



## DIRECTOR OF PUBLIC PROSECUTIONS, TASMANIA

### ANNUAL REPORT 2008-2009

This Report is prepared for submission to the Attorney-General in accordance with the requirements of Section 15 of the *Director of Public Prosecutions Act 1973*, to report on the performance of my functions during the 12 months ending on 30 June in each year.

During the year staff in my Office have undertaken the prosecution of all criminal trials, pleas of guilty, breaches of suspended sentences or conditional discharges and bail applications in the Supreme Court, the conduct of lower court appeals and appeals in the Court of Criminal Appeal, and all civil litigation on behalf of the State of Tasmania. The Office has also provided representation and advice to Agencies and Departments involved in prosecutions and proceedings in Courts of Petty Sessions and Tribunals and representation, where appropriate, for officers of Courts and Tribunals and other decision-makers whose decisions or actions become the subject of applications for review.

This is the tenth Annual Report I have had the honour of presenting. The first of those, 1999-2000, contained (as does this Report) statistical reviews of aspects of the Office's work, including a breakdown of the numbers of persons presented for trial, plea and discharge in the previous nine years. In that year the number of persons presented 'spiked' at 711 due to legislation now repealed. 711 was over double the number of many of the previous nine years, and even with it the average number of persons presented per year over the ten years was 371.

In this year's Report, the same table appears (Table 1). The average number of persons presented over the last ten years, including this year, is 576, an increase of over 55% from the previous ten years. That this has been accommodated by those who work in this Office without a corresponding increase in people to do the work is proof of their efficiency and dedication. In particular, the additional efficiency would not have been possible without the unflappable expertise and dedication of Ms Donna Spong, the Criminal Case Co-ordinator.

The now established increase in matters dealt with also underlines how necessary it was that the Office's budget was protected from cuts in the last Budget (indeed, some capital expenditure on interview rooms in the Hobart office was authorised, which will be of great use) and how welcome it is that the Treasurer has agreed to an independent review of funding based on recently agreed terms of reference.

## **Appeals**

I have rights of appeal against acquittals and sentences in the Supreme Court. There seems to be a degree of public misunderstanding concerning the exercise and limits of those rights and I take this opportunity to address this.

### ➤ **Appeals against sentence**

The right of appeal against sentence given by s 401(2)(c) of the *Criminal Code* is given to the Attorney-General, which term is defined (s 399) to include an officer appointed to prosecute in any criminal proceeding. (In accordance with the now established conventions by which decisions in criminal matters are made independently of Government, the Attorney-General does not personally exercise her appeal rights.) Although the right is unfettered in terms, the High Court has nevertheless indicated that DPP or Crown appeals "*should be a rarity*", brought only to establish some matter of principle, which can include the need to avoid manifest disparity or inconsistency. In relation to appeals against sentence it is also necessary to bear in mind that the Appeal court does not simply embark on a task of sentencing afresh, substituting its own opinion for that of the sentencing judge. The sentencing judge has a substantial discretion and an appellate court will only interfere if it is demonstrated that the sentencing judge fell into material error of law or fact.

Those considerations make me require to be satisfied that an appeal against sentence is likely to succeed and it is in the public interest that it be brought.

'In the public interest' does not mean 'when the public have taken an interest in a particular sentence', especially when that interest has been sparked or fanned by inaccurate or selective reporting of the case in the media, as has happened more than once recently. The judges' comments on passing sentence are published in full on the Supreme Court website (<http://www.supremecourt.tas.gov.au>) usually within a day or two of sentence and would repay reading especially by those whose view of sentencing is informed only by the mass media. The 'You be the Judge' link to the Sentencing Law in Tasmania home page (<http://www.courtlists.tas.gov.au/Sentencing/home.html>) is also a valuable and interesting site for those who would like a clearer understanding of this area.

➤ **Appeals against acquittal**

The right to appeal against a verdict of acquittal is limited to an appeal on a question of law, and requires a certificate of a trial judge that it is a fit case for appeal, or the leave of the Court of Criminal Appeal.

Contrary to the fears expressed in jurisdictions which have no appeal rights against acquittal, this is used quite infrequently, in less than 1% of cases which have resulted in acquittal or conviction on an alternative (lesser) charge.

As the appeal is limited to a question of law, it is concerned entirely with what the trial judge has ruled or how he or she has instructed the jury in law.

Even if there is an acquittal and a question of law involved, if a retrial of the accused is not sought an Attorney-General's reference, which does not jeopardise the acquittal, can proceed (and I have on occasion proceeded in this way notwithstanding an appeal might have been used instead.

The justice system is hierarchical, in recognition that the law can be complex, mistakes can be made by judges, and even where there is not a 'mistake' in the ordinary sense there are often at least two possible results to a disputed legal issue upon which learned and reasonable minds may disagree. A judgment of a single judge is 'correct' and binding in the jurisdiction in which it is given unless and until it is overruled by a Court higher in the hierarchy for that jurisdiction. If the decision is reversed that does not mean the first judge ought to be removed from the Bench, nor that the party who advanced the case which does not find favour should never have done so. Contested cases develop the law and the State has a responsibility to assist that development.

That there is an hierarchical system of appeals in which the State as a litigant has a right to access informs the test to be applied to consideration of a Crown appeal against verdict (or other orders, which are set out in s 401(2) of the *Criminal Code* but do not presently include an order of a stay which accordingly has to be given special leave to appeal by the High Court if it is to be appealed). The test for signing an indictment commencing a prosecution is that there appear reasonable prospects of conviction. This embraces both the facts of the case and the law. If there is an aspect of the law applicable to the case which is not covered by binding authority and if there is a properly informed view (informed by research and principle) of the law which if accepted will result in conviction, then to ignore the appellate system and never appeal the adverse decision of a single judge would be to abdicate the responsibility to prosecute. Of course, public interest considerations remain alive at all times, and if the point is not of

significant or general importance, or unlikely to arise again, it may warrant not seeking to disturb the first instance ruling. The role of public interest considerations is more fully explained in my prosecution guidelines re-published with last year's Report.

I believe the existence of a limited right of appeal against acquittal has served to develop a culture in the Tasmanian legal profession by which both sides – prosecution and defence – recognise and fulfil their duty to the Court to assist the judge to correctly determine the law.

### **Suspended sentences**

The Australian Institute of Criminology recently published a research paper by Lorana Bartels which provided an overview of the use of suspended sentences in the Supreme Court of Tasmania. It was found that those offenders serving suspended sentences had the lowest reconviction rates compared to those who received non-custodial and unsuspended sentences.

An additional finding was that only five to six percent of offenders who were in breach of a suspended sentence by committing an offence punishable by imprisonment were returned to court for breach action, an unacceptably small proportion. This point was also made by the Tasmanian Law Reform Institute in its excellent Sentencing Report of June 2008.

Both the paper and the report had recommended closer liaison between me and other bodies, and consideration of the use of computer software to automatically notify apparent breaches. In fact, as I detailed in my submission to the Joint Select Committee on Ethical Conduct, in April 2007 I was concerned that the protocols for referral of apparent breaches (which in the case of breach of Supreme Court suspended sentences by commission of summary offences relies on Police Prosecution referral to my Office) was not working and wrote to Police suggesting that an electronic capturing system ought to be investigated. I wrote again in May 2007 having received no reply, and attempted to follow it up in 2008 where I discovered that in September 2007 the then Commissioner had prepared a Cabinet Minute for the Attorney-General's signature seeking to make judges and magistrates responsible for identifying breaches.

I am presently uncertain where matters stand. I do not have direct involvement with the recording system of crimes and offences and therefore cannot develop any capacity for electronic capture and enforcement of breach proceedings. It could be that more summary and efficient triggers for breach proceedings, to arise at the instance of the magistrate, judge or prosecutor who is seized of a matter involving an apparent breach, could be refined to provide a workable improvement, if not a complete solution.

## STATISTICAL REVIEW

### **Criminal cases in the Supreme Court**

During this year a total of 768 persons (a record number) were presented for trial, plea or discharge in the Supreme Court (Table 1). 745 persons were committed for trial (compared with 683 the previous year, and 501 the year before that). I wrote last year that the then record number of persons committed was probably a statistical 'spike' caused by the effect of changes to the *Justices Act 1959* whereby persons are committed to the Supreme Court sooner than had previously been the case. However with numbers still rising that may not be the case.

The number of discharges is also at a high, although as a percentage of persons presented not alarmingly higher than other years (recent years have ranged between 23.28% and 18.50%; this year it is 28.13% when including two found not fit to plead). A higher percentage of discharges was expected with the changes to the *Justices Act 1959* as, prior to those changes, my Office was often able to consider matters before they were committed for trial, and where a discharge or another disposition was indicated that could take place before committal and hence would not show on these statistics. Now, we seldom see any case before committal of the accused person has taken place, which may account for the rise of the ratio of persons discharged to those presented.

Nevertheless, the Acting Deputy Commissioner of Police and I have commenced an audit of this year's and last year's discharges and their reasons. Discharges are usually for insufficiency of evidence meeting the test of reasonable prospect of conviction, but there may be a variety of other reasons such as disappearance or change of recollection of witnesses, or the existence of satisfactory summary charges as an alternative, or exercise of principled discretion. We hope to be able to identify ways to reduce the number of discharges.

TABLE 1

Year	Persons Presented	Persons Convicted	Persons Acquitted	Persons Discharged
1999-00	711	562	45 <sup>1</sup>	103
2000-01	445	333	68 <sup>2</sup>	79 <sup>3</sup>
2001-02	462	319	32	111
2002-03	616	446	38	132
2003-04	567	390	43	134
2004-05	533	375	43 <sup>4</sup>	115
2005-06	537	389 <sup>5</sup>	47 <sup>6</sup>	101 <sup>7</sup>
2006-07	562	413 <sup>8</sup>	45 <sup>9</sup>	104 <sup>10</sup>
2007-08	558	408	32 <sup>11</sup>	118 <sup>12</sup>
2008-09	768	512	40 <sup>13</sup>	216 <sup>14</sup>

- 1 1 person found not guilty by reason of insanity and  
1 person whose jury failed to reach a verdict
- 2 1 person found not guilty by reason of insanity and  
3 persons to be retried
- 3 1 person deceased before trial
- 4 3 persons found not guilty by reason of insanity
- 5 1 life prisoner re-sentenced
- 6 4 persons found not guilty by reason of insanity
- 7 4 persons found unfit to plead after inquiry
- 8 1 life prisoner re-sentenced
- 9 2 persons found not guilty by reason of insanity
- 10 2 persons found unfit to plead after inquiry
- 11 1 person found not guilty by reason of insanity
- 12 2 persons found unfit to plead after inquiry, and  
2 persons discharged under other Mental Health Orders
- 13 7 persons found not guilty by reason of insanity
- 14 2 persons found unfit to plead after inquiry

Table 2 below shows that the number of persons whose cases were pending at the end of the period rose from 294 to 305, an insignificant rise as it is almost matched by the rise in warrants issued.

**TABLE 2**

Area	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
Hobart	122	124	113	113	113	133
Launceston	77	119	91	73	127	117
Burnie	46	43	60	46	54	55
	<b>245</b>	<b>286</b>	<b>264</b>	<b>232</b>	<b>294</b>	<b>305</b>

The total includes 22 people in respect of whom warrants have been issued (15 are in the Launceston figures).

Table 3 below shows the major groupings of crime by convicted persons.

**TABLE 3**

**CRIME (TYPE) MAJOR GROUPINGS BY PERSONS CONVICTED**

Crime (Type)	2006-07 %	2007-08 %	2008-09 %
Dishonesty (aggravated/ armed robbery, stealing, burglary, receiving, fraud, etc.)	17.35	25.14	17.30
Personal violence (murder, manslaughter, assault, wounding, grievous bodily harm)	28.20	24.60	25.40
Arson & injury to property	6.26	7.36	5.60
Sex crimes (rape, unlawful sexual intercourse/relationship, indecency)	17.12	16.52	9.40
Perjury & perverting the course of justice	8.19	6.82	11.80
Drugs	15.90	13.28	25.90
Other ungrouped (includes indictable fisheries crime, conspiracy, causing death by dangerous driving, escape, abduction & other)	6.98	6.28	4.60

The high percentage of drug matters will need to be watched, and needs to be understood in light of other figures (such as are presented in the Annual Tasmanian Illicit Drug Reporting System studies).

Table 4 below shows the types of disposal of criminal matters.

**TABLE 4**

**COMPARATIVE TABLE RELATING TO THE DISPOSAL OF CRIMINAL MATTERS**

<b>Year</b>	<b>No. of Persons Presented</b>	<b>Pleas of Guilty</b>	<b>Dealt with other than as Plea</b>	<b>No. of Persons Tried</b>
1999-00	711	488	104	119
2000-01	445	260	79	106
2001-02	462	244	111	107
2002-03	616	357	132	127
2003-04	567	315	134	118
2004-05	533	294	118	121
2005-06	537	299	102	136
2006-07	562	330	102	130
2007-08	558	332	116	110
2008-09	768	399	214	155

Of those persons tried -

<b>Year</b>	<b>Convictions</b>	<b>Acquittals</b>	<b>Found insane or unfit to plead</b>	<b>Retrials</b>
1999-00	74	43	1	1
2000-01	73	29	1	3
2001-02	75	32	0	0
2002-03	89	38	0	0
2003-04	75	43	0	0
2004-05	81	37	3	0
2005-06	89	43	4	0
2006-07	83	43	2	2
2007-08	76	31	3	0
2008-09	113	33	9	0

### Other criminal matters

Crown counsel appeared in 96 bail applications this year (appeals from refusal of bail in the Magistrates' Court). 47 were granted, 48 refused and one was withdrawn.

43 summary prosecutions were lodged, 44 finalised. 32 Lower Court appeals were lodged, 40 finalised. 83 miscellaneous criminal files were opened, 101 finalised.

### Civil matters

Type	Opened	Closed	Active
Anti discrimination	3	9	21
Debt recovery	6	14	34
Employment	167	235	459
Housing	0	1	3
Medical negligence	5	39	93
Other	91	139	301
Risk Management Fund	31	31	64
Risk Management Fund medical negligence	0	0	3
	<b>303</b>	<b>468</b>	<b>978</b>

T J Ellis SC  
**DIRECTOR OF PUBLIC PROSECUTIONS**

15 September 2009