community service order and driving disqualification	1	0
Community service order	1	1
Fine and driving disqualification	6	2
Fine and conviction	1	1

4.3.5 Changes to sentences in successful offender appeals

In relation to the 22 successful offender appeals against sentences imposed in the Magistrates Court, there was information available about the new sentence imposed in 17 of the cases. In nine of the 17 cases the sentence type was changed as follows:

- in one case, the sentence was changed from a fully served sentence of imprisonment to a non-custodial sentence;
- in one case, the sentence imposed for one of the offences was changed from a fully served sentence of imprisonment to a wholly suspended sentence of imprisonment (and an allowance for parole was made in relation to other offences);
- in three cases, the sentence was changed from a partially suspended sentence to a wholly suspended sentence;
- in two cases, the sentence was changed from a wholly suspended sentence to a non-custodial sentence;
- in one case, the sentence was changed from a community service order to a fine; and
- in one case, the sentence was changed from a fine and a recorded conviction to dismissal without conviction.

In six other cases, the length of the sentence was reduced:

- in four cases, the length of the period of imprisonment was reduced;
- in one case, the period of imprisonment was reduced for a partly suspended sentence; and
- in one case, the length of the period of licence disqualification was reduced.

In the remaining cases, an order in relation to eligibility for parole was made in one case and in the other case, the appeal was successful due to an error made in relation to the penalty provision for an offence but the length of the partially suspended sentence imposed by the Magistrate was unchanged on appeal.

4.4 Crown appeals against sentence

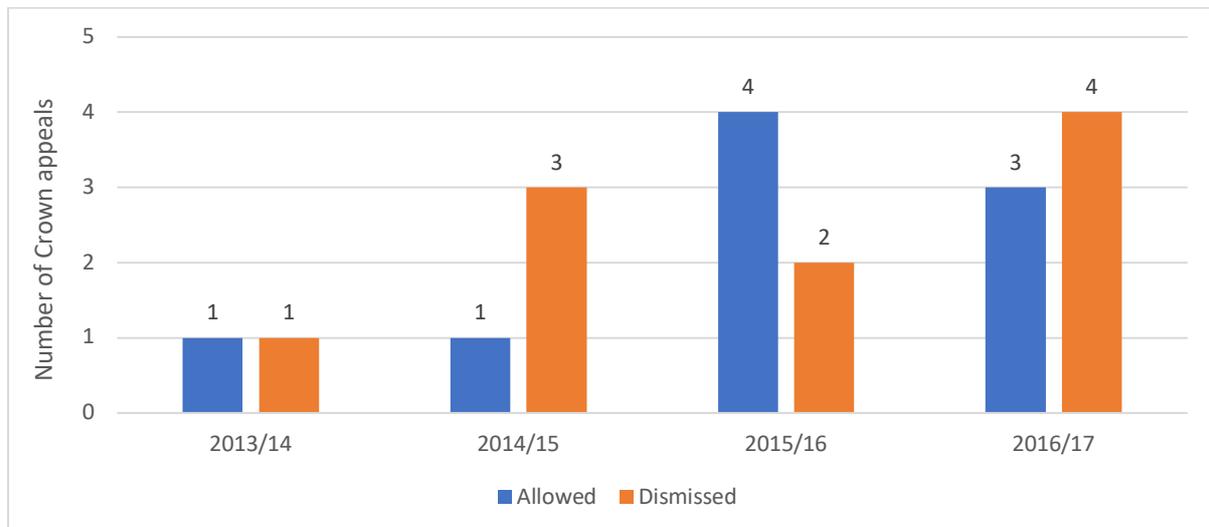
As indicated, in relation to the 61 motions to review sentences identified in the reference period, 19 of these were Crown appeals (31.3%).

4.4.1 Success rates of Crown appeals

As previously stated, 47.4% of Crown appeals were successful (nine of 19 finalised motions to review the sentence that were initiated by the Crown). As noted, fewer Crown appeals against sentence were successful in the relation to motions to review in the Supreme Court when compared to Crown appeals against sentence heard in the Court of Criminal Appeal (where 80% were successful).

Figure 4.3 sets out the number of Crown appeals against sentence allowed and dismissed by the Supreme Court for each year in the reference period.

Figure 4.3: Number of Crown appeals against sentence allowed and dismissed by the Supreme Court 2013–14 to 2017–18



4.4.2 Grounds of appeal

Motions to review sentence determined by the Supreme Court in the reference period have been analysed according to the grounds of appeal relied upon by the Crown. In all but two cases, the only ground of appeal relied on by the Crown was that the sentence imposed as manifestly inadequate (17 out of 19 cases). This was successful in seven of the 17 cases where it was raised (41.2% of cases). In one of the remaining cases, manifest inadequacy was relied upon as well as an error of law in relation to the mix of 'cumulative, concurrent and global sentences imposed'.¹³⁶ Both these grounds of appeal

¹³⁶ *Bonde v White* [2017] TASSC 30.

were successful. In the other case, the ground of appeal was an error of law in relation to the sentence type imposed not being available in the case.¹³⁷ This was successful.

4.4.3 Offence types of sentences appealed

During the reference period, analysing offence type in sentence appeals by the most serious offence in each case, the most common most serious offence type in Crown sentence appeals was the category of acts intended to cause injury (typically assault) in 10 out of 19 appeals (52.6%) followed by traffic offences in six out of 19 appeals (31.6%). There was one appeal for an offence against justice procedures, one involving prohibited weapons offences and one involving theft and related offences. It is noted that nine out of the 19 appeals involved sentences imposed for offending that was classified as family violence (assault, breach family violence order and stalking).

In Crown sentence appeals that were successful, the most common most serious offence types were firearms offences (one out of one) and traffic offences (three out of six). In relation to Crown sentence appeals for offences that were classified as acts intended to cause injury, five of the 10 appeals were successful. Crown appeals were successful in relation to four of the nine family violence sentence appeals.

4.4.4 Sentence type in sentence appeals

As shown in Table 4.5, the most common sentence types that were the subject of a sentence appeal by the Crown were an adjourned undertaking without recording a conviction under the *Sentencing Act 1997* (Tas) s 7(f) and wholly suspended sentences. These were the original sentence types imposed that were the subject of a Crown appeal in five cases. However, none of these appeals in relation to adjourned undertakings were successful. In relation to the five appeals against wholly suspended sentences, two of these were successful. There were four appeals against partially suspended sentences and all of these were successful.

Table 4.5: Sentence types originally sentenced (by most serious sentence) in the Magistrates Court in 2013–14 to 2016–17 and involved in Crown motions to review during the reference period

Sentence type	Number of all Crown motions to review (n = 19)	Number of successful Crown motions to review (n = 9)
Imprisonment	0	0
Partially suspended sentence	4	4
Wholly suspended sentence	5	2
Probation order with conviction	2	0
Probation order without conviction	1	1
Community service order	1	1
Adjourned undertaking (without conviction) <i>Sentencing Act 1997</i> (Tas) s 7(f)	5	0
Fine and driving disqualification	1	1

¹³⁷ *Wilkie v Taylor* [2017] TASFC 7.

4.4.5 Changes to sentences in successful Crown appeals

In relation to the nine successful Crown appeals against sentences imposed in the Magistrates Court, there was information available about the new sentence imposed in seven of the cases. In four of the seven cases, the sentence type was changed as follows:

- in two cases, the sentence was changed from a partially suspended sentence to a fully served sentence of imprisonment;
- in one case, the sentence was changed from a wholly suspended sentence to a fully served sentence of imprisonment; and
- in one case, the sentence was changed from a fine and licence disqualification to a fine, licence disqualification and probation order.

In the remaining three cases:

- the sentence of imprisonment that was wholly suspended was increased (one case); and
- the partly suspended sentence was ordered to be served cumulatively and not concurrently with another sentence of imprisonment (two cases).

5 CONCLUSION

Addressing the research questions identified in this paper based on the appeals against sentence in the review period, the key findings of the Council's research are as follows:

The proportion of cases sentenced in the Supreme Court and Magistrates Court resulting in an appeal against sentence

- In relation to Supreme Court sentences, there were 68 finalised appeals against sentence in relation to 1114 cases (6.1%).
- In relation to Magistrates Court sentences, there were 61 motions to review sentence (0.15% of defendants proven guilty).

The proportion of appeals that were initiated by the offender or the Crown

- In relation to Supreme Court sentences, there were 48 offender appeals (70.6%) and 20 Crown appeals (29.4%).
- In relation to sentences imposed in the Magistrates Court, there were 42 offender appeals (68.9%) and 19 Crown appeals (31.1%).

The proportion of appeals against sentence that were allowed or dismissed

- In relation to Supreme Court sentences, there were 23 successful appeals against sentence, which represented 33.8% of the 68 finalised appeals and 2.1% of the offenders sentenced in the reference period. Crown appeals against sentence were more successful than offender appeals against sentence as 80% of Crown appeals were successful (16 of 20 finalised appeals) compared to 14.6% of offender appeals (7 of 48 appeals).
- In relation to Magistrates Court sentences, there were 31 successful motions to review sentence determined by the Supreme Court which represented 50.8% of finalised motions to review and 0.08% of defendants proven guilty in the reference period.
- Unlike appeals from sentences imposed in the Supreme Court, where the success rate of offender appeals against sentence was much lower than the success rate of Crown appeals against sentence, the success rate for offender and Crown appeals against sentences imposed in the Magistrates Court were similar. In relation to sentences imposed in the Magistrates Court, 47.4% of Crown appeals were successful (nine of 19 finalised appeals) and 52.4% of offender appeals were successful (22 of 42 appeals).

Grounds of appeal

- In relation to Supreme Court sentences, nearly all offenders relied on the ground that the sentence was manifestly excessive in the circumstances (95.8% of offenders). There were only two offenders who did not rely on this ground of

appeal. An argument that the sentence was manifestly excessive was the only effective ground of appeal in 33 out of 48 offender appeals (68.75%).

- In relation to Crown appeals against sentences imposed in the Supreme Court, in all but one case the only ground of appeal was that the sentence imposed as manifestly inadequate (19 out of 20 cases). This was successful in 16 of the 19 cases where it was raised (84% of cases).
- In relation to Magistrates Court sentences, a majority of offenders relied on the ground that the sentence was manifestly excessive in the circumstances (85.7% of offenders). This was the only effective ground of appeal in 31 out of 42 offender appeals (73.8%). However, it is noted that there were a greater proportion of offenders who did not rely on this ground of appeal (14.3% compared to 4.2% of offenders in relation to sentences imposed in the Supreme Court).
- In relation to Crown appeals against sentences imposed in the Magistrates Court, in all but two cases the only ground of appeal relied on by the Crown was that the sentence imposed as manifestly inadequate (17 out of 19 cases).

Offence types most likely to be involved in a sentence appeal

- In relation to Supreme Court sentences, the most common offences in sentence appeal proceedings (as a proportion of all cases where that offence was the most serious offence type) were homicide offences (19.4%); robbery (9.6%); and sexual offences (8.3%).
- In relation to offender appeals against sentence from a sentence imposed in the Supreme Court, the most common most serious offence types were non-sexual offences against the person and sexual offences (20.8% or 10 out of 48 appeals for both offence types), and drug offences and robbery (14.6% or seven out of 48 appeals for both offence types). In offender sentence appeals that were successful, the most common most serious offence type was robbery (28.6% or two out of seven appeals), followed by homicide and offences involving fraud and dishonestly (25% or one out of four appeals for both offence types), and then sexual offences (20% or two out of 10 appeals).
- In relation to Crown appeals against a sentence imposed in the Supreme Court, the most common most serious offence types in Crown sentence appeals were non-sexual offences against the person (40% or eight out of 20 appeals) and drug offences and robbery (20% or four out of 20 appeals). In Crown sentence appeals that were successful, the most common most serious offence types were robbery (four out of four appeals), sexual offences (two out of two appeals) and offences involving fraud and dishonestly (one out of one appeal).
- In relation to motions to review sentences initiated by offenders, the most common most serious offence type was the category of traffic offences (19 cases). There were six cases where the most serious offence was an act intended to cause injury.
- In relation to Crown initiated motions to review sentences imposed in the Magistrates Court, the most common most serious offence in Crown sentence

appeals was the category of acts intended to cause injury (typically assault) in 10 out of 19 appeals (52.6%) followed by traffic offences in six out of 16 appeals (31.6%).

Change to original sentence after a successful appeal

- In relation to Supreme Court sentences, most of the sentences appealed by offenders were immediate terms of imprisonment (79% or 38 of 48 offender appeals). In five of the successful offender sentence appeals involving sentences of immediate imprisonment, none resulted in the offender being resentenced to a different sentence type (such as a suspended sentence or a non-custodial sentence). In three cases, the non-parole period was varied and in two cases, the head sentence was also reduced. In the remaining two cases, the appeal was allowed but the sentence imposed by the sentencing judge was unaltered, except that imprisonment commenced one day earlier.
- In relation to Crown appeals against sentences imposed in the Supreme Court, as with offender appeals, the most common sentence type that was the subject of a sentence appeal by the Crown was a sentence of an immediate terms of imprisonment (55% or 11 of 20 Crown appeals). In relation to successful Crown sentence appeals there were seven cases where the sentence type was changed (44%), and in appeals involving immediate sentences of imprisonment there were significant increases in the sentence imposed.
- In relation to Magistrates Court sentences, most of the sentences appealed by offenders involved a sentence of imprisonment that was to be served immediately — either as a sentence of full-time imprisonment (15 cases) or as partially suspended sentence (14 cases).
- In relation to Crown appeals against sentences imposed in the Magistrates Court, the most common sentence types that were the subject of a sentence appeal by the Crown were an adjourned undertaking without recording a conviction under the *Sentencing Act 1997* (Tas) s 7(f) and wholly suspended sentences. These were the original sentence types imposed that were the subject of a Crown appeal in five cases each. However, none of these appeals in relation to adjourned undertakings were successful and two of the appeals in relation to wholly suspended sentences were successful. There were four appeals against partially suspended sentences and all of these were successful.

Legal representation

- In relation to appeals heard in the Court of Criminal Appeal, there were 12 out of 48 offenders who were unrepresented in relation to their sentence appeal (25%). All of these appeals were unsuccessful.
- In relation to offender appeals from the Magistrates Court to the Supreme Court, a higher proportion of offenders were represented by counsel at the hearing of the appeal. There were only five offenders (11.9%) who were not represented, and in one of those cases the notice of appeal and papers were prepared by counsel.

Jurisdictional comparison

- There were proportionately more appeals against sentence in Victoria than in Tasmania. In relation to sentences imposed in the Supreme Court of Tasmania, as noted, there were 68 finalised appeals against sentence in relation to 1114 cases (6.1%). In Victoria, of the 1910 cases sentenced in the higher courts in 2013–14, there were 183 appeals against sentence (9.5%)
- There were more Crown appeals and fewer offender appeals against sentence as a proportion of appeals in Tasmania as compared to Victoria. In relation to appeals heard by the Court of Criminal Appeal, there were 48 offender appeals (70.6%) and 20 Crown appeals (29.4%). In Victoria, there were 153 offender appeals against sentence (86.9%) and 23 Crown appeals (13.1%).
- Success rates for appeals were similar in Tasmania and Victoria. In Tasmania, there were 23 successful appeals against sentence, which represented 33.8% of the 68 finalised appeals. In Victoria, there were 60 successful appeals against sentence, which represented 32.8% of the appeals.
- Offender appeals against sentence were less successful than Crown appeals against sentence in both Tasmania and Victoria. In Tasmania, 80% of Crown appeals against sentence heard by the Court of Criminal Appeal were successful compared to 14.6% of offender appeals. In Victoria, 69.6% of Crown appeals against sentences imposed by higher courts in 2013–14 were successful compared to 28.8% of offender appeals.
- Offender appeals against sentence were less successful in Tasmania than in Victoria or New South Wales. In Tasmania, of the 48 offender appeals against sentence, only 14.6% of appeals were successful (seven of 48 finalised appeals). This can be contrasted with research in Victoria which found that 28.8% of offender appeals against sentence for sentences imposed in the higher courts in 2013–14 were ultimately successful (44 cases out of 153 cases). In 2016, in New South Wales there were 176 applications for leave to appeal against sentence and 59 of these were successful (33.5%).
- Crown appeals against sentence were more successful in Tasmania than in Victoria. In Tasmania, Crown appeals were successful in 80% of cases (16 of 20 finalised appeals). In Victoria, Crown appeals were successful in 69.6% of cases (16 of 23 appeals).

The Council has considered the reasons for the disparity in the success rate of offender sentence appeals in the Court of Criminal Appeal and makes the following observations:

- Fewer judges in Tasmania may have resulted in a greater degree of consistency in sentencing than in other states.
- Differences in legislation that provide for appeal as a right (as in Tasmania) and the need for leave to appeal (Victoria and New South Wales) would not appear to provide an explanation for the difference, as VSAC and NSW Judicial Commission figures reflect successful leave applications that led to successful appeals against sentence.

- While the number of unrepresented appellants who pursue sentencing appeals in other jurisdictions is not known, in Tasmania, the Council's analysis of appeals finalised by the Court of Criminal Appeal found that there were 12 out of 48 offenders who were unrepresented in relation to their sentence appeal (25%). All of these appeals were unsuccessful. Legal Aid is only granted to initiate an appeal against sentence if there is a reasonable prospect of success, and the prospect of a substantial reduction in sentence or a substantial advantage to the accused. While it is not known if any of the unrepresented defendants had applied for aid, it is plausible that a reason why at least some of these offenders were not represented on appeal was because the basis of the appeal did not meet the criteria for the grant of aid based on the prospects of success of their appeal. In Tasmania, there is no threshold test for initiating an appeal against sentence. It is noted that if unrepresented defendants are excluded from a consideration of the success rate of offender appeals, then the success rate for offender initiated appeals is 19.5% (seven out of 36 finalised appeals).
- In Tasmania, offenders predominately rely on manifest excess rather than a specific error made by the sentencing judge. It was raised in 46 out of 48 sentencing appeals (96%). Although caution must be taken in comparing research, an analysis of offender sentence appeals in Victoria from 2010 found that manifest excess was raised in 82.4% of offender appeals.
- Sentences of imprisonment in Tasmania are generally shorter than those imposed in Victoria and New South Wales.
- Sentencing legislation in Tasmania has traditionally been less complex than sentencing legislation in comparable jurisdictions (and so gives rise to fewer appealable errors).

Appendix A: Data sources and methodology

Methodology

In relation to sentences imposed in the Supreme Court, the analysis conducted by the Council uses data received from the TLRI Sentencing database, which covers the years 1 January 2001 to 30 June 2017. Data is entered from the Supreme Court judges' Comments on Passing Sentence, hard copies of which are held in the Law Library at the University of Tasmania.

In Tasmania, when an offender is convicted of multiple offences, a judge has the power to impose one sentence for all offences (a global sentence). Tasmanian courts also have the power to impose separate sentences for each offence, but in practice, when an offender is convicted of multiple offences, a global order is usually made. Consequently, in most cases it is not possible to determine the proportion of the total sentence that relates to each individual count.

In the database, the cases are entered based on assessment of the principal offence (most serious offence) as the 'major crime'. This is used to make an assessment of the crime type. There are 11 broad crime types in the database. For the most part, the categories correspond with the major offence divisions listed in the Australian and New Zealand Standard Offence Classification ('ANZSOC'). The crime types are set out below together with the corresponding ANZSOC division level.

- Homicides (Division 01)
- Non-sexual offences against the person (Division 02)
- Sexual offences (Division 03)
- Robbery (Division 06)
- Burglary (Division 07)
- Offences involving fraud or dishonesty (Division 09)
- Drug offences (Division 10)
- Property damage (Division 12)
- Offences against good order (Division 15)
- Commonwealth offences
- Other

In relation to sentences imposed in the Magistrates Court, the analysis conducted by the Council uses data set out in the ABS, *Criminal Courts*¹³⁸ for information on the number of sentences imposed on offenders in the period 2013–14 to 2016–17 for the following offence categories from ANZSOC:

- Acts intended to cause injury (Division 02)
- Sexual assault and related offences (Division 03)

¹³⁸ ABS (n 20).

- Dangerous or negligent acts endangering persons (Division 04)
- Abduction, harassment and other offences against the person (Division 05)
- Robbery, extortion and related offences (Division 06)
- Unlawful entry with intent/burglary, break and enter (Division 07)
- Theft and related offences (Division 08)
- Fraud, deception and related offences (Division 09)
- Illicit drug offences (Division 10)
- Prohibited and regulated weapons and explosives offences (Division 11)
- Property damage and environmental pollution (Division 12)
- Public order offences (Division 13)
- Traffic and vehicle regulatory offences (Division 14)
- Offences against justice procedures, government security and government operations (Division 15)
- Miscellaneous offences (Division 16)

Appeal judgments for the Court of Criminal Appeal and the Supreme Court were obtained from a search of AUSTLI databases. This was cross checked with data provided by the Supreme Court and a further 13 cases involving finalised motions to review from sentencing decision in the Magistrates Court were identified that did not appear on AUSTLI and were only published to the parties. These are indicated with an ‘*’ in Appendix B.

In determining the offence category to which the appeal related, the Court of Criminal Appeal decisions were categorised on the basis of the offence category used for the original sentencing decision in the TLRI database. This was possible given that the Council had access to the raw data in the TLRI database.

In relation to motions to review from the Magistrates Court, the Council compiled its own database from the information contained in the Supreme Court judgments. These were compared with the figures provided in a different dataset (data obtained from the ABS *Criminal Court* series). To allow comparisons to be made between the two datasets, the Council manually categorised the Supreme Court decisions into offence categories to correspond to the categories reported in the ABS, *Criminal Court* series (as listed above) using the NOI to determine the principal offence if a motion to review related to a global sentence imposed for different offences. If a global sentence was imposed for multiple counts and this sentence was the subject of an appeal, the cases were entered based on assessment of the principal offence (most serious offence) as the ‘major crime’. If a separate sentence was imposed for different offence(s), then each of those offences were counted for the purposes of comparing offence categories.

Appendix B: List of sentencing appeal decisions 2013–18 relating to sentences imposed 2013–14 to 2016–17

2013

Supreme Court

Shea v Lane [2013] TASSC 62

Burke v Goodwin [2013] TASSC 72

Chatwin v Godfrey [2013] TASSC 70

Lane v Parish 832/2013*

Court of Criminal Appeal

Director of Public Prosecutions v Williamson [2013] TASC CA 6

2014

Supreme Court

Webb v Biddle [2014] TASSC 6

Laning v Harvey & Wilkie 139/2014*

Millington v Lane [2014] TASSC 7

Brown v Lusted 758/2014*

Garcie v Lusted [2014] TASSC 27

Coventry v Lusted 1282/2013*

Mitchell v Marshall [2014] TASSC 43

Everett v Tasmania 441/2014*

Court of Criminal Appeal

Williams v Tasmania [2014] TASC CA 2

TAP v Tasmania [2014] TASC CA 5

Director of Public Prosecutions (Acting) v Ohi [2014] TASC CA 4

JCS v Tasmania [2014] TASC CA 6

2015

Supreme Court

Barrett v Wilson [2015] TASSC 3

Collins v Caccavo [2015] TASSC 53

Young v Wilson [2015] TASSC 16

Parker v Hall [2015] TASSC 60

S v Johnson [2015] TASSC 20

Wilkie v Taylor [2015] TASFC 7

Lyons v Bakes [2015] TASSC 37

Perkins v Wolf 281/2015*

Brown v Lusted & Parker [2015] TASSC 45

McCrostie v Lyons & Ors 943/2014*

Jamieson v State of Tasmania [2015] TASSC 50

Starling v Barnes 148/2015*

Starling v Kerr 1041/2014*

Court of Criminal Appeal

Director of Public Prosecutions (Acting) v Pearce [2015] TASCCA 1
Director of Public Prosecutions (Acting) v Foster [2015] TASCCA 2
Baldock v Tasmania [2015] TASCCA 3
Director of Public Prosecutions (Acting) v Gardner [2015] TASCCA 4
Chevoux v Tasmania [2015] TASCCA 5
Hall v Tasmania [2015] TASCCA 6
Taylor v The Queen [2015] TASCCA 7
Director of Public Prosecutions (Acting) v Hawkins [2015] TASCCA 8
CJP v Tasmania [2015] TASCCA 9
Director of Public Prosecutions (Acting) v Poole [2015] TASCCA 10
Director of Public Prosecutions (Acting) v Morgan [2015] TASCCA 11

Dare v Tasmania [2015] TASCCA 12
Connelly v Tasmania [2015] TASCCA 15
Devine v Tasmania [2015] TASCCA 19
Brasher v Tasmania [2015] TASCCA 16
Sullivan v Tasmania [2015] TASCCA 18
Director of Public Prosecutions (Acting) v Rushton [2015] TASCCA 20
M J K v Tasmania [2015] TASCCA 21
Director of Public Prosecutions (Acting) v Crosswell [2015] TASCCA 22
Summers v Tasmania [2015] TASCCA 23
Stanley v Tasmania [2015] TASCCA 24
Sclater v Tasmania [2015] TASCCA 26
Fama v Tasmania [2015] TASCCA 27

2016

Supreme Court

Wilkie v Cohen [2016] TASSC 14
Wilkie v Fewkes [2016] TASSC 18
Bester v Barnes [2016] TASSC 19
Moore v R [2016] TASSC 23
Smith v Bonde [2016] TASSC 24
Upston v Moore [2016] TASSC 32
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Leaman v Tasmania [2016] TASSC 36
Williams v Parker [2016] TASSC 39
Bonde v Ellery [2016] TASSC 43

Bailey v Harriss [2016] TASSC 48
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Phillips-Crole v Godfrey 686/2016*
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Court of Criminal Appeal

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Sweetman v Tasmania [2016] TASCCA 5

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[2016] TASCCA 9

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Bradford* [2016] TASCCA 14

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Kaye v Tasmania [2016] TASCCA 15

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Deakin v Tasmania [2016] TASCCA 19

Roland v Tasmania [2016] TASCCA 20

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2017

Supreme Court

Smith v Kirkham [2017] TASSC 3

Biddle v Applebee [2017] TASSC 7

Cock v Depaoli [2017] TASSC 8

Lavell v McKenna [2017] TASSC 10

Kelleher v Avery [2017] TASSC 14

Bluett v Lusted [2017] TASSC 15

Attard v Moore [2017] TASSC 16

Parker v Keefe [2017] TASSC 17

Parker v Riley-McDonald [2017] TASSC
26

Parker v Stebbings [2017] TASSC 28

Bonde v White [2017] TASSC 30

Mayne v Tasmania [2017] TASSC 38

Pike v Lusted [2017] TASSC 46

Langley v Lyons [2017] TASSC 48

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Court of Criminal Appeal

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2

Cooper v Tasmania [2017] TASCCA 3

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[2017] TASCCA 8

Mitchell v Tasmania [2017] TASCCA 9

TGW v Tasmania [2017] TASCCA 10

SG v Tasmania [2017] TASCCA 12

Pattison v Tasmania [2017] TASCCA 13

Cordwell v Tasmania [2017] TASCCA
14

Director of Public Prosecutions v WLNH
[2017] TASCCA 15

Richardson v Tasmania [2017] TASCCA
16

Armstrong v Tasmania [2017] TASCCA
18

Dobson v Tasmania [2017] TASCCA 19

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JWM v Tasmania [2017] TASCCA 22

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2018

Supreme Court

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