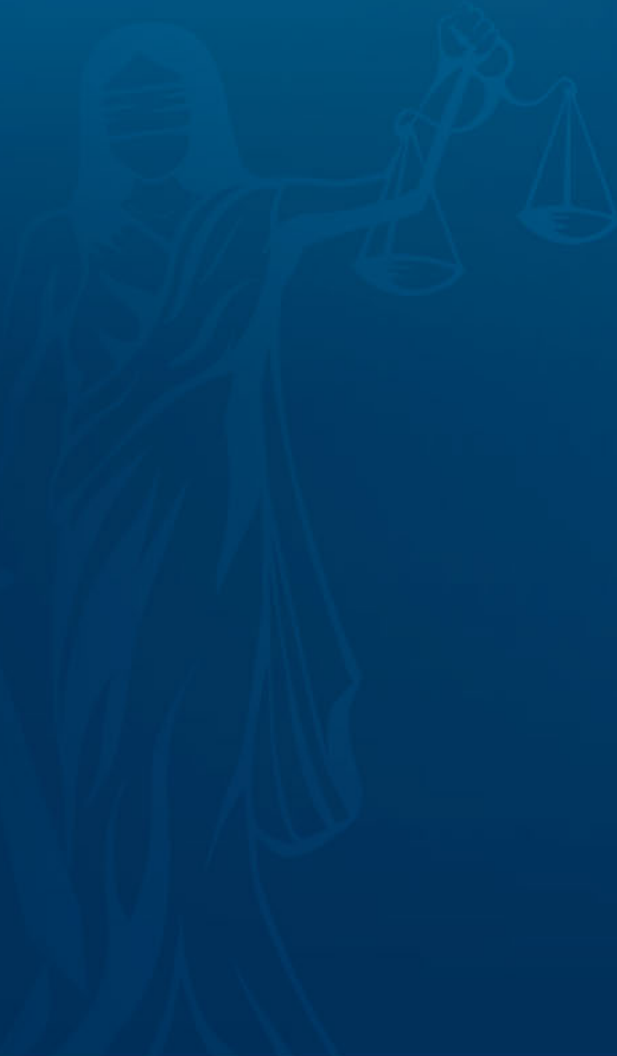




ACT DPP
DIRECTOR OF PUBLIC PROSECUTIONS ANNUAL REPORT
2019-2020





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DIRECTOR OF PUBLIC
PROSECUTIONS

ANNUAL REPORT
2019-2020





Themis

Our office logo is the modernised Greek Titaness Themis (or Lady Justice). To add a local flavour, Themis is draped in a dress and sash in the colours of the ACT Government Crest and was drawn by a young artist from a local community organisation that uses art to overcome social and psychological challenges. We thank artist Kelsey Askew for her wonderful concept.

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Contents

Abbreviations and Acronyms	10
Glossary of Technical Terms	13
Contact Sources	28
Annual report contact details	29

A. Transmittal Certificate and Compliance Statement **30**

A.1 Transmittal Certificate	30
A.2 Compliance Statement	31

Director's foreword **33**

B. Organisational Overview and Performance **39**

B.1 Organisational Overview	39
B.1.1 The Role and Functions of the Office	39
B.1.2 Internal Accountability	40
B.1.2.1 Senior Executives and their responsibilities	40
<i>Deputy Director</i>	40
<i>Assistant Director</i>	41
<i>Crown Prosecutors</i>	41
B.1.3 Organisational Structure	42
B.1.4 ODPP Core Team	42
B.1.5 ODPP Working Committees	43
B.1.5.1 Executive Committee	43
B.1.5.2 Working Environment Group	43
B.1.5.3 Continuing Professional Development - Ad hoc Committee	43
B.1.6 ODPP Stakeholders	43

B.2	Performance Analysis	44
B.2.1	ODPP's Criminal Practice	44
B.2.1.1	Development in the Magistrates Court	45
B.2.1.2	Development in the Supreme Court	45
B.2.2	Magistrates Court	46
B.2.2.1	MC Cases	46
	<i>Police v Lee Robert Townsend</i>	46
	<i>Police v Luke Schneider</i>	47
	<i>Police v Tiarna Joan Thomas</i>	47
B.2.3	Supreme Court	48
B.2.3.1	SC Cases	49
	<i>The Queen v Budack</i>	49
	<i>The Queen v CN</i>	49
	<i>The Queen v Henderson (No. 2)</i>	50
	<i>R v Smith (a pseudonym)</i>	51
	<i>ZL v Corey</i>	51
B.2.3.2	Drug and Alcohol Sentencing List	52
B.2.4	Crown Chambers	54
B.2.4.1	Involvement with external criminal justice agencies	54
B.2.4.2	Notable Cases by the Crown Chambers	54
	<i>R v Bradley Grey</i>	54
	<i>R v Graham Vickerstaff; R v Dean Welsh; R v Colin Booth</i>	55
	<i>R v Lachlan Chancellor</i>	57
	<i>R v Peter Forster-Jones</i>	58
	<i>R v Peter Middleton</i>	59
	<i>R v Robert Sirl</i>	59
	<i>R v Sharon Stott; R v Dean Reid; R v David Evans; R v Joshua Watson;</i> <i>R v Norman Collier</i>	61

B.2.4.3	Crown Chambers prosecutions after recent RCIRCSA law reforms	63
	<i>R v CT</i>	63
	<i>R v DU</i>	63
	<i>R v Jake Versteeg</i>	64
	<i>R v KN</i>	64
B.2.5	Appeals	64
B.2.5.1	Supreme Court	64
	B.2.5.1.1 Appeals to the Supreme Court	65
	<i>Jakaj v Kinnane</i>	65
	<i>Williams v IM</i>	65
B.2.5.2	Court of Appeal	66
	B.2.5.2.1 Appeals to the Court of Appeal	67
	<i>KN v The Queen</i>	67
	<i>Middleton v The Queen</i>	67
	<i>NO v The Queen</i>	68
	<i>R v Nicholas; R v Palmer.</i>	68
B.2.5.3	High Court	70
	B.2.5.3.1 Appeals to the High Court	70
	<i>Potts v The Queen</i>	70
	<i>UD v The Queen</i>	70
	<i>UQ v The Queen</i>	71
B.2.6	Sexual Offences Unit	72
B.2.6.1	Sexual Offences: Trials and Sentences in the Supreme Court – 1 July 2019 to 30 June 2020	73
B.2.6.2	Breakdown of Sexual Offence matters in different courts – 1 July 2019 to 30 June 2020	74
B.2.6.3	Sexual Offences – Cases	74
	<i>Police v Dane Muench</i>	74
	<i>R v John Cattle</i>	74
	<i>R v EN</i>	76
	<i>R v Mark Jones</i>	77
	<i>R v NBB (No 5)</i>	77
	<i>R v SQ</i>	78
	<i>R v Timothy King</i>	79

B.2.7	Family Violence Unit.	79
B.2.7.1	Family Violence Cases: Trials and Sentences in the Supreme Court – 1 July 2019 to 30 June 2020	81
B.2.7.2	Breakdown of FV cases in different courts – 1 July 2019 to 30 June 2020	81
B.2.7.3	FV Cases	82
	<i>Police v Duncan Gaul</i>	82
	<i>Police v KX</i>	83
	<i>Police v LH</i>	84
B.2.8	Witness Assistance Service.	85
B.2.8.1	Intermediary Program	85
B.2.8.2	Impact of COVID-19	86
B.2.8.3	Breakdown of WAS matters – 1 July 2019 to 30 June 2020	87
B.2.9	Confiscation of Criminal Assets.	87
B.2.9.1	COCA Cases	88
	<i>Jeremiah Deakin</i>	88
	<i>Trinity Smith</i>	88
B.2.10	Work Health and Safety Prosecutions	88
B.2.10.1	WHS Cases	89
	<i>Michael Watts</i>	89
	<i>Nikias Diamond Pty Ltd</i>	89
B.2.10.2	Breakdown of WHS matters	89
B.2.11	Regulatory Matters	90
B.2.11.1	Breakdown of regulatory matters	90
B.2.12	Parking Matters	91
B.2.13	List Team	91

B.2.14	ODPP Statistics (from 1 July 2019 to 30 June 2020)	92
B.2.14.1	Total matters finalised by jurisdiction	93
B.2.14.2	Matters finalised disaggregated by matter type	94
B.2.14.3	Committals to the Supreme Court	98
B.2.14.4	Plea of Guilty after Committal for Trial	98
B.2.14.5	Committals to the Supreme Court disaggregated by matter type	99
B.2.14.6	Supreme Court Matters	100
B.2.14.7	Appeals	100
B.3	Scrutiny	101
B.3.1	Audit of Reviewable Decisions	101
B.4	Risk Management	101
B.5	Internal Audit	102
B.6	Fraud Prevention	102
B.7	Freedom of Information	103
B.7.1	FOI Access Applications	104
B.8	Community Engagement and Support	105
B.9	Aboriginal and Torres Strait Islander Reporting	105
B.9.1	Office Employment Diversity Statement	106
B.10	Work Health and Safety	107
B.10.1	Notifiable incidents	107

B.11 Human Resources Management	108
B.11.1 ARIns Reporting	108
B.11.1.1 Agency profile	109
B.11.1.2 FTE and headcount	109
B.11.1.3 Classifications	109
B.11.1.4 Employment category by gender	109
B.11.1.5 Equity and workplace diversity	110
B.11.1.6 Age profile	110
B.11.1.7 Average years of service by gender	110
B.11.1.8 Recruitment and separation rates	110
B.12 Ecologically Sustainable Development	111
B.12.1 Sustainable development performance – current and previous financial year	111
C. Financial Management Reporting	113
<hr/>	
C.1 Financial Management Analysis	113
C.2 Financial Statements	113
C.3 Capital Works	113
C.4 Asset Management	114
C.5 Government Contracting	114
C.6 Statement of Performance	115
D. Territory Records	116
<hr/>	

E. Appendices	117
<hr/>	
Appendix A	
Prosecution Policy of the Australian Capital Territory	117
Appendix B	
Director’s Instruction No. 14.1 – Review of a Decision to Discontinue a Prosecution . . .	134
Appendix C	
Director’s Instruction No. 14.2 – Reviewable Decisions to Discontinue – Contact with Complainants, Review Processes and Auditing	136
Appendix D	
Audit Report on Legal Compliance of Procedures Relating to Reviewable Decisions . . .	144
Appendix E	
Record of Reviewable Decisions - Audit 2019-2020	145
F. Index of Cases	148
<hr/>	
F.1 Magistrates Court	148
F.2 Supreme Court	148
F.3 Crown Chambers	148
F.4 Appeals	149
F.5 Sexual Offences	150
F.6 Family Violence Unit	150
F.7 Confiscation of Criminal Assets	150
F.8 Work Health and Safety	150
G. Index of Legislation	151
<hr/>	
H. Index of Tables and Figures	154
<hr/>	
I. Alphabetical Index	155
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Abbreviations and Acronyms

ABS	Australian Bureau of Statistics
ACAT	ACT Civil and Administrative Tribunal
ACT	Australian Capital Territory
ACTCS	ACT Corrective Services
ACTPS	ACT Public Sector
AFP	Australian Federal Police
AG	Attorney-General of the Territory
AMC	Alexander Maconochie Centre
ANZSOC	Australian and New Zealand Standard Offence Classification
AOABH	Assault Occasioning Actual Bodily Harm
APIC	Audit Performance and Improvement Committee
ARIns	Attraction and Retention Incentives
ASIO	Australian Security Intelligence Organisation
ATSI	Aboriginal and Torres Strait Islander
AVL	Audio Visual Link
BCP	Business Continuity Plan
BTC	Bitcoin
CA	Court of Appeal
CADAS	Court Alcohol and Drug Assessment Service
CARHU	Child and Risk Health Unit
CASES	Criminal Advocacy Support and Enquiry System (this is the ODPP's Case Management System)
CCC	Criminal Case Conferencing
CJ	Chief Justice
CMTEDD	Chief Minister, Treasury and Economic Development Directorate
COCA	Confiscation of Criminal Assets
COVID-19	Corona virus disease 2019
CPC	Criminal Party Conferencing
CPD	Continuing Professional Development
CPS	Child and Protection Services
CRCC	Canberra Rape Crisis Centre
Cwlth	Commonwealth
CYPS	Child and Youth and Protection Services

DASL	Drug and Alcohol Sentencing List (DASL)
DATO	Drug and Alcohol Treatment Order
DFAT	Department of Foreign Affairs and Trade
DMT	N, N-dimethyltryptamine
DPP	Director of Public Prosecutions
DVCS	Domestic Violence Crisis Service
EAP	Employee Assistance Program
FAMSAC	Forensic and Medical Sexual Assault Care
FCPP	Fraud and Corruption Prevention Plan
FMH	Forensic Mental Health
FOI	Freedom of Information
FTE	Full Time Equivalent
FV	Family Violence
FVEIC	Family Violence Evidence in Chief Interview
FVIP	Family Violence Intervention Program
HAZMAT	Hazardous materials
HC	High Court
ICMS	Integrated Court Management System
ICO	Intensive Correction Order
ICT	Information Communication Technology
ICU	Intensive Care Unit
JACSD	Justice and Community Safety Directorate
LGBTQIA	lesbian, gay, bisexual, transgender, queer or questioning, intersex, and asexual or allied
LSD	Lysergic acid diethylamide
MC	Magistrates Court
MDMA	3,4-Methylenedioxymethamphetamine
NOI	National Offence Index
NSW	New South Wales
ODPP	Office of Director of Public Prosecutions
OEDS	Office Employment Diversity Statement
OMCG	Outlaw Motorcycle Gang
OPP	Office of Public Prosecutor, PNG
PNG	Papua New Guinea
PP	Public Prosecutor at the OPP
PTG	Public Trustee and Guardian

RCIRCSA	Royal Commission into Institutional Responses to Child Sexual Abuse
RORD	Record of Reviewable Decisions
RSPCA	Royal Society for the Prevention of Cruelty to Animals
SACAT	Sexual Assault and Child Abuse Team
SARP	Sexual Assault Reform Program
SC	Supreme Court
SCA	<i>Supreme Court Act 1933</i>
SES	Senior Executive Service
TD	Trial Directions
VIS	Victim Impact Statement
VSACT	Victim Support ACT
WAS	Witness Assistance Service
WEGIES	Working Environment Group
WHS	Work Health and Safety

Glossary of Technical Terms

A1 list	Criminal General List - Matters dealt with include adjournments, short sentences, uncontested or simple applications, uncontested committals, and case management will be dealt with in the morning and longer sentences will be listed in the afternoon.
A2 list	Criminal bail/sentence list - Matters dealt with include first appearances from custody; contested bail applications or variations and bail reviews; related issues which can be dealt with expeditiously, such as entry of a plea or ordering of reports unless the Magistrate forms the view that they are more appropriately moved to another list; applications for extradition pursuant to the <i>Service and Execution of Process Act 1992</i> (Cwlth); and Sentencing Administration Board warrants.
ACT Auditor-General	Refers to the ACT Auditor-General who conducts independent financial and performance audit on ACT Government agencies and those entities in receipt of ACT Government funding or resources. The results of these audits are reported to the ACT Legislative Assembly and ACT community.
ACT Bar Association	The professional body that regulates barristers in the ACT. It represents the interests of members who practise at the private bar.
ACT Bar Council	It manages the general business of the ACT Bar Association and is responsible for regulating the professional conduct, practice and etiquette to be observed by practising barristers.
ACT's Executive	There shall be an ACT Executive. The members of the Executive are the Chief Minister and such other Ministers as are appointed by the Chief Minister.
accused	person charged with an offence, usually an indictable offence
acquit	When the Magistrate, jury or appeal court finds that a person is not guilty of the crime.
actus reus	refers to the act or omission that comprise the physical elements of a crime as required by statute
adjournment	To ask the court to delay your court case until a later date. The delay is referred to as an adjournment. This is a break in legal proceedings, either for part of a day or put off until another day.
advocate	An individual who presents or argues another's case; one who gives legal advice and pleads the cause of another before a court or tribunal.
agencies	administrative units of the ACT Public Service

aggravated burglary	where burglary is committed by two or more people; or during the burglary, an offensive weapon is used
aggravated robbery	where a person commits robbery in a group with one or more people or commits robbery whilst having a weapon in their possession
aggravating factors	Circumstances that make an offence much more serious. Facts or details about the offence, the victim and/or the offender that tend to increase the offender's culpability and the sentence they receive.
alcohol use disorder	Alcohol use disorder (includes alcoholism) is alcohol use that involves problems controlling one's drinking, being preoccupied with alcohol, continuing to use alcohol even when it causes problems, having to drink more to get the same effect, or having withdrawal symptoms when one rapidly decreases or stops drinking.
Alexander Maconochie Centre ('AMC')	This is the ACT's prison for persons who are sentenced to full-time imprisonment and remand.
antecedents	Refers to the life history and previous convictions of a defendant in a criminal case. This information is given to the court before sentence is given. The criminal history of the convicted plays a role in the frame of the punishment.
appeal	To take a case to a higher court in order to challenge a decision. The person who appeals is the appellant. Not all decisions can be appealed.
appellant	The party appealing a court's decision. This can be the defendant or the prosecution.
appellate	Relating to appeals; reviews by superior courts of decisions of inferior courts.
Attorney-General of the Territory	The Minister who has the responsibility for the administration of justice in the Territory.
Attraction and Retention Incentive ('ARIn')	An ARIn may be offered where a position is deemed critical to the operation of the Directorate or its business unit; requires employees with specialist qualifications or specialist or high level skills; the skills required by the position are in high demand in the marketplace, or the position would incur significant costs to replace. An ARIn may contain enhanced pay rates, provision for privately plated vehicles or other terms and conditions of employment where the Director-General and Head of Service considers there is a clear, unambiguous and exceptional need.

audio visual link ('AVL')	The AVL facility is a form of video conferencing using cameras and television screens, that allows two-way communication to a remote location. AVL may be used to take evidence from witnesses not able to attend the location, e.g. for witnesses who are interstate or overseas. Using AVL for bail hearings reduces unnecessary transportation of prisoners to and from Court, especially to regional locations and increases the security for court users.
B list	Children's Court general list
bail	The release of a defendant into the community until a court decides the charge(s) against the person. Bail orders always include a condition that the defendant must attend court hearings. Additional conditions such as a requirement to live at a certain address or report to police may be added to a person's bail undertaking.
beyond reasonable doubt	This is the level to which the prosecution in a criminal proceeding must prove that the accused person committed the alleged offence.
bipolar affective disorder	This is a psychological illness that involves severe mood swings. These mood swings take the form of depression or mania and may last for several months at a time.
Bitcoin	It is a type of cryptocurrency.
brief of evidence	Refers to the things that make up the case against a person if they have been charged with a crime. This can include the charge sheet, the informant's statement, their criminal record and other documents the police have about their matter.
BTC market	This is a cryptocurrency and digital asset exchange.
CADAS report or Court Alcohol and Drug Assessment Service report	Where offending is related to alcohol or drug misuse, the magistrate or judge can order the preparation of a CADAS report. This report will detail the nature and extent of any drug and alcohol misuse issues and identify treatment services available to the offender. These services are designed to support rehabilitation and reduce the risks of reoffending.
callover	Cases often appear in the court's lists several times before there is a hearing, or before sentencing occurs. These court appearances are known as 'callovers' or 'mentions'. They are used to find out how one will plead, and how much time the court will need to allocate for a hearing.
capacity diagnostic	An assessment of the agency's management capacity in respect of its core functions.
case management	This is an active judicial intervention in matters before the court, intended to decrease resolution times and ensure the efficient use of court resources.

charge	A statement giving the details of a crime an accused person is claimed to have committed.
child	A person below the age of 12 years.
Childrens Court	A court that hears offences committed by children and young people. The Childrens Court is a special court of the Magistrates Court.
closing address	The closing statement by counsel to the trier of facts, after all parties have concluded their presentation of evidence.
Code	<i>Criminal Code 2002</i> (ACT)
committed for sentence	The magistrate can commit the defendant to a superior court for sentencing if: <ul style="list-style-type: none"> › it is an indictable offence; or › if there is not the required consent; or › the magistrate is of the opinion that the interests of justice require committal to a superior court.
committed for trial	Where a magistrate determines that there is a case to answer, the matter will be committed for trial in the Supreme court. The term committed for trial means sending the matter to one of the higher court jurisdictions.
common assault	Where a person has either threatened to harm another person or where unlawful force has been used without the persons consent.
common law	The law based on previous court decisions and customs as distinct from statute law created by Parliament.
community service work	This is an alternative to prison and involves the offender doing voluntary work in the community. The offender may be ordered to do work such as plant trees, remove graffiti, work with homeless people, or anything else the supervising officer deems suitable.
complainant	A person against whom it is alleged a crime has been committed, usually used in the context of sexual assault.
concurrent sentence	Individual sentences for each offence that are ordered to be served at the same time. This means the shortest sentence is subsumed into the longest sentence (also called the ‘head sentence’).
controlled drug	A drug or other substance that is tightly controlled by the government because it may be abused or cause addiction. The control applies to the way the substance is made, used, handled, stored, and distributed. Controlled substances include opioids, stimulants, depressants, hallucinogens, and anabolic steroids. In the ACT illegal drugs are called ‘drugs of dependence’ or ‘controlled drugs’ or ‘prohibited substances’.
conviction	A determination of guilt made by a court.

co-offender	Co-offending is defined as the act of committing crime alongside one or more accomplices.
core conditions	Conditions that one on a good behaviour order ('GBO') will have e.g. to not commit any more crimes while on a GBO; to tell the court of a change of address or other contact details within two days; to tell the court if charged with a new crime within two days; to go to court if asked by the police to do so; and to follow any other conditions set by the courts.
coronavirus	Coronaviruses are a large family of viruses that cause respiratory infections. These can range from the common cold to more serious diseases like SARS (severe acute respiratory syndrome), MERS (Middle East respiratory syndrome) and the more recent coronavirus disease (COVID-19).
coroner	Coroners hold inquests into violent, sudden, or suspicious deaths. Coroners investigate deaths, fires and explosions, helped by police and a team of their own investigators.
count	Each separate statement in a complaint which states a cause of action which, standing alone, would give rise to a lawsuit, or each separate charge in a criminal action.
Court of Appeal	The Supreme Court is known as the Court of Appeal when exercising its appellate jurisdiction.
court therapy dogs	These dogs can reduce anxiety, offer a pleasant distraction, and provide non-judgemental support to people in need. In a courthouse environment, emotions and stress are often at a high and victims of crime are at risk of being re-traumatised and left feeling vulnerable. Interacting with a court therapy dog may reduce these feelings and improve the person's wellbeing.
Courts Canine Support Program	This is a community-based initiative by Guide Dogs NSW/ACT in partnership with NSW Government, Department of Justice (Victim Services). This program seeks to assist in reducing witness anxiety levels when they give evidence.
COVID-19	Coronavirus disease 2019 is an infectious disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).
criminal case conferencing	Refers to negotiations between the prosecution and defence to discuss issues in dispute in order to bring about an early resolution to proceedings. Such negotiations may result in the amendment, substitution or withdrawal of charges and/or the agreement as to a factual basis of sentence and submissions on the sentence range.

Criminal Central Listing callover	The list will be called over before a Judge. Parties will advise the Court on matters which could affect the hearing, including whether the matter is to proceed by trial by jury or a trial by judge alone, whether there are any pre-trial applications or hearings in the matter, any prospects of the matter resolving without the need for a trial, counsel and witness unavailability during the sitting time, the expected duration of the trial, any requirement for CCTV, video conferencing or the recording of evidence, etc.
criminal history	A record of the offences a person has been convicted of.
Crown	In higher courts the prosecution may be referred to as the Crown that is, representing the Queen in the rights of the Commonwealth.
Crown Prosecutor	the prosecutor in the Supreme Court or Court of Appeal
cryptocurrency	A digital asset designed to work as a medium of exchange wherein individual coin ownership records are stored in a ledger existing in a form of computerized database using strong cryptography to secure transaction records, to control the creation of additional coins, and to verify the transfer of coin ownership.
cumulative sentence	Individual sentences for each offence that are ordered to be served one after the other.
defendant	a person charged with an offence
Deputy Director	Deputy Director of the Office of the Director of Public Prosecutions
Director	Director of Public Prosecutions
Director-General	person appointed to head an administrative unit of the ACT Public Service under Division 3.4 of the <i>Public Sector Management Act 1994</i>
directorates	administrative units of the ACT Public Service
DMT	DMT (N,N-Dimethyltryptamine) is a hallucinogenic tryptamine drug that is referred to as the “spirit molecule” due to the intense psychedelic experience. DMT produces a brief but intense visual and auditory hallucinogenic experience.
doli incapax	This is the presumption that a child under the age of 14 does not possess the necessary knowledge required to have criminal intent. This presumption can be disproved or rebutted by leading evidence to show that a child knew their actions were morally wrong.
Ethereum	It is a type of cryptocurrency.
evidence	Material presented to a court to prove or disprove a fact. It can include what witnesses say as well as documents and other objects.
evidence-in-chief	Questioning of a witness by the party who called the witness to give evidence, other than questioning re-examination.
evidential burden	The burden of adducing evidence that suggests a reasonable possibility that the matter exists or does not exist.

ex officio indictment	Even if committal proceedings have not taken place, or if a magistrate has found during committal proceedings that there is insufficient evidence for a trial, the DPP may file a special information or indictment, called an <i>ex officio indictment</i> , against the offender and they must then stand trial in the normal manner in the Magistrates Court or Supreme Court.
excluded offences	Refers to the excluded offences laid out in Part 2.2 of Schedule 2 (Trial by Judge Alone – excluded offences) in the <i>Supreme Court Act 1933</i> .
exhibit	A document or object that is provided as evidence in a court case or referred to in a sworn statement.
FI list	This refers to the Family Violence List in the Family Court. Defendants charged with family violence offences are to appear in the FI list.
FOI Act	<i>Freedom of Information Act 2016</i>
forcible confinement	A person who unlawfully confines or imprisons another person.
Forensic Mental Health report	This report concerns the treatment of people experiencing mental illness/disorder and at high risk of offending, or those already in the criminal justice system. The report provides critical components of the pathways a person with mental illness/disorder may take when they come into contact with the criminal justice system, and can be a key contributor to the reduction of risk for those people who may offend due to their mental illness.
FV Unit	Family Violence Unit
gender dysphoria	Gender dysphoria involves a conflict between a person's physical gender and the gender with which they identify.
good behaviour order	A good behaviour bond is a period of time when the offender must show good behaviour to avoid jail. It comes with numerous conditions such as participating in drug and alcohol counselling, staying away from certain people, and reporting to the supervising officer. Failure to follow the conditions may lead to harsher penalties ranging from simple warnings to imprisonment.
ground rules hearing	This is a pre-trial process that involves the parties and judge to address issues, including the manner and content of cross-examination, and the comprehension capacity and communication needs of vulnerable witnesses and assisting parties to plan their questions. It will be required in criminal proceedings in any matter in which an intermediary has been appointed.

guilty	When a defendant enters a plea of guilty, they accept responsibility for the offence. When a defendant pleads not guilty, a jury will determine the guilt of the defendant if the matter proceeds as a trial in a higher court. Where a defendant pleads not guilty in the Magistrates Court, the magistrate determines the guilt of the defendant.
Head of Service	person appointed to head the ACT Public Service under Division 3.2A of the <i>Public Sector Management Act 1994</i>
head sentence	The total period of imprisonment imposed. A person will usually be released on parole or a suspended sentence before the entire head sentence is served.
hearing	A proceeding where the evidence is presented to the court after an accused or defendant has pleaded not guilty.
High Court	Refers to the High Court of Australia. The highest court in the Australian judicial system. The High Court only deals with legal matters of wider public importance and is not a sentencing court.
historical offences	A term used to describe offences that have occurred in the distant past.
hung jury	An outcome where the jury cannot agree whether the accused is guilty or not.
incarceration	confinement in a jail or prison
indictable offence	An offence required or able to be dealt with in the Supreme Court.
indictment	A formal accusation of the commission of a criminal offence in Supreme Court proceedings.
Industrial Court	Refers to the ACT Industrial Court. The Court has jurisdiction to deal with industrial or work safety matters.
intensive correction order	An intensive correction order or ICO is a sentence of imprisonment of up to four years duration (section 11(3) of the <i>Crimes (Sentencing) Act 2005</i>).
inter alia	amongst other things
intermediary	Intermediaries are skilled communication specialists who assist vulnerable witnesses to give their best evidence. Their role is to help communication with the witness and to assist the witness to give evidence to police and in court.
intermediary program	The ACT's Intermediary Program commenced in January 2020 and is actively providing intermediaries to assist police and courts' engagement with vulnerable witnesses in criminal matters.
judicial review	The court's review of an administrative decision on the basis of a legal error in the decision-making process.

jury	A group of (usually) 12 people chosen at random from the general community who are tasked with the responsibility of determining whether the defendant is guilty on the evidence presented in a criminal trial.
leave to appeal	A defendant must first seek permission to appeal before their appeal can be heard by the Court of Appeal. The leave to appeal argument will be heard before a single judge in the Supreme Court.
Legal Professionals Enterprise Agreement 2018-2021	This refers to the ACT public sector <i>Legal Professionals Enterprise Agreement 2018-2021</i> .
Legislative Assembly	Refers to the Legislative Assembly for the ACT, i.e. the parliament for the nation's capital. It was established after self-government in 1989. It performs both territory and local level functions and makes decisions that impact the lives of those who live and work in the ACT.
Litecoin	It is a type of cryptocurrency.
lockdown	During the COVID-19 pandemic, the term lockdown was used for actions related to mass quarantines or stay-at-home orders.
LSD	LSD, also known colloquially as acid, is a hallucinogenic drug. The effects of the drug include altered thoughts, feelings, and awareness of one's surroundings.
Magistrate	The person who hears the case and decides the sentence in the Magistrates Court or the Childrens Court.
Magistrates Court	The first tier of the ACT courts system. Most criminal cases are heard in this court in some form.
manslaughter	The act of causing another person's death without the intent to do so.
MDMA	MDMA, commonly known as ecstasy (E) or molly, is a psychoactive drug primarily used for recreational purposes.
mental health order	Where a person does not have decision-making capacity or where their mental illness/disorder is placing them or the community at significant risk, involuntary measures may be required to provide them with the necessary assessment, treatment, care or support. There are a number of mental health orders that ACAT can make under the <i>Mental Health Act 2015</i> including Psychiatric Treatment Orders, Community Care Orders, Restriction Orders, Forensic Psychiatric Treatment Orders, and Forensic Community Care Orders.
mental impairment	This includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.
mention	This is where the case appears in court for a brief time, usually to deal with a procedural matter and is not the 'hearing' of the matter. This includes setting dates and deciding bail.

methamphetamine	Methamphetamine is a powerful, highly addictive stimulant that affects the central nervous system. It is also known as meth, blue, ice, and crystal.
miscarriage of justice	This is a reference to an outcome in a judicial proceeding that is unjust; especially an error made in a court of law that results in an innocent person being punished or a guilty person being free.
model litigant	<p>The model litigant policy is founded upon the concepts of behaving ethically, fairly and honestly to model best practice in litigation. The model litigant rules are about fair play, about the prosecution conducting its case, about ensuring that the community has good reason to trust the ODPP and the way its prosecutors conduct the prosecution.</p> <p>The model litigant guidelines apply to civil rather than criminal proceedings and are therefore not directly applicable to the work of the Office. In making decisions in the prosecution process, prosecutors are guided by the procedures and standards which the law requires to be observed, and in particular by the Prosecution Policy promulgated by the Director. Like the origins of the model litigant principles, that policy reflects the higher standards of behaviour and disclosure required of the Crown.</p>
non-conviction order	Where the offender is found guilty, the court may make an order directing the charge to be dismissed if satisfied that it is not appropriate to impose any punishment, or a good behaviour order. (Section 17 of the <i>Crimes (Sentencing) Act 2005</i>)
non-parole period	The time a person serves in prison before being released on parole or becoming eligible to apply for release on parole.
notice of appeal	A written document filed by the appellant with the court and a copy of which is sent to the respondent. This is the initial step in the appeals process. It informs the court and the party in whose favour a judgment or order has been made that the unsuccessful party seeks a review of the case.
notifiable instrument	<p>A statutory instrument that is declared to be a notifiable instrument by an Act, subordinate law, disallowable instrument or another notifiable instrument. As with disallowable instruments, this 'declaration' is generally included in the provision that authorises the making of the instrument.</p> <p>If a primary law gives power to do something by notifiable instrument, then (a) if the thing is done, it must be done by instrument, and (b) that instrument is a notifiable instrument.</p> <p>Examples of notifiable instruments include notices of road closures and declarations about public holidays.</p>

objective seriousness of the offence	<p>The outer limits of a sentence depend on the gravity of the offence in light of its objective circumstances. A court must make a ‘real assessment of the objective criminality of the offending’.</p> <p>Objective seriousness is how serious the particular instance of the offence is. A case may fall at the lower end of seriousness for an offence and attract a very minor penalty, or it may be towards to the most serious example of the offence and attract close to the maximum penalty. To determine the objective seriousness of an offence, the judge must take into account the facts and circumstances of the offence, the maximum penalty that can be ordered for such an offence, as well as any aggravating factors (factors that make the offence more serious) and mitigating factors (factors that may reduce the sentence).</p>
offence	A criminal act.
offender	A person who has been found guilty of an offence, or who has pleaded guilty to an offence.
Office	Office of the Director of Public Prosecutions. The Office shall consist of the Director and the members of the staff of the office.
on the papers	If a decision is to be made ‘on the papers’, the court will usually make orders for one to file their written evidence or submissions in relation to that particular decision before it is scheduled to be handed down.
onerous	excessively burdensome or troublesome; causing hardships
onus of proof	The responsibility to prove a case in court. In criminal trials, the prosecution must prove its case, leaving no reasonable doubt about it.
oral hearing	A person and their representative can attend, or their representative can attend the hearing without them. This is a hearing in which all the participants are physically present in the same place, receiving the same information at the same time.
paralegal	An individual who is employed or retained by a lawyer, law office, corporation, governmental agency, or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible. Paralegals perform tasks requiring knowledge of the law and legal procedures.
parole	The conditional release of a person from prison. When a person is released on parole, they serve the unexpired portion of their prison sentence in the community under supervision.

physical distancing	This is the practice of maintaining a greater than usual physical space between oneself and other people or of avoiding direct contact with people or objects in public places during the outbreak of a contagious disease in order to minimize exposure and reduce the transmission of infection.
plaintiff	The person who initiates or files a case with a court.
plea	The response by the accused to a criminal charge – ‘guilty’ or ‘not guilty’.
practice direction	Practice directions are procedural guidelines issued by judges of the Supreme Court. The directions are designed to complement existing legislation, rules and regulations and may refer to issues including the use of the court precinct, appearances by practitioners and parties, and case management.
practising certificate	Once admitted as a lawyer in Australia you must hold a practising certificate before you can practise law in any Australian jurisdiction. Different bodies issue practising certificates in different jurisdictions.
pre-sentence report	This report is prepared by ACTCS based on interviews with the offender and information on the reasons for offending; the offender’s attitude to the offence, including whether they are remorseful; any history of offending; any history of drug and alcohol misuse or mental health concerns; their prospects for rehabilitation; and their risk of reoffending. The pre-sentence report also sets out the available sentencing options and indicates the offender’s suitability for these various options.
probation	Probation allows a person convicted of a crime the chance to remain in the community instead of going to jail. Probation requires that one complies with certain court-ordered rules and conditions under the supervision of a probation officer. Typical conditions may include performing community service, meeting with one’s probation officer, refraining from using illegal drugs or excessive alcohol, avoiding certain people and places, and appearing in court during requested times.
proofing	A victim of crime or witness for the prosecution may be asked to attend a meeting, or number of meetings, at the ODPP. ‘Proofing’ is a meeting with the prosecutor who has conduct of the prosecution case involving the accused.
Reading program	This is a mandatory stage of the qualification process for barristers, in which a trainee barrister must appear with a qualified barrister for a specified period.

remote witness room	The remote witness room enables vulnerable people, complainants and sexual offence witnesses in prescribed sexual offence proceedings to give evidence by means of closed-circuit television facilities or other technology that enables communication with the courtroom. Witnesses are also entitled to have a support person with them in the remote witness room which is considered to be part of the court. For the safety of witnesses their location is confidential.
resentence	To impose a new or revised sentence or punishment on someone who has already been sentenced for a crime.
respondent	The party responding to an appeal or application before a court.
restraining order	A court order that prohibits someone from doing something.
SC Registrar’s TD List	Supreme Court Registrar’s Trial Directions List
search warrant	search warrants involve the right of police to enter someone’s home and search the premises for the purpose of investigating matters. Search warrants are issued by magistrates on the basis of information provided on oath by police officers.
self-represented	A person who does not have a lawyer to appear for them in court and who presents their case to the court themselves.
sentence	The penalty that the court imposes on a person who has been found guilty of an offence.
sentencing proceedings	A person who pleads guilty, or is found guilty, may wish to call evidence in mitigation of the penalty. Matters considered at sentencing include age, good character, previous good record, and the circumstances of the offence.
shutdown	temporary closure of services or business
Silk	A Silk lawyer is the colloquial name given to a Senior Counsel who is selected by an independent panel committee due to their knowledge, experience and skill. Senior counsels are colloquially known as “silks” because their robes include a gown made of silk. (Junior counsels wear gowns made of cotton.)
SO Unit	Sexual Offences Unit
social distancing measures (COVID-19)	These measures include not shaking hands, or exchanging physical greetings, and wherever possible, staying at least 1.5 metres away from others.
special leave to appeal	Where an appeal decision is denied by the Court of Appeal, special leave may be made to the High Court. This can only be done in exceptional circumstances and must involve a ‘question of law of general importance’.
statement of facts	A brief outline of the allegations.

statutory limitation	The period within which time court proceedings must be issued.
stay the proceedings	An order that a particular legal action stop. A stay may be for a fixed period, until certain events occur, or permanent.
submission	The opinion, argument, etc. put forward by a party in a court case.
subpoena	This is a document that is served on any party in proceedings to require that documents relevant to the court case be produced to the court. People can also be subpoenaed to appear in court to give evidence.
suicidal ideation	Suicidal ideation, also known as suicidal thoughts, is thinking about, considering, or planning suicide. The range of suicidal ideation varies from fleeting thoughts, to extensive thoughts, to detailed planning.
summary offences	This is an offence that is punishable by two years imprisonment or less (section 190 of the <i>Legislation Act 2001</i>). As a general rule, there is no statute of limitations for an offence punishable by more than 6 months imprisonment, meaning that most summary offences can, be prosecuted outside of a 12 month-time frame (section 192 of the <i>Legislation Act 2001</i>).
Supreme Court	The highest state court in ACT. It comprises the trial division and the Court of Appeal.
suspended sentence	A sentence of imprisonment that is not served, unless there is a breach of an attached good behaviour order.
tendency evidence	This is evidence ‘of the character, reputation or conduct of a person, or a tendency that a person has or had’, adduced to prove that the person ‘has or had a tendency (whether because of the person’s character or otherwise) to act in a particular way, or to have a particular state of mind’.
Territory	Refers to the ACT. The ACT is established as a body politic under the Crown by the name of the ACT.
the Act	the <i>Director of Public Prosecutions Act 1990</i>
the financial year	Refers to the 2019-20 financial year or reporting year.
trial	A hearing in a court where all evidence is heard, and a final decision is made.
trial directions	Orders made by the registrar in relation to the conduct of a proceeding. Before the trial or hearing of a matter, a registrar may give directions so that the parties involved will be properly ready. The directions usually set down a list of steps to be taken by the parties and the deadline for those steps. The steps usually involve filing of material and defining the issues that require a decision by the Court.

upholding an appeal	A court finding in favour of the appellant.
verdict	The decision of a jury in a criminal trial as to whether an accused is guilty or not guilty of an offence.
victim	A person who has suffered harm directly because of a criminal offence, or a family member or dependant of a person who has died or suffered harm because of a criminal offence.
victim impact statement	A statement written by a victim that may be read or presented to a court after an offender has been found guilty and before they are sentenced. The VIS informs the court about the harm suffered by the victim as a result of the offence. In sentencing, the court is required to consider a number of factors including the injury, loss or damage to a victim, resulting from the offence.
Victims of Crime Charter	This is a charter embodying a raft of victim's rights provided for in the <i>Victims of Crimes Act 1994</i> and the <i>Human Rights Act 2004</i> .
witness	A person who appears in court to give direct information about something relevant to the case the court is hearing.
young person	A young person is a person who is 12 years old or older, but not yet an adult. An adult is as a person who is at least 18 years old.

Contact Sources

Agency Contact Details

AGENCY	WEBSITE / CONTACT DETAILS
Access Canberra	https://www.accesscanberra.act.gov.au/
ACT Audit Office	https://www.audit.act.gov.au/
ACT Bar Association	https://www.actbar.com.au/
ACT Corrective Services	http://www.cs.act.gov.au/
ACT Environment Protection Authority	https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/3149/~environment-protection
ACT Health	https://health.act.gov.au/
- Alcohol and Other Drug Service	https://www.health.act.gov.au/services/alcohol-and-drug-services
ACT Integrity Commission	https://www.integrity.act.gov.au/
ACT Ombudsman	https://www.ombudsman.act.gov.au/
ACT Policing	https://police.act.gov.au/
ACT Policing's Family Violence Coordination Unit	https://police.act.gov.au/safety-and-security/family-violence
ACT Policing Victim Liaison Office	Victims Liaison Office Telephone: (02) 6245 7441 Email: Victims-Liaison-Office@afp.gov.au
Alexander Maconochie Centre	http://www.cs.act.gov.au/custodial_operations/types_of_detention/alexander_maconochie_centre
Australian Bureau of Statistics	https://www.abs.gov.au/
Australian Federal Police	https://www.afp.gov.au/
Canberra Rape Crisis Centre	https://www.crc.org.au/
Chief Minister, Treasury and Economic Development Directorate	https://www.cmtedd.act.gov.au/
Child and Youth Protection Service	https://www.communityservices.act.gov.au/ocyfs/children/child-and-youth-protection-services

AGENCY

WEBSITE / CONTACT DETAILS

Child at Risk Health Unit	https://www.health.act.gov.au/services-and-programs/women-youth-and-children/children-and-youth/child-risk-health-unit
Domestic Animal Services	https://www.cityservices.act.gov.au/pets-and-wildlife/domestic-animals/dogs/about-das
Domestic Violence Crisis Service	https://dvcs.org.au/
Forensic and Medical Sexual Assault Care (Canberra Hospital)	https://www.health.act.gov.au/hospitals-and-health-centres/canberra-hospital
Human Rights Commission	https://hrc.act.gov.au/
Justice and Community Safety Directorate	https://justice.act.gov.au/
Legal Aid Commission	https://www.legalaidact.org.au/
Legislative Assembly for the Australian Capital Territory	https://www.parliament.act.gov.au/home
Public Trustee and Guardian	https://www.ptg.act.gov.au/
Royal Society for the Prevention of Cruelty to Animals	https://www.rspca-act.org.au/
Territory Records Office	https://www.territoryrecords.act.gov.au/home
Victim Support ACT	https://www.victimsupport.act.gov.au/home
WorkSafe ACT	https://www.worksafe.act.gov.au/ https://www.accesscanberra.act.gov.au/app/home/workhealthandsafety/worksafeact

Annual report contact details

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A. Transmittal Certificate and Compliance Statement

A.1 Transmittal Certificate



ACT Office of the Director of Public Prosecutions

11 December 2020

Mr Shane Rattenbury MLA
Attorney-General for the ACT
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Attorney,

ANNUAL REPORT

I present my Annual Report for year ended 30 June 2020. This Report has been prepared in accordance with section 7(2) of the *Annual Reports (Government Agencies) Act 2004* and the requirements under the Annual Report Directions. It has also been prepared in conformity with *Director of Public Prosecutions Act 1990*.

I certify that the attached Annual Report, and information provided for whole of government reporting, is an honest and accurate account and that all material information on the operations of the Office during the period 1 July 2019 to 30 June 2020 has been included. I also hereby certify that fraud prevention has been managed in accordance with the *Public Sector Management Standards 2006 (repealed)*, Part 2.3 (see section 113, *Public Sector Management Standards 2016*).

Section 13 of the *Annual Reports (Government Agencies) Act 2004* requires that you present the Report to the Legislative Assembly within 15 weeks after the end of the financial year. However, as the 15-week period coincides with the pre-election period for a general election of members of the Legislative Assembly you must present the Report to the Legislative Assembly on the second sitting day after the election is held.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Shane Drumgold", with a horizontal line extending to the right.

Shane Drumgold SC
Director - ACT Director of Public Prosecutions

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A.2 Compliance Statement

The 2019-20 ACT Director of Public Prosecutions Annual Report must comply with the Annual Report Directions (the Directions) made under section 8 of the Annual Reports Act. The Directions are found at the ACT Legislation Register: www.legislation.act.gov.au.

The Compliance Statement indicates the subsections, under Parts 1 to 5 of the Directions, that are applicable to the Office of the Director of Public Prosecutions, ACT and the location of information that satisfies these requirements:

Part 1 Directions Overview

The requirements under Part 1 of the Directions relate to the purpose, timing and distribution, and records keeping of annual reports. The 2019-20 ACT Director of Public Prosecutions Annual Report complies with all subsections of Part 1 under the Directions.

To meet Section 15 Feedback, Part 1 of the Directions, contact details for Office of the Director of Public Prosecutions, ACT are provided within the 2019-20 ACT Director of Public Prosecutions Annual Report to provide readers with the opportunity to provide feedback.

Part 2 Reporting entity Annual Report Requirements

The requirements within Part 2 of the Directions are mandatory for all reporting entities and the Office of the Director of Public Prosecutions, ACT complies with all subsections. The information that satisfies the requirements of Part 2 is found in the 2019-20 ACT Director of Public Prosecutions Annual Report as follows:

- A. Transmittal Certificate, see page 30.
- B. Organisational Overview and Performance, inclusive of all subsections, see B.1 from page 39 to page 43 and B.2 from page 44 to page 100 respectively.
- C. Financial Management Reporting, inclusive of all subsections, see page 113 to page 115.

Part 3 Reporting by Exception

The Office of the Director of Public Prosecutions, ACT has nil information to report by exception under Part 3 of the Directions for the 2019-20 reporting year.

Part 4 Directorate and Public Sector Body Specific Annual Report Requirements

The Office of the Director of Public Prosecutions, ACT is not required to report under Part 4 of the Directions.

Part 5 Whole of Government Annual Reporting

All subsections of Part 5 of the Directions apply to the Office of the Director of Public Prosecutions, ACT. Consistent with the Directions, the information satisfying these requirements is reported in the one place for all ACT Public Service directorates, as follows:

- › Bushfire Risk Management, see the annual report of the JACSD;
- › Human Rights, see the annual report of the JACSD;
- › Legal Services Directions, see the annual report of the Justice and Community Safety Directorate
- › Public Sector Standards and Workforce Profile, see the annual State of the Service Report; and
- › Territory Records, see the annual report of CMTEDD.

ACT Public Service Directorate annual reports are found at the following web address:
http://www.cmd.act.gov.au/open_government/report/annual_reports

Director's foreword

The 2019-20 financial year ('the financial year') completes my first full year as the Director of Public Prosecutions. The second half of the financial year has presented challenges never before experienced by the Office. The year 2020 began with the devastating bushfires that destroyed homes and bushland, and the tragic loss of 34 lives. Then, just as the smoke cleared, COVID-19 reached our shores.

When COVID-19 hit Australia, the Australian Government commissioned several reports aimed at slowing the spread of the coronavirus, thus ensuring the Australian health system was to be prepared under a range of scenarios. In essence, the COVID-19 models were about managing the demand for Intensive Care Unit ('ICU') beds, the capacity of which was being increased to around 7,000 ICU beds throughout the country. At that stage, the most probable scenario saw stringent COVID-19 lockdown measures in place for at least 43 weeks (i.e. the remainder of 2020). However, even with such stringent lockdown measures, there was still the prospect of up to 20% of the Australian community who may need ICU beds, not having access to them.

On 16 March 2020, the ACT Minister for Health declared a public health emergency under section 119 of the *Public Health Act 1997*. Over the weeks that followed, several health emergency directions were issued by the ACT Chief Medical Officer closing entertainment venues, restaurants, cafés and gyms, limiting gatherings and directing compliance with the social distancing measures that basically only permitted a maximum room occupancy of no more than one person per four square metres.

On the same day (16 March 2020), the Supreme Court made an announcement on its operation during the COVID-19 outbreak, highlighting *inter alia* that special measures would be taken to protect the health of people summoned to attend for jury service and those who are selected as jurors. The Supreme Court then issued *Practice Direction 1 of 2020, Special Arrangements in response to COVID-19* on 23 March 2020, drawing attention to the provisions put in place to ensure the health and safety of all involved in Supreme Court proceedings.

Finally, by virtue of an amendment to the *Supreme Court Act 1933* ('SCA'), included in the *COVID-19 Emergency Response Act 2020*, which was passed by the ACT Legislative Assembly on 6 April 2020, jury trials were suspended indefinitely as of 7 April 2020. The *COVID-19 Emergency Response Act 2020* inserted a new section 68BA in the SCA, covering criminal proceedings if the trial was to be conducted, in whole or in part, during the COVID-19 emergency period (period beginning 16 March 2020).

With the special arrangements in place in the Supreme Court and suspension of jury trials, future judge alone trials and Court of Appeal matters were bought forward at short notice. This enabled the Supreme Court to remain fully operational during the COVID-19 lockdown period but placed enormous pressure on this Office due to a shorter response time.

Meanwhile, on 27 March 2020, the Magistrates Court issued *COVID-19 Measures (No 4)*, an interim practice direction, which was then revised in *COVID-19 Measures (No. 5)*, that limited the Magistrates Court's operations to daily A1, A2 and B lists, and weekly FI lists; and effectively suspending criminal hearings indefinitely.

In light of decreased Magistrates Court's operations, my Executive team and I designed and implemented the *COVID-19 Business Continuity Plan* ('BCP') in the Office on 30 March 2020. The BCP included the coronavirus response measures of the Office of the Director of Public Prosecutions (ODPP).

The BCP effectively divided the office personnel into three separate and independent teams, attending to the Magistrates Court on an alternating two-day cycle roster, leaving our Crown Chambers sufficiently operational to service the Supreme Court. When personal attendance at the Office or at court was not required, our staff were encouraged to work from home. Further, the sudden transition to 'virtual courts' forced changes, particularly due to remote court appearances. In order to support our remote workforce, suitable technology had to be deployed to allow the Office to continue functioning during the COVID-19 lockdown. This involved a rapid technological response, for example sourcing laptops and the installation of various software, to facilitate virtual meetings and court appearances, and allow staff to work from home.

Due to the nature of our work at the ODPP, particularly the confronting and potentially traumatising material, workplace mental health has always been a priority. I was only too aware that by having staff work from home, there was a risk of unanticipated mental health consequences due to isolation and burnout. Worry about a new pandemic like COVID-19 can be overwhelming. Dealing with this as well as work-related stresses from the isolation of home can have a negative impact on the health and wellbeing of staff. Regular mental health welfare checks through virtual meetings became an essential feature of our BCP. Our dedicated team of managers were committed to ensuring that the health and wellbeing of staff were maintained, especially since we were effectively bunkered down for what the Office thought would be the remainder of 2020.

Australia's performance in flattening the epidemiological curve far exceeded the forecasting. Thus, on 8 May 2020, the Australian Government issued a recovery plan, and the ACT released its Canberra's Recovery Plan which included the COVID-19 Easing of Restrictions Roadmap. In response to this, the Magistrates Court resumed its custody hearings. It then followed by issuing a new practice direction, *COVID-19 Measures - revised arrangements*, which revoked its earlier *COVID-19 Measures (No. 5)*, on 20 May 2020. The *COVID-19 Measures - revised arrangements* basically returned the Magistrates Court to its regular functions from 2 June 2020. The Supreme Court then recommenced jury trials on 15 June 2020, with Court facilities and resources allowing for appropriate social distancing and health measures for jurors, witnesses, practitioners, accused people and staff. With the return of jury trials to the Supreme Court, my Office suspended its BCP and resumed normal operations; further reinforcing its social distancing and hygiene practices within the Office to ensure staff remain safe.

From my observations, the ACT legal community coped well during an enormously trying period. Sensible and timely measures by the ACT's legal profession limited the impact of COVID-19 on victims, witnesses and accused people alike. The legal profession by adopting specific COVID-19 hygiene measures continues to contribute to the safety and wellbeing of those who engage with the court system.

Office Performance

Notwithstanding the way the COVID-19 shutdown has been managed in the ACT, charge statistics have still been considerably impacted. Notably, the total 1031 completed criminal matters in the fourth quarter of the financial year amounts to about a 30% reduction from the total completed cases of the other three quarters of the financial year. In spite of this, the total 5046 new completed criminal matters in the financial year still amounts to a 10% increase compared to the previous 2018-19 financial year. This rise in criminal cases finalised in the financial year includes 20 homicide cases across all court levels (see breakup in table B.2.14.2 on page 94).

Further, despite the COVID-19 shutdown in the last quarter of the financial year, completed family violence and sexual offence matters in the financial year remain as high as in previous years. Indeed, total sexual offence trials and sentences completed in the financial year marginally increased compared to the total in the previous financial year. The Office also had double the total number of completed regulatory matters in the financial year compared to the previous financial year.

In relation to Supreme Court trials, the COVID-19 shutdown effectively led to two of the four scheduled trial listing periods for the courts to be significantly interrupted. As a consequence, approximately 23 criminal trials had to be vacated. As the Supreme Court's trial schedule had been significantly impacted by COVID-19, the total number of trials completed over the course of 12 months ended up lower than previous years. On the basis of court listing however, this calendar year has seen the continued upward trajectory of trials being listed. At the time the COVID-19 special measures and restrictions were introduced, the first two quarters of this calendar year (2020) had a total of 80 trials listed, this being the highest number of trial listings ever recorded by the Office over a six-month period.

As mentioned earlier, the *COVID-19 Emergency Response Act 2020* introduced section 68BA, and amended section 68B, of the SCA. Whilst section 68BA removed the right to trial by jury, the amended section 68B removed a list of offences which were previously excluded from being heard by 'judge alone'. When jury trials resumed on 15 June 2020, section 68BA ceased operation. However, the amended section 68B remains in force, effectively preserving the right to trial by 'judge alone' for offences previously excluded from being heard by 'judge alone'.

Generally, based on our statistics over past years, the accused pleads guilty prior to commencement of the trial in about 50% of trials. Of those matters that proceed to trial, historically around 60%-70% result in a verdict of guilty and the remaining 30%-40% result in a verdict of not guilty. It is noteworthy that the amendments to the SCA has resulted in a substantial increase in the number of 'judge alone' trials. This consequently has had an impact on our conviction rate. As an illustration, as at 30 June 2020, of the eight trials that proceeded as 'judge alone' trials (post COVID-19 shutdown period), seven returned verdicts of not guilty. These verdicts will have an impact on our statistics. Notwithstanding the shift in conviction rates, the Office continues to get positive results from the criminal case conferencing process, consistently settling around 1/3rd of matters either during case conferencing or as a direct result of case conferencing.

Office Structure and Accommodation

We have finally completed the organisational restructure of the Office, having made a number of major adjustments.

First, the former single team of paralegals have been distributed across the six practice units (refer to figure 1 on page 42). This has led to greater workplace cohesion and has appreciably improved the social structure within the teams and the Office as a whole.

Secondly, we have merged the policy and appeal functions within the Office together (refer to figure 1 on page 42) and formed a strong Policy /Appeals Team to evaluate points of appeal carefully and provide detailed and comprehensive submissions on law reform. This new team has already been instrumental in making significant contributions to recent law reform in the ACT.

Thirdly, we have introduced a new position called Quality and Compliance Manager. This position reports directly to the Director, independently auditing the functions of the Office, thus ensuring there is full compliance with our obligations. The internal audit exercise includes the ODPP's duties and responsibilities stemming from the recommendations of the *Royal Commission into Institutional Responses to Child Sexual Abuse*, obligations and commitments under the Victims of Crime Charter, and obligations under the Public Interest Disclosure and Freedom of Information regimes. This position also has oversight of our duties and obligations under the relevant work health and safety laws, commitments under the Enterprise Agreement, as well as our commitment to having an open dialogue with the unions on all workplace issues.

The revised organisational structure of the Office has already produced anticipated productivity gains. We have noted a 10% reduction in our accountability indicators, such as the average cost per completed matter at the Office. In addition, our continuing investments in current projects such as the electronic transfer of data direct from the Integrated Court Management System ('ICMS') into our case management system at the ODPP called CASES, and electronic bench sheets, will result in more accurate data and less manual data entry, providing further productivity gains over the coming years.

On the accommodation front, on 1 July 2020, we commence a new five-year lease with a further five-year renewal option with the Reserve Bank. This will enable a much-needed expansion to our current office accommodation. The Office previously occupied the ground floor, the first floor, and 282 m² of the second floor of the Reserve Bank. The new lease increases our office space on the second floor by 374 m², allowing us to now occupy the entire 656 m² of the second floor. After the COVID-19 outbreak, the Federal Budget was pushed back to 6 October 2020, and the ACT Budget was pushed back to after the October 2020 ACT Legislative Assembly election. This posed challenges for us to submit the required budget bid to fund the second floor fit-out necessary to make the space conducive to our work needs. We were fortunate to have attracted sufficient COVID-19 stimulus funding to carry out the design and fit-out works on the second floor. The second-floor fit-out is scheduled to be completed in early December 2020. It will accommodate our newly established Crown Chambers, Policy/Appeals team, COCA team, Executive team, and Corporate team. This move will relieve the huge accommodation pressure we are experiencing with our current office space on the ground floor and first floor.

Office Diversity

The ODPP has always enjoyed a gender diverse workforce with some 65% of our personnel female. In 2019 we introduced our Office Employment Diversity Statement ('OEDS'). In our OEDS, we have committed to reporting demographic figures against a more comprehensive set of 'diversity' criteria. The OEDS figures can be found on page 106 of this Annual Report. It has been most encouraging to note that there has been an increase with the number of staff identifying as Aboriginal or Torres Strait Islander ('ATSI'). In the 2018-19 financial year, 2.7% of staff identified as ATSI, but in the 2019-20 financial year, this increased with 8.4% identifying as ATSI.

The goal for the Office was to increase the number of ATSI staff to more than 5% of our workforce, to match the demographic representation of the broader population in Australia. In 2019 we initiated a 'work experience placement program' with the University of Canberra, aimed at indigenous students studying at its Canberra Law School. We received a good response upon launching the placement program and hosted our first student on a 12-month placement from September 2019. Over the past year, this 'work experience placement program' was extended to the Australian National University. As a consequence, we are now employing three indigenous prosecutor associates in our Crown Chambers.

In addition, in our last annual report I mentioned that the Office played a key role in establishing the *Disability Justice Strategy 2019-2029*. COVID-19 has slowed the progress of the *Disability Justice Strategy* which is a 10-year plan to ensure people with disability have equal access to justice. We, nonetheless, remain committed to the Disability Justice Strategy and its accompanying action plans which we anticipate will regain momentum in 2021.

As one initiative in support of the *Disability Justice Strategy*, we will be welcoming our first disability supported staff member in the coming months. This is in line with the workplace inclusion and diversity strategy adopted by the Office. The ODPP is resolutely committed to an accessible and inclusive workplace, working towards removing barriers for people with disability and providing the tools necessary to undertake their job.

It is unfortunate that due to our accommodation pressures, the Office has had to temporarily suspend its recruitment process for a Disability Justice Liaison Officer. Nevertheless, this recruitment exercise will resume in early 2021.

Office Engagement within the Legal Profession

I am proud of the fact that our prosecutors are now heavily engaged with the broader legal profession. Prosecutors from Grade 3 and above are now members of the ACT Bar Association. Prosecutors from Grade 4 and above also hold Practising Certificates issued by the ACT Bar Association. The ACT Bar Association and ODPP often hold joint CPD training sessions for their members. Further, the ACT Bar Council now has a representative from the ODPP.

Proposals are currently being developed to enable all prosecutors to sit for the Bar Exam, attend the Bar Practice Course and participate in the Reading program. This means our trial prosecutors will receive the same standard of training as their colleagues at the private Bar.



The Director delivering the Silks' address at the High Court of Australia

On the whole, this will result in a much more unified legal profession, and a profession that has greater oversight of the functions of our criminal prosecutors. The increased cohesion within the legal profession has been warmly received by both sides of the bar table as well as the Bench.

2019 was also a significant year for me personally, receiving the honour of being appointed Silk. I was further given the privilege of being the first Silk from the ACT to deliver the Silks' Address at the High Court of Australia, on behalf of the 52 Silks appointed from around Australia in 2019. My Silks' address can be located on the ODPP website.

Community Engagement

The Office is increasingly utilising technology to engage with the community. This can be seen from our ongoing efforts to make our website (www.dpp.act.gov.au) as user friendly as possible. We have added numerous resources to assist and guide victims, witnesses and defendants. There is a 'Witnesses and Victims' webpage that contains information that includes, a comprehensive list of victims' rights, and videos providing important information on the court and trial process. By providing such information, the Office aims to relieve victims and witnesses of the anxiety experienced through their engagement with the court process. Similar information can be located on the 'Defendants' webpage. This includes videos to assist self-represented defendants negotiate the criminal justice system. The information on the 'Defendants' webpage was contributed by members of the private Bar.

The Team

We have built a talented team, and I want to particularly acknowledge my head of Crown Chambers Mr Anthony Williamson, my head of Criminal Practice Mr Joel Hiscox, my Office Manager Ms Mercy Wilkie, and my Executive Officer Ms Katie Cantwell, who have worked tirelessly over the past 12 months to build an office the ACT can be proud of. I also wish to acknowledge my Policy Officer Dr Melanie Blair, who laboured determinedly to get this Annual Report together, as well as the outstanding team of Crown Prosecutors and Supervising Prosecutors and talented and dedicated staff they manage.

B. Organisational Overview and Performance

B.1 Organisational Overview

B.1.1 The Role and Functions of the Office

The Office of the Director of Public Prosecutions ('ODPP') was established by the *Director of Public Prosecutions Act 1990* ('the Act') to institute, conduct and supervise prosecutions and related proceedings. It comprises the Director of Public Prosecutions ('Director'), an independent statutory officer appointed by the ACT's Executive, and staff employed under the *Public Sector Management Act 1994*, to assist the Director. The ODPP, an independent prosecution authority of and for the ACT, is solely under the control of the Director.

The Director has complete independence in relation to the operations of the ODPP. Nevertheless, it is important to note that the ODPP works closely with the courts, the legal profession, police and other investigators, victims' representatives, and other government agencies.

The current Director, Shane Drumgold SC, was appointed on 1 January 2019. The Director is aided by an Executive team¹ in running the full operations of the ODPP. They are Anthony Williamson who is the Deputy Director in charge of the Crown Chambers,² Joel Hiscox who is the Assistant Director in charge of the Criminal Practice,³ Mercy Wilkie who is the Office Manager, and Katie Cantwell who is the Executive Officer.

The Director reports to the Attorney-General of the Territory ('AG'). The Act requires the Director and AG to consult with each other, if required, concerning the functions and powers of the Director. The AG may give directions of a general nature to the Director. However, such directions can only be given after prior consultation with the Director. The AG's directions should also be presented to the Legislative Assembly and be published as a *notifiable instrument*.⁴

The Director makes prosecutorial decisions independent of political influence or control. The Director's prosecuting role is independent of the police and other investigative agencies. Once a prosecution has been instituted, all prosecutorial decisions are made by the Director.

The principal duties of the Director include the following:

- › to institute and conduct prosecutions, both summary and indictable;
- › to institute and respond to appeals;
- › to restrain and confiscate assets used in, or derived from, the commission of criminal offences;

1 Refer to B.1.5.1 (Executive Committee) on page 43.

2 Refer to B.2.4 (Crown Chambers) on page 54.

3 Refer to B.2.1 (ODPP's Criminal Practice) on page 44.

4 There were no such directions given in the financial year.

- › to assist the coroner in inquests and inquiries; and
- › to provide advice to the police and other investigative agencies.

Some of the important statutory functions of the Director include the following:

- › to institute a prosecution on indictment where there has been no committal for trial (known as an *ex officio* indictment);
- › to decline to proceed further in a prosecution and bring it to an end;
- › to take over and conduct, or discontinue, prosecutions instituted by another person (other than the AG);
- › to give to a person an undertaking that specified evidence will not be used against them, or that they will not be prosecuted for a specified offence or conduct; and
- › to give directions or furnish guidelines to the chief police officer and other persons specified in the Act, including investigators and prosecutors.

Prosecutors are ‘ministers of justice’, a phrase which sums up the unique position of the prosecutor in the criminal justice system. Prosecutors act in accordance to the procedures and standards as provided by the law. They are also guided in their role by the Prosecution Policy⁵ and further directions and guidelines issued by the Director under the Act.

B.1.2 Internal Accountability

Since late 2019, the ODPP has five prosecutors holding executive positions at the Senior Executive Service (‘SES’) level. They are the Deputy Director, Mr Anthony Williamson, who heads the Crown Chambers,⁶ the Assistant Director, Mr Joel Hiscox, who is in charge of the Criminal Practice,⁷ and three Crown Prosecutors attached to the Crown Chambers, Ms Rebecca Christensen, Mr Keegan Lee and Mr Trent Hickey.

The responsibilities of the Senior Executives at the ODPP, as at 30 June 2020 are provided below.

B.1.2.1 Senior Executives and their responsibilities

Deputy Director

The Deputy Director is responsible for assisting the Director with the management of the ODPP. The position also manages the ODPP’s professional staff and ensures effective deployment of those resources. The Deputy Director reports directly to the Director and provides the necessary leadership and support in representing the Director and the ODPP.

The Deputy Director heads the Crown Chambers. As such the Deputy Director manages a team of Crown Prosecutors, Senior Advocates and advocates.

The Deputy Director exercises the discretion to initiate, vary and discontinue serious criminal charges and appeals. The Deputy Director conducts more complex litigation in the Supreme Court, including in relation to committals and trials on indictment and appears for the

⁵ Refer to Appendix A on page 117 for the *Prosecution Policy of the Australian Capital Territory*.

⁶ Refer to B.2.4 (Crown Chambers) on page 54.

⁷ Refer to B.2.1 (ODPP’s Criminal Practice) on page 44.

prosecution in appeal matters. The position also develops policy and procedures relevant to the ODPP and ensures effective working relationships with criminal justice agencies within the ACT are maintained.

Assistant Director

The Assistant Director who manages the Criminal Practice at the Office reports directly to the Director. The Assistant Director provides the necessary support in both representing the Director and the ODPP, and effectively managing the caseload at the Office. The Assistant Director is responsible for managing the allocation of prosecution work and for advising staff on evidentiary and procedural rules, and providing advice to the police. The position also has responsibility for prosecution staff (including performance appraisal and performance management) and for mentoring of junior legal staff.

Besides appearing as lead counsel in superior court criminal trials, the Assistant Director role contributes to the training, mentoring and the performance management of prosecutors. The Assistant Director conducts complex prosecutions, appeals and related proceedings. The Assistant Director also plays an active role in training and enhancing legal staff development at the Office, and makes contribution to the development of policy and procedure.

Crown Prosecutors

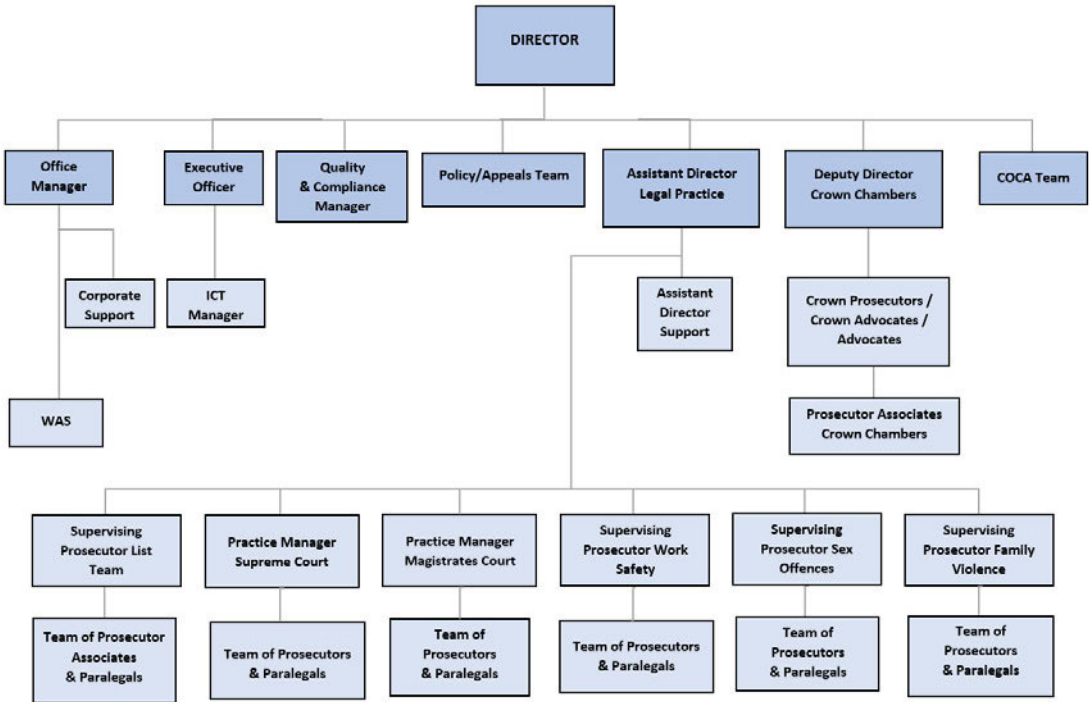
The Crown Prosecutors sitting in the Crown Chambers report to the Deputy Director. They appear in the more complex matters including conducting trials and appeals in superior courts. They also provide high level legal and policy advice and assist the Director in formulating internal policies, guidelines and directions, and manuals. They also represent the Director on committees and in forums dealing with criminal justice issues.

The Director and Senior Executives are paid in accordance with the determinations of the ACT Remuneration Tribunal, and relevant laws and instruments including the *Public Sector Management Act 1994* and the *Public Sector Management Standards 2016*. The Director or Senior Executives may, however, make submissions to the said Tribunal on matters relating to their remuneration.

B.1.3 Organisational Structure

The Office structure as at 30 June 2020 is as follows:

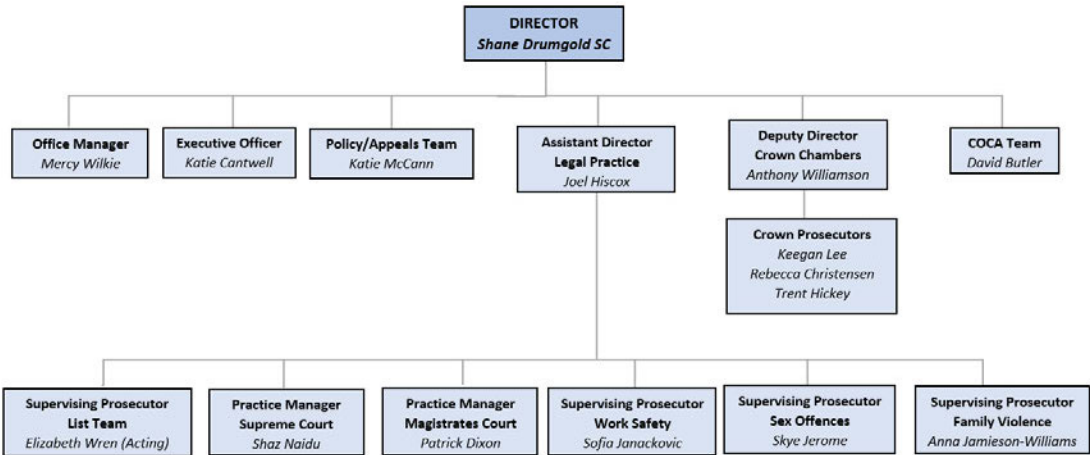
FIGURE 1



B.1.4 ODPP Core Team

The ODPP core team structure as at 30 June 2020 is as follows:

FIGURE 2



B.1.5 ODPD Working Committees

A number of internal committees inform the work of the ODPD:

B.1.5.1 Executive Committee

The operations of the Office (both legal and administrative) are overseen by the Executive Committee comprising the Director, Deputy Director, Assistant Director, Office Manager and the Executive Officer.⁸ The Executive Committee is headed by the Director and its charter encompasses a wide range of issues including staff, policy (including legal and administrative), budget, resource allocation and legal matters. The Committee meets weekly to deal with immediate operational issues. At these meetings, Committee members provide advice and guidance to the Director on the strategic direction and management of activities.

B.1.5.2 Working Environment Group

The Office has a Working Environment Group ('WEGIES') which meets monthly to discuss issues affecting staff and their working environment. All practice units within the ODPD are represented in the WEGIES. The objectives of the WEGIES are to:

- › foster co-operation in relation to the working environment and workplace safety issues;
- › disseminate information and consult about employment conditions, the working environment, and health and safety at work; and
- › co-ordinate health and wellbeing activities for the Office.⁹

B.1.5.3 Continuing Professional Development - Ad hoc Committee

The Continuing Professional Development ('CPD') - Ad hoc Committee ('Ad hoc Committee') assists in the planning and delivery of CPD programs within the ODPD. The CPD - Ad hoc Committee is normally made up of the Director, Deputy Director and Crown Prosecutors from the Crown Chambers.¹⁰

The CPD program is a vital training tool for all legal staff that focuses on professional development of legal staff in the technical aspects of the criminal justice process and laws of evidence.¹¹ A series of fortnightly sessions are presented, concentrating on practical issues, enhancing the skills and knowledge of prosecutors. The CPD program was temporarily suspended during the COVID-19 lockdown period.

B.1.6 ODPD Stakeholders

The ODPD does not have clients because of its independent nature. However, it has a number of important stakeholders including the Supreme Court, the Magistrates Court, the Australian Federal Police ('AFP'), ACT Public Sector ('ACTPS') regulatory agencies and the legal profession.

⁸ Refer to the Executive team mentioned in B.1.1 (The Role and Functions of the Office) on page 39.

⁹ Refer to B.11 (Human Resources Management) on page 108.

¹⁰ Refer to B.2.4 (Crown Chambers) on page 54.

¹¹ Refer to B.11 (Human Resources Management) on page 108.

B.2 Performance Analysis

B.2.1 ODPP's Criminal Practice

The main prosecutorial work by the ODPP is carried out in two court jurisdictions in the ACT. The first jurisdiction is the Magistrates Court, where cases dealt with refer to summary matters and matters where parties can consent to the Magistrates Court exercising jurisdiction. The second jurisdiction is the Supreme Court where matters are committed to the Supreme Court or dealt with on appeal.

Prosecutors who are of the level of Grade 1 to 2 regularly appear in the Magistrates Court, whilst prosecutors who are of the level of Grade 3 and above predominantly appear in the Supreme Court. This work basically forms the Criminal Practice at the Office.

Over the 2019-20 financial year, the ODPP introduced substantial changes to the way in which the Criminal Practice at the Office operates. While the management of the Criminal Practice was considered before the COVID-19 crisis, most of the changes that were put into effect were during the COVID-19 lockdown period.

It may have been easy to justify ceasing the review and improvements to the ODPP's Criminal Practice operations during COVID-19. Instead, the coronavirus pandemic provided a catalyst and opportunity for the Office to revisit and rethink the business operations within its Criminal Practice. The following are some of the broader achievements of the Criminal Practice in the depths of the COVID-19 lockdown.

- › The recruitment of Crown Advocates to expand the capabilities of the Crown Chambers¹² and supplement the work of Crown Prosecutors.
- › The recruitment of prosecutor associates, to convert these previously 'contracted' positions into 'full time' positions (following the formalisation of such positions in the *Legal Professionals Enterprise Agreement 2018-2021*¹³).
- › The formation of a dedicated policy and appeals team.¹⁴
- › Recruitment for the newly established independent List Team¹⁵ i.e. a team of prosecutors who focus on attending to matters in the A1 and A2 lists of the Magistrates Court.
- › Expansion of the ODPP's ICT capabilities, including streamlining the ability of the Office to automatically process and file electronic communications and documents that are sent to the Office by the AFP.
- › Further, the ODPP has further developed its ICT capabilities to receive more briefs of evidence in electronic format. These enhancements were made possible with the co-operation of ACT Policing. The ODPP and ACT Policing will continue to work on further ICT upgrades. These technological advancements will ultimately reduce costs and increase efficiencies, particularly as the Courts move towards an e-filing system.

¹² Refer to B.2.4 (Crown Chambers) on page 54.

¹³ The *Legal Professionals Enterprise Agreement 2018-2021* which only became effective on 25 February 2020 was backdated to October 2018.

¹⁴ Refer to B.2.5 (Appeals) on page 64.

¹⁵ Refer to B.2.13 (List Team) on page 91.

- › Greater opportunities given to Supervising Prosecutors to engage with and manage staff. While the existence of teams within the ODPP is not new, the scope and responsibility of Supervising Prosecutors to manage teams has increased. Supervising Prosecutors now manage support staff within their teams, resulting in the creation of cohesive teams and a more function-based, integrated office.
- › During the COVID-19 lockdown all regular established work structures within the ODPP were broken down. Thus, new work arrangements had to be put in place to manage the Office operations while only 1/3rd of our workforce were physically present in the Office. Where the COVID-19 necessitated changes have brought about positive benefits, the ODPP will retain these shifts after business resumes normal operations and staff return to regular workforce.

It is important to acknowledge that these revisions in our Criminal Practice were made possible by the co-operation of all the staff at the ODPP who responded positively and supportively, and embraced and accepted both the challenges and new opportunities that were presented by these changes. The Office has benefited immensely from these changes.

The future prospects for ODPP's Criminal Practice include the firming up, strengthening and expansion of the Crown Chambers, implementation of the independent and now sufficiently staffed 'List Team', and further advancement in ODPP's online case management system called 'Criminal Advocacy Support and Enquiry System' ('CASES').

B.2.1.1 Development in the Magistrates Court

In the 2018-19 annual report, the ODPP indicated that it was supportive of introducing in the Magistrates Court an equivalent system to Criminal Case Conferencing ('CCC') in the Supreme Court. Towards the second half of 2019, the Office was directly involved in working towards the introduction and shaping a similar system in the Magistrates Court. With a system that is to be ultimately referred to as Criminal Party Conferencing ('CPC'), the Office hopes that it will have favourable results, particularly earlier pleas as has been the experience in the Supreme Court. However, it has been rather unfortunate that the implementation of the CPC has been delayed due to COVID-19. The anticipated launch of the CPC is scheduled for the start of the law term in 2021.

The 2019-20 financial year saw the re-introduction of the Magistrates Court Users Forum ('MCUF'), an initiative of the Magistrates Court to bring key stakeholders together to discuss improvements to the overall delivery of services. This is welcomed by the ODPP and the Office looks forward to working as part of the MCUF for the betterment of the court system as a whole.

B.2.1.2 Development in the Supreme Court

Recent developments in the Supreme Court include the introduction of the Drug and Alcohol Sentencing List ('DASL').¹⁶ This sentencing process is an option for offenders whose drug and alcohol use has contributed to their offending. The DASL offers an alternative approach to rehabilitating offenders whose crime is related to drug or alcohol dependency. Those sentenced under the DASL must engage in an intensive treatment program that is overseen by a judge.

¹⁶ Refer to B.2.3.2 (Drug and Alcohol Sentencing List) on page 52.

The Office was involved in the development, implementation and training phases of DASL. The ODPP has appointed a dedicated prosecutor who not only appears regularly in this sentencing list but sits as part of the team overseeing the related treatment program. The ODPP is pleased to note that the initial outcomes for a number of the DASL participants have been very promising.

B.2.2 Magistrates Court

Every criminal case conducted by the ODPP starts in the Magistrates Court. The vast majority of matters that are prosecuted in the ACT are summary in nature. Therefore, these are dealt with by the Magistrates Court. It is a dynamic jurisdiction which serves to train and develop emerging advocates who will one day move on to prosecute indictable cases in the Supreme Court.

The ODPP continues to promote the fair and reasonable resolution of matters in accordance with its *Prosecution Policy of the Australian Capital Territory*¹⁷. By maintaining contact with victims, witnesses, investigative authorities and other relevant stakeholders, the ODPP strives to obtain just, and efficient results.

The COVID-19 crisis this year (2020) presented a challenge for the Magistrates Court, and in turn, the Magistrates Court's Practice at the ODPP. Swift and drastic changes to how the Office carried out its functions demanded agility and nimbleness from its prosecutors who ran the summary prosecutions. Changes in the way defendants, witnesses and their representatives appeared in court, the manner in which the court received documents for filing, and the electronic tendering of exhibits heralded a significant, albeit forced, departure from the way things had been done in the past. The prosecutors at the ODPP did a great job in adapting to these changes. Their role was integral in the smooth operation of the ACT criminal justice system during these trying times.

The immediate future will be a busy one for the Magistrates Court's Practice at the Office. As the court works hard to regain ground lost during the COVID-19 forced shut down, prosecutors at the ODPP will be asked to play a significant role. A co-operative approach between the courts, defence and the Office will ensure the continued and effective administration of justice in the ACT.

B.2.2.1 MC Cases

Police v Lee Robert Townsend

The defendant managed a fishing equipment and tackle store in Belconnen. His employment was terminated after the owners identified unexplained stock discrepancies. Sometime after his dismissal, the owners reported the matter to the police. A warrant was granted to search the defendant's home. The subsequent search uncovered vast amounts of fishing rods, fishing reels, fishing tackle and associated fishing paraphernalia. A significant majority of this equipment was brand new. A lot of that equipment was identified as being from the fishing store where he formally worked. However, there was no record of those items having been legitimately purchased.

¹⁷ Refer to Appendix A on page 117 for the *Prosecution Policy of the Australian Capital Territory*.

Following negotiations between the ODPP and defence, the defendant pleaded guilty to one count of theft and one count of possessing property suspected of being the proceeds of crime. He appeared before the Magistrates Court for sentence. The sentencing magistrate noted the theft was aggravated by the fact that the defendant breached his employers trust by stealing in the course of his employment.

On the theft charge, the defendant was sentenced to eight months imprisonment, to be suspended after serving two months of that sentence. On the charge of possessing property suspected of being the proceeds of crime, the defendant was sentenced to four months imprisonment, concurrent with the sentence imposed on the theft charge, suspended after serving two months and upon him entering into a 12-month good behaviour order.¹⁸

Police v Luke Schneider

A search warrant was executed on a residential address in Mawson. During the search police entered a garden shed attached to the house. Inside the shed police located a clandestine drug manufacturing laboratory. There were a number of chemistry flasks and associated glassware, heating elements, chemicals and other items required to manufacture controlled drugs. The ACT Fire & Rescue, Hazardous Materials ('HAZMAT') unit was called to safely manage the scene.

During a video recorded interview, the defendant told the police that he was \$20,000 in debt and that he thought he would manufacture drugs to pay it off. He was ultimately unsuccessful.

The defendant was charged with an attempt to manufacture a controlled drug. He pleaded guilty to the charge. He was convicted and sentenced to four months imprisonment. That sentence was suspended on condition that he complies with a 12-month good behaviour order.

Police v Tiarna Joan Thomas

The complainant was at the Rose Cottage Inn celebrating her son's 18th birthday. The bar made a 'last call' for drinks just before midnight. The complainant, along with her family and friends left the building and made their way to the car park. At the same time several other patrons were in the car park too. The complainant noticed a female, the defendant, dancing on the bonnet of a car. Soon after, the defendant got into the car that she had been dancing on and sat in the front passenger seat. As the car wound its way through the car park, it sounded its horn loudly, whilst the defendant leant out her window yelling and shouting. One of the complainant's party (A) struck the rear panel of the car that the defendant was in. In response, the defendant got out of the car she was riding in and approached A. She then struck A in the face. For this offence, the defendant was charged with common assault, to which she eventually pleaded guilty and was fined \$500.00.

After the above incident, the defendant's friends dragged her back into the car she was travelling in. The driver of the car drove a short distance before it stopped for the second time. The defendant got out and went to the boot of the car. She removed the car jack handle from the boot and turned towards the people nearby. The defendant then struck the complainant (who was the closest person to her) in the head with the car jack handle. The force of the blow not only left the complainant dazed but caused a three-centimetre laceration as well. In relation to

¹⁸ There was an appeal against sentence at the time of print.

this offence, the defendant pleaded not guilty to one count of assault occasioning actual bodily harm ('AOABH') and one count of possessing an offensive weapon with intent. The defendant claimed she was acting in self-defence. Following a two-day hearing, the defendant was found guilty of both charges. She was sentenced to 12 months imprisonment to be served way of an intensive correction order ('ICO') and ordered to perform 150 hours of community service work.

B.2.3 Supreme Court

Despite the COVID-19 lockdown and the social distancing measures in place, matters have continued to progress through the Supreme Court. This includes both trial matters and sentencing proceedings.

Between 1 July 2019 and 30 June 2020, 39 trials commenced in the Supreme Court, totalling 195 trial days. Of these 39 trials:

- › 26 were jury trials and 13 were judge alone trials;
- › 19 trials returned guilty verdicts;
- › 14 trials returned verdicts of not guilty;
- › five trials returned no verdicts because the jury was hung (two) or the trial was aborted (three); and
- › one trial resulted in a special verdict being entered of not guilty by way of mental impairment.

23 trials (including trials involving co-accused persons) were vacated due to COVID-19.

In terms of sentencing proceedings, the COVID-19 lockdown has had minimal impact on these proceedings continuing. As the Supreme Court issued *Practice Direction 1 of 2020, Special Arrangements in response to COVID-19*, during the COVID-19 lockdown period, parties and offenders appeared by audio-visual link ('AVL') or by phone. Between 1 July 2019 and 30 June 2020, there were 142 sentencing proceedings in the Supreme Court following a plea of guilty in the Magistrates Court, a change of plea after being committed for trial, or as a result of breaching a sentencing order.

The Supreme Court Registrar's Trial Directions List ('SC Registrar's TD List'), which is held every Thursday morning, deals with matters which have been committed for trial, committed for sentence, return of subpoena matters and breach proceedings in the Supreme Court.

Pursuant to the Supreme Court's *Practice Direction 1 of 2020, Special Arrangements in response to COVID 19*, the SC Registrar's TD List continued to operate remotely via AVL and phone during the COVID-19 lockdown period. The SC Registrar's TD List is where pre-trial application and pre-trial evidence hearing dates are set down, intermediary ground rules hearing dates are set, criminal case conferences are scheduled, and matters are listed either for the Criminal Central Listing callover or for sentencing. The Office remains impressed by how the SC Registrar's TD List continues to operate efficiently and effectively in the case management of matters to progress them to sentencing or into the callover for trial.

There are four Criminal Central Listing callovers in the court calendar year. At these callovers, matters which have been committed for trial are given trial dates for the upcoming months. The callovers are conducted by the Chief Justice who is aided by the Supreme Court Registrar.

B.2.3.1 SC Cases

The Queen v Budack

This was judge alone trial pursuant to section 68B of the *Supreme Court Act 1933*.

The accused was facing one count of unauthorised possession of a firearm and one count of trafficking in a controlled drug (163.69g of MDMA). Police executed a search warrant at the apartment of the accused as part of a larger AFP operation. The apartment, which was accessible by a swipe card and key, was located on the 11th floor of its apartment complex. During the search, police located 163.69g of MDMA under the kitchen sink, drug paraphernalia and indicia, a sawn-off shotgun and bags of ammunition inside a case in the lounge room. The issue in dispute was whether the accused had knowledge of these items inside his apartment.

The trial judge concluded that there was no evidence that the accused knew the drugs and associated paraphernalia and indicia were inside his apartment, in circumstances where other people could have accessed his apartment, as a number of swipe card and keys had been issued for the apartment. As such, the judge found that there was no case for the accused to answer with respect to the drugs.

In terms of the firearm charge, the definition of 'possession' in the *Firearms Act 1996* is expansive and includes where a firearm is found in premises leased or occupied by the accused. The accused gave evidence to discharge his evidential burden to show that he did not have knowledge of the firearm and ammunition in his apartment. The judge found that the accused had discharged his evidential burden based on the evidence he had given. He was therefore acquitted of the firearm charge. [The full written reasons for the decision was not published because the judge passed away the following evening.]

As part of this same AFP operation, the following offenders were convicted and sentenced in the Supreme Court for trafficking drugs:

- › *R v Butler* – on the 8th of May 2020, the offender was convicted on three separate counts of trafficking (56.802g of MDMA, 246.465g of cocaine and 111.546g of MDMA). The offender received a head sentence of 24 months imprisonment to be served by way of an ICO;
- › *R v Turnbull* – in August 2018, the offender was convicted and sentenced on two separate counts of trafficking (MDMA and cocaine), together with some drug possession charges and a charge of dealing in the proceeds of crime. The offender received a head sentence of 38 months full-time imprisonment, with a non-parole period of 19 months.

The Queen v CN

This was a trial that commenced on 16 March 2020 with a jury of 14, empanelled to hear six counts of sexual intercourse without consent, alleged to have been committed by the accused on his young step-granddaughter. The offending was alleged to have occurred between November 2017 and January 2018.

Throughout the trial, the counsel for the accused made repeated applications to vacate the trial due to the COVID-19 pandemic. However, the members of the jury decided that they wanted to continue with the trial.

On 23 March 2020, after the jury had sat through seven days of evidence, and with the trial being scheduled to end in two days, the counsel for the accused made a further application to vacate the trial due to COVID-19. This time the trial judge acceded to the application and discharged the jury. The trial of the accused was then scheduled to commence afresh again on 24 August 2020.

Meanwhile, in a separate matter, the Chief Justice empanelled a jury of 14 on 23 March 2020 for a trial that commenced before Her Honour on that day. This trial ended five days later with the jury returning a verdict.

*The Queen v Henderson (No. 2)*¹⁹

This was a judge alone trial pursuant to section 68B of the *Supreme Court Act 1933*. The accused faced trial for trafficking in a controlled drug (444.29g of cocaine) and dealing in the proceeds of crime (\$12,450.00).

Police had been conducting surveillance on the accused for approximately five weeks. On 13 October 2018, police observed the accused driving to Sydney. The accused stopped in Sydney for approximately 10 minutes before driving back to Canberra. Suspecting this to be a drug deal, police intercepted the accused on his return to Canberra. The accused was the driver of the vehicle with a male passenger in the front seat.

A search warrant was executed on the vehicle. Close to half-a-kilogram of cocaine (with a street value of approximately \$288,600.00) was found in the vehicle's centre console. Located in the backseat of the vehicle was cash amounting to \$12,450.00 inside a shoebox. Further, police found a rolled up \$5.00 note with cocaine residue, with the DNA of the accused, located in the driver's side visor. The accused claimed that the cocaine was not his. He stated that he had no knowledge that the cocaine was in the centre console of the car. He asserted that others could have gained access to the car, and placed the cocaine in the console, and the cash in the backseat.

The judge acquitted the accused because he was not able to conclude that the cocaine on the rolled up \$5.00 note was the same cocaine as that located in the centre console, and there was also no evidence to establish that the accused was familiar with what was in the centre console of his car.

The following are excerpts of the judgment.

“Unquestionably, I have a good deal of suspicion about the accused and the cocaine. He was the primary user of the vehicle, he was a person who used cocaine and the trip to Sydney ... resulting in a turnaround time of 10 minutes, is definitely, without more, a source of significant conjecture. In addition ... there is the improbability of another person leaving up to \$300,000 worth of cocaine in an unlocked vehicle.”

“The accused used cocaine. But that is not enough. Had there been forensic evidence that indicated, if only by percentage of purity, that the cocaine on the five-dollar note was consistent with the cocaine in the centre console the Crown's case would have been significantly stronger. ... there was no independent forensic link between the accused and the bag...”

¹⁹ *The Queen v Henderson (No. 2)* [2020] ACTSC 147.

“In my view I am compelled to reach a conclusion that while there are facts consistent with the accused’s guilt there are also facts ... inconsistent with his guilt. This conclusion is a reasonable conclusion derived from the circumstances established by the evidence. ... Ultimately I am not satisfied that the Crown has proved beyond reasonable doubt that the accused knew about the presence of the cocaine in the console.”

R v Smith (a pseudonym)²⁰

This is a criminal case involving the accused (Smith) who was 17 years old at the time of the incident. The accused was charged with one count of committing an act of indecency contrary to section 60(1) of the *Crimes Act 1900*, and two counts of engaging in sexual intercourse without consent contrary to section 54(1) of the *Crimes Act 1900*. The complainant was also 17 years old at the time of the incident.

Ordinarily in the ACT, any offender charged with ‘excluded offences’ (including homicide and sexual offences) must be tried by jury. However, in response to the coronavirus pandemic, amendments to section 68B of the *Supreme Court Act 1933* effectively allowed accused persons to be able to waive their right to a jury trial, and have their matter determined by a judge alone. The amendments to the law enabled accused persons to make an election for a trial by judge alone in their proceedings, notwithstanding that they related to “excluded offences”.

The offender was the first accused to make such an election on 17 April 2020 and have his trial proceed by judge alone. As the offender was a young person at the time of the offending, he was tried as a young person.

The complainant had given evidence at a pre-recorded hearing in January 2020. The remaining witnesses for the Crown and defence were called at the trial in March 2020. The parties and witnesses were required to observe strict social distancing and hygiene protocols as the trial ran at the height of the COVID-19 pandemic. Indeed, judicial officers, lawyers, court staff and many others involved in court and justice processes were ‘essential workers’ during the pandemic.

The issue in the trial was a factual dispute in relation to consent. The trial judge who sat as trier of both fact and law, found the offender guilty of all counts on the indictment.

The offender lodged an appeal against conviction while awaiting sentence.²¹

ZL v Corey²²

The appellant is the mother of the complainant, a seven-year-old boy.

On the evening of 21 November 2018, the appellant and her son were the only two people home at their residence. The appellant observed that some of her son’s toys were missing. He disclosed to her that he had taken them to school, which he was not allowed to do, and had lost them. The appellant became angry and took off one of her slippers, being a cork heeled shoe, and struck the complainant two or three times on the upper area of his back.

20 *R v Smith (a pseudonym)* [2020] ACTSC 142.

21 The appeal has yet to be determined at the time of print.

22 *ZL v Corey* [2020] ACTSC 143.

Two days later the complainant told to his classroom teacher that his back was sore. He revealed that his mother had hit him during the week. The school then informed the police of this incident.

The appellant initially denied the allegations stating that her son had hurt his back at swimming lessons. She, however, entered a plea of guilty in the Magistrates Court following negotiations, an amended statement of facts, and after the matter was first listed for a contested hearing.

The appellant sought a non-conviction order pursuant to section 17 of the *Crimes (Sentencing) Act 2005*. However, the prosecution submitted that the objective seriousness of the offending was too high for such a disposition. The Magistrate agreed with the prosecution and sentenced the appellant to two months imprisonment, suspended upon entering into a good behaviour order for a period of 12 months. The appellant appealed her sentence to the Supreme Court, on the ground that the sentence imposed was manifestly excessive, and that the findings made by the magistrate that no penalty other than a term of imprisonment was appropriate was not available on the evidence.

Justice Loukas-Karlsson heard the appeal on 30 January 2020. Her Honour held that whilst sentencing is a discretionary process, appellate intervention was warranted in this matter. Her Honour stated a sentence of imprisonment, albeit suspended, was on all the facts manifestly excessive in this case. Her Honour was of the view that alternatives to imprisonment were not explicitly considered on the facts of the case and should have been so considered. Her Honour was of the view that it cannot be said that a sentence of imprisonment was the only alternative in this matter. Imprisonment is a sentence of last resort. The ground for appeal was therefore upheld, and further evidence was admitted for the purpose of re-sentence.

Following the sentencing hearing, parties were invited to provide further written submissions on the imposition of an order pursuant to section 17 of the *Crimes (Sentencing) Act 2005*. The Crown submitted that if the appellant were to be afforded a non-conviction order, the sentence would be one that was manifestly inadequate in that it would be “*so plainly short of the mark as to bespeak error of principle*”²³. Further, the Crown submitted that a conviction is a formal mark of society’s disapproval of the wrongdoing and is part of the offender’s punishment.

Justice Loukas-Karlsson concurred with the Crown that offences occurring in the family home are a scourge in our community, and that Courts play an integral role in denouncing such conduct. Ultimately, however, Her Honour set aside the sentence and conviction recorded by the magistrate, and a non-conviction order under section 17 of the *Crimes (Sentencing) Act 2005* was substituted. Further, the offender was required to enter into a 12-month good behaviour order.

B.2.3.2 Drug and Alcohol Sentencing List²⁴

The Drug and Alcohol Sentencing List (‘DASL’) in the Supreme Court commenced operation on 3 December 2019. It is a new sentencing option available for people whose drug and alcohol use has substantially contributed to their offending. Drug courts, in various forms, also exist in other Australian and international jurisdictions.

²³ Citing *Nguyen v The Queen* [2016] HCA 17; 256 CLR 656 at [66].

²⁴ Refer to B.2.1.2 (Development in the Supreme Court) on page 45.

A Drug and Alcohol Treatment Order ('DATO') enables offenders who meet the eligibility criteria to have their sentence of imprisonment fully suspended on condition that the offender agrees to complete a treatment program which is overseen by a judge.²⁵ The DASL provides a therapeutic and holistic approach to justice and managing an offending participant's treatment plan.

To be eligible, participants must:

- › be over 18 years and live in the ACT;
- › have entered or indicated a guilty plea;
- › likely to be imprisoned between one and four years;
- › have no other sentencing orders in place;
- › be dependent on alcohol or other drugs;
- › give informed consent to the order being made; and
- › not have committed a serious violence offence or a sexual offence.

The sitting judge is supported by the DASL treatment and supervision team which is comprised of:

- › the Director-General Justice and Community Safety, represented by a community corrections officer;
- › the Director-General ACT Health, represented by an employee of the Alcohol and Other Drug Service;
- › the ODP, represented by a prosecutor;
- › the Legal Aid Commission, represented by a solicitor from Legal Aid ACT;
- › the Chief Police Officer of the ACT, represented by an ACT police officer; and
- › Forensic Mental Health.

There are currently²⁶ six offenders subject to a DATO. Of those six, one is in a residential rehabilitation facility while the rest are in the community. Four offenders have graduated to phase two of their order, the 'consolidation phase'. Graduation to the consolidation phase of the order requires offenders, among other things, to abstain from illicit drug use for a minimum of four consecutive weeks, cease criminal activity and participate actively in the program.

Two DATOs were cancelled in April 2020 for non-compliance with the program.²⁷ In both instances, the non-compliance involved ongoing drug use and unsatisfactory engagement with the treatment program. These offenders are now serving their sentences in full time imprisonment.

25 Section 12A of the *Crimes (Sentencing) Act 2005*.

26 At the date of print.

27 *R v Kaihea (No 2)* [2020] ACTSC 82 and *R v Bell (No 2)* [2020] ACTSC 83.

B.2.4 Crown Chambers

The Crown Chambers was established in the ODPP in 2019. It is loosely modelled on the Crown Chambers operated by the NSW DPP. It is an internal chambers within the Office reserved for the most senior and experienced counsel. It comprises the Deputy Director, three Crown Prosecutors, four Senior Advocates and six prosecutor associates that support them.

Unlike other prosecutors in the ODPP, the prosecutors in the Crown Chambers hold a barrister's practicing certificate and are members of the ACT Bar Association. These prosecutors deal with the most complex and serious trials, sentencing and appellate matters. They appear predominantly in the ACT Supreme Court and the Court of Appeal.

Crown Chambers has carriage of the prosecution of homicide matters, and the most serious charges of sexual offending, crimes involving personal violence, serious drug trafficking matters, and prosecutions involving outlaw motorcycle gangs ('OMCGs'). It also oversees referrals for prosecution made by the ACT Integrity Commission.

The Crown Chambers takes a lead role in organising Continuing Professional Development ('CPD') for other prosecutors within the Office.²⁸ In 2019, the Crown Chambers entered into an arrangement with the ACT Bar Association, as part of a more collaborative approach, whereby it would open its CPD training sessions to members of the legal profession at the private Bar.

B.2.4.1 Involvement with external criminal justice agencies

The ODPP is very accommodating of its Crown Prosecutors' involvement with criminal justice agencies in other jurisdictions (foreign or otherwise). In December 2019, the Office endorsed the participation of its Crown Prosecutor, Ms Rebecca Christensen, in an independent panel conducting an 'agency capacity diagnostic' of the Office of the Public Prosecutor ('OPP') in Papua New Guinea ('PNG'),²⁹ including an examination of the future conduct of the partnership between the OPP and the Commonwealth of Australia's Attorney General's Department.³⁰ The objectives of the panel included an analysis of the constraints to improved performance within the OPP PNG, and ensuring that the OPP was achieving maximum productivity to support its Minister, the Government of PNG, and the people of PNG.

B.2.4.2 Notable Cases by the Crown Chambers

The following are some of the more noteworthy cases that the Crown Chambers prosecuted in the financial year.

R v Bradley Grey

The offender was the manager of a brothel known as Mitchell Mistresses. The victim came into contact with the offender through a social media site about escort work. At the time the victim had a large student loan, was not earning much and was living in temporary accommodation.

²⁸ Refer to B.1.5.3 (Continuing Professional Development - Ad hoc Committee) on page 43.

²⁹ The OPP is a Constitutional Office in the PNG Public Service responsible for conduct of prosecutions for serious offences.

³⁰ Ms Rebecca Christensen was a former Senior State Prosecutor and Advisor in PNG. She was formally requested by the Commonwealth Attorney General's Department to be part of this independent panel.

The victim had not done sex work before but was lured in with promises of good money. In December 2015 the offender paid for the victim's flights from Sydney. The offender picked the victim up from the airport and drove her to the brothel. When they arrived at the brothel, the offender photographed the victim in lingerie for her online profile. Afterwards the offender led the victim into one of the working rooms.

Once in the working room, the offender deceitfully told the victim that she had to undergo "training" with him for the job. In essence, the offender had misused his position of authority as manager of the brothel, by making a fraudulent representation about training for the job. During the training, the offender took his clothes off, lay on the bed and told the victim to give him a massage. In the course of the massage the offender masturbated himself. The offender subsequently told the victim that it was her turn to get a massage, and that he was going to show her his massage technique. When the victim got onto the bed, the offender took off her underwear and sexually assaulted her. The sexual activity unfolded quickly into sexual intercourse to which the victim did not consent.

In the months that followed six other women new to sex work contacted the offender for employment. When each woman first attended the brothel, the offender photographed them in lingerie for their online profile before also falsely telling them that they had to undergo "training" with him. Later one of the women complained to the police and during the investigation the police became aware of the other women. Police charged the offender with multiple charges of sexual intercourse without consent and committing acts of indecency. The offender pleaded not guilty. Before the trial, prosecutors applied to the court to run the charges together by leading the evidence of each woman to prove that the offender had a tendency to use the "training" to obtain sexual gratification from them. The court agreed.³¹

During the trial, prosecutors argued that some of the women did not consent to sexual activity with the offender, and on other occasions where there was apparent consent by the women, it was negated because it was caused by the offender's abuse of his position of trust as manager of the brothel. The jury found the offender guilty, and he was sentenced to nine years imprisonment with a non-parole period of six years three months.^{32, 33}

R v Graham Vickerstaff; ³⁴ *R v Dean Welsh*; ³⁵ *R v Colin Booth* ³⁶

In the early hours of 17 December 2017, the victim (Bobby Stewart Allan), a father and self-employed tradesman, died after an altercation involving the three offenders (Vickerstaff, Welsh and Booth). The victim was known to Vickerstaff and Booth. The three offenders had gone to the victim's house with the intention of purchasing drugs. On the way to the victim's house, the offenders had stopped at the 7-Eleven service station in Fyshwick. The CCTV footage showed Vickerstaff purchasing a can of Motortech Degreaser.

31 *R v Grey* [2019] ACTSC 104.

32 *R v Grey (No 2)* [2019] ACTSC 315.

33 *R v Grey (No 3)* [2020] ACTSC 43.

34 *R v Vickerstaff (No 2)* [2019] ACTSC 343.

35 *R v Welsh* [2019] ACTSC 344.

36 *R v Booth* [2019] ACTSC 345.

When the offenders arrived at the victim's house, and the victim opened his front door, Vickerstaff aimed the aerosol can of engine degreaser at the victim and sprayed it into his face. The victim stepped back and tried to close the door, but Vickerstaff pushed the door and forced his way inside the victim's house. Vickerstaff then violently assaulted the victim, by also using a metal baseball bat. The victim attempted to defend himself. The altercation resulted in a significant amount of blood being shed at the entrance area of the victim's house, towards the living room and kitchen, and directly inside and outside the front door.

The victim ran outside his house and walked up his street yelling "help me", seeking assistance from his neighbours. He managed to get to a house some distance away from his own and knocked loudly on the door, asking for help. The frightened occupants called the police. A few minutes later, the police and paramedics arrived and found the victim to be unresponsive. There were attempts to revive him, but the victim succumbed to his injuries. The cause of death was later found to be cardiac arrest, the result of the combined effects of blunt force head trauma, exertion, cardiovascular disease and methamphetamine toxicity.

Meanwhile, Vickerstaff left the victim's house on a bicycle belonging to the victim. Welsh and Booth left in a taxi, after finding their car with flat tyre, and after having taken some of the victim's property. Soon after the incident, the offenders used the victim's credit card to purchase food and alcohol. An extensive police investigation led to the identification of the three offenders. During the course of the prosecution, evidence establishing the role of each offender was acquired.

The three offenders pleaded guilty in the Supreme Court to an offence of manslaughter on a basis of criminal liability of extended joint commission pursuant to the *Criminal Code 2002*. This ensured each of the offenders was criminally responsible for the victim's death, even if they were not physically engaged in the assault on him. It was accepted that they each entered into an agreement, at the very least a non-verbal understanding, to commit an assault and/or robbery and during the course of carrying out that agreement the offence of manslaughter was committed. Each of the offenders was liable for the offence of manslaughter as they were reckless that an unlawful and dangerous act with an appreciable risk of serious injury would be committed.

During the course of the sentencing proceeding, family members of the victim read victim impact statements to the court. The sentencing judge adopted a submission to the effect that –

*"The impact of [the] offending on the immediate and broader family together with the community has been extraordinary. Anyone who was sitting in court listening to the reading of a number of victim impact statements of the deceased's family who was not in some way affected lacks the fundamental fabric of truly knowing what it means to have a sense of family, belonging, community and purpose."*³⁷

The court recognised the offending as involving a violent assault upon an unsuspecting victim with the use of weapons. After having regard to the antecedents of each offender, and the role of each offender in the offence and their level of willingness to assist the police investigation, the court-imposed sentences as follows:

³⁷ *R v Vickerstaff (No 2)* [2019] ACTSC 343 at [22].

Vickerstaff was sentenced to nine years and three months imprisonment (reduced from 10 years imprisonment for the plea of guilty), with a non-parole period of six years and six months being imposed. Welsh was sentenced to four years and 15 days imprisonment (reduced from four years and six months imprisonment for the plea of guilty), with a non-parole period of 34 months. Booth was sentenced to 33 months and 15 days imprisonment (reduced from four years for the plea of guilty), with a non-parole period of 23 months and 15 days.

*R v Lachlan Chancellor*³⁸

The offender (Lachlan Chancellor) was a Detective Acting Sergeant of Police in the ACT. On Friday, 4 May 2018, the offender was on shift performing duties as a shift supervisor for the Belconnen Station. At about 8pm, the offender was alone and conducting mobile patrols in a marked police vehicle. He was called to an incident in Bruce and responded under 'urgent duty driving' conditions. The emergency warning lights of the police vehicle were activated, but the siren was not on. At around this time, the victim (Amanda Beehag) was driving home after work and some shopping. She entered an intersection on Baldwin Drive, and travelled through the intersection on a green light. The offender also entered the intersection and entered on a red light. On approach to the intersection, the offender was traveling at a speed between 120 km/h and 136 km/h.

The offender and the victim's vehicles collided, with the police vehicle hitting the victim's vehicle in a T-bone type collision that struck the victim's door. Following the impact, the vehicles came to a rest after striking the central traffic light pole. The offender provided immediate first aid to the victim, and she was transported to Canberra Hospital. The victim was admitted to the hospital with life threatening injuries and was placed on life support and ventilation. The victim never regained consciousness and four weeks after the accident, on 1 June 2018, life support was removed, and she died.

The offender pleaded guilty in the Supreme Court to an offence of negligent driving causing death contrary to the *Road Transport (Safety and Traffic Management) Act 1999*. The sentencing court found that the offending involved a high degree of negligence. While the use of speed in excess of the limit and crossing an intersection contrary to a red light is permitted for police under the road rules, the offender was nevertheless required to take reasonable care for the safety of other road users. The sentencing court recognised that the offender was a "person of exceptionally good character with an impressive history of service to the community over the twelve and a half years that he spent in the AFP". By the time of sentencing, the offender had resigned from the AFP. On 18 July 2019, the offender was sentenced to a term of imprisonment of four months and seven days, to be wholly suspended with a good behaviour order for 12 months.

The sentencing judge described this case as follows:

"This is a case which may properly be described as a tragedy for all concerned. While road accidents are a regrettable part of modern life, often involving the death of innocent people, it is particularly awful that an innocent driver is killed by the completely avoidable negligence of a police officer ... no one expects to be killed or for their loved ones to be killed on their way home"

38 *R v Lachlan Chancellor* [2019] ACTSC 191.

from the shops by a police officer who is negligent driving through a red light. The momentary negligence of the police officer, who is otherwise a person of exceptionally good character and who was acting in good faith in the course of his duties, has led not only to the loss of innocent life but also the loss of his own career. ... I have taken into account the obviously dramatic impact upon the victim and her family. Despair, anguish and sorrow are the consequences of her death ... an inquest into the death of the victim would be a forum in which any systemic issues necessary to be addressed in order to avoid accidents like this in the future could be addressed. ... it must be clear to those who have dispensations from the road rules that if they fail to take reasonable care, then they will bear significant consequences if those failures cause death to other people on the road.”

R v Peter Forster-Jones

The offender (Peter Forster-Jones) was charged, *inter alia*, with murder, aggravated burglary (home invasion) and aggravated robbery. The Crown’s case was that the offender, and two co-offenders, attended the victim’s (Eden Waugh) unit in relation to a dispute over a drug deal. The offender and his two co-offenders attacked the occupants of the unit, striking them with machetes and the butt of a shotgun. Two of the occupants sustained deep lacerations, and another occupant jumped from the third story balcony to escape the attack and fractured two vertebrae in his back.

Six weeks later the offender and a co-offender returned to the unit. They had balaclavas and were armed with a shotgun and machete. They tried to force their way into the unit but the victim and his partner pressed themselves against the door to try and prevent entry. The offender then discharged the shotgun at near point-blank range, aiming at the door. The ammunition from the shotgun went through the door and entered the victim’s abdomen, killing him instantly. The offender and his co-offender then stepped over the victim and grabbed his female partner by the hair, dragging her across the unit to rob the victim and her of drugs and cash.

The offender made a number of admissions to an undercover police officer, leading to his arrest. He pleaded guilty on the third day of his trial after some argument in relation to the admissibility of certain evidence.

The offender was sentenced at first instance to 40 years and six months imprisonment, with a non-parole period of 25 years. The Crown had argued that the sentences imposed for the earlier home invasion on the victim’s residence should be largely cumulative upon those imposed in relation to the murder to reflect the separate and discrete criminality involved in the two incidents.

However, when the offender appealed his sentence to the Court of Appeal (‘CA’), the CA found an error with the earlier sentencing decision. Thus, the CA re-sentenced the offender to a period of 30 years imprisonment with a non-parole period of 18 years.

*R v Peter Middleton*³⁹

On 6 July 2018, the offender (Peter Middleton) was sentenced for nine sexual offences against two girls.⁴⁰ The offender was a family friend of the girls and was visiting their grandparents in Canberra at the time of the offences. The girls were aged from seven to 10 years of age, and in the course of multiple incidents, the offender committed sex crimes against the victims with acts including penetration and sexual touching. On 5 February 2020, the offender appealed to the Court of Appeal on the basis that he was suffering from a form of dementia at the time of the offending, and that this was not taken into account in sentencing.⁴¹ The matter was remitted for re-sentencing before the Supreme Court ('SC').

In early April 2020, while awaiting resentencing, the offender applied for bail contending that he was at a higher risk of severe illness from COVID-19 as he was elderly (aged 78 years) and confined to prison. The bail application was opposed by the Crown for reasons including, the risk to the community if the offender was released unsupervised during the period of lockdown. Bail was refused by the SC and the sentence proceeding was expedited to allow finalisation as soon as possible to minimise any health risk to the offender from COVID-19. The sentence hearing proceeded remotely in April and May 2020, with the prosecutors, defence counsels and offender appearing in the SC via audio-visual link ('AVL'). Witnesses giving expert medical evidence on behalf of the prosecution and defence also appeared remotely, via AVL, from Sydney and Adelaide.

On 15 May 2020, the offender was resentenced to a total term of five years and five months imprisonment, with a non-parole period of three years and four months imprisonment.⁴² The sentencing judge was satisfied that, the offender suffers from a vascular brain disease of moderate severity with frontal lobe damage and frontal lobe executive dysfunction; as a result, the offender's moral culpability for the offences was reduced by a moderate degree. Nevertheless, the SC did consider a real risk of reoffending if the offender was to be released into the community without strict supervision. The SC recommended that the Sentence Administration Board should have the offender assessed by a geriatrician prior to any proposed release on parole, and that he only be released directly into a facility appropriate for treating his dementia at the time and where appropriate supervision and security is available.

R v Robert Sirl

Victim A

In August 2018, victim A had gone to a friend's house to buy marijuana. While victim A and the offender were alone in a room, the offender told her that they were going to have some fun first. The offender pushed victim A on the bed, pulled off her pants and sexually assaulted her.

Victim A alleged that the offender had put methylamphetamine in her coffee, and then had penile intercourse with her, without her consent. He then penetrated her with a foreign object that caused five lacerations to her cervix. As a consequence, victim A had bled profusely, losing

39 Refer to *Middleton v The Queen* at B.2.5.2.1 on page 67.

40 *R v Middleton* [2018] ACTSC 198.

41 *Middleton v The Queen* [2020] ACTCA 6.

42 *R v Middleton (No 2)* [2020] ACTSC 123.

between 33% and 50% of her total blood volume. According to victim A's account of events, she heard the offender reach for a bag/box close by and then felt him sexually assault her with something hard and sharp. Victim A felt pain and told the offender to stop. When the offender stopped sexually assaulting her, victim A stood up and put her pants on. She felt she was bleeding. Victim A ran to a shower block and sat in a shower stall. She waited for the bleeding to stop. When the bleeding did not stop after several hours, victim A rang for an ambulance. The paramedics who arrived on the scene rushed her to the emergency department (hospital). At first, victim A was not truthful with the paramedics about what had happened to her. She told them that she had been sexually assaulted by a Tinder date.

At the hospital, victim A underwent emergency life-saving surgery to stop the blood loss. Victim A's medical records on her surgery showed that she had five distinct incised wounds on either side of her cervix. In the doctor's opinion, these wounds were caused by a sharp bladed object and would have been extremely painful. While in hospital victim A's children visited her.

Police charged the offender with sexual intercourse without consent, and recklessly inflicting grievous bodily harm. The offender pleaded not guilty. However, following a week-long trial, a jury found him guilty of both offences. The offender was sentenced to eight years and six months imprisonment with a non-parole period of five years and 11 months.⁴³

Victim B

The offender was 47 years old when he met victim B (a child) in late August 2018 at a friend's house. Victim B was staying at the friend's house for a week, hanging out with the offender and other girls her age, smoking cannabis and methylamphetamine, which was mostly supplied by the offender. The offender would spend time alone with the girls and several times he was alone with victim B. During this period victim B told the offender that she was 15 years old and that she was in foster care. At that stage victim B was not going to school. At some point the offender started having sexual intercourse with victim B in exchange for methylamphetamine.

As a consequence of the complaint about the attack on victim A, police obtained a warrant to search the offender's premises. In October 2018, police uncovered the offending when they went to the offender's house to speak to him about the attack on victim A. The police knocked on the offender's bedroom door. They heard noises coming from the room like people were having sex. When the police entered the room, they caught the offender 'red handed' in the act of having sex with victim B. Upon seeing victim B, they immediately thought she was 13 or 14 years old due to her small build.

Police separated victim B from the offender and spoke to her. Victim B confirmed that the offender and she were having sexual intercourse. Subsequent police investigation revealed that the offender had been maintaining a sexual relationship with two vulnerable underage girls in exchange for drugs.

In respect of victim B, police charged the offender with maintaining a sexual relationship with a young person. The offender pleaded not guilty. At his trial, the offender relied on the defence that he reasonably believed that victim B was at least 16 years old. However, photos and videos

⁴³ *R v Sirl (No 2)* [2019] ACTSC 388.

of victim B taken at around the time of the offence clearly showed that she looked like a young child. The jury rejected the defence and found the offender guilty.⁴⁴ The offender was sentenced to a further 2½ years imprisonment, in addition to the sentence imposed for the crime committed against victim A.

Victim C

The third case involving the offender was in relation to his sexual relationship with the second vulnerable underage girl who was about 14-15 years old who was couch surfing on friends' couches and mixing in the same circles as victim B. Once again, police charged the offender with maintaining a sexual relationship with a child. Initially the offender pleaded not guilty to this charge. However, following the verdicts of the juries in the earlier two trials in relation to victim A and victim B respectively, the offender changed his plea to guilty. The offender was sentenced to a further one-year imprisonment for this third charge.

The offender's total sentence for the above-mentioned offences was 13 years and six months imprisonment, with a non-parole period of eight years.⁴⁵ The offender appealed the conviction in relation to the offences against victim A to the Court of Appeal.⁴⁶ The Crown, on the other hand, cross-appealed the offender's sentence, arguing it was manifestly inadequate. The CA found that the jury's verdict in relation to victim A was unreasonable and acquitted him on the basis that the victim could have lacerated her own cervix, or some other, unknown person could have done it. The CA did, however, re-sentence the offender to nine years imprisonment on two counts of maintaining a relationship with underage persons, with a non-parole period of six years and three months.

*R v Sharon Stott;*⁴⁷ *R v Dean Reid; R v David Evans;*⁴⁸ *R v Joshua Watson; R v Norman Collier*

Sharon Ann Stott had become aware that the victim had a sawn-off gun at his residence. Stott wanted to take it from the victim. On 10 January 2019, Stott was accompanied by the co-offenders (Dean Reid, David Evans, Joshua Watson, and Norman Collier) to the victim's residence at Oaks Estate. Stott had brought the co-offenders there for the purpose of getting the door open.

Collier and Watson made the first attempt to gain entry to the victim's unit. They spoke with the victim briefly through the locked screen door. However, the victim would not let them in. Collier and Watson then returned several minutes later with Reid and Evans. Reid spoke with the victim through the door, and the victim allowed him to enter the unit. The other men followed Reid inside. Once inside, Reid disarmed the victim of a knife that he had been holding for his protection and forced him to the floor. Reid then held the knife to the victim's throat and made threats of violence and demands. At some point, Reid claimed to be the president of the 'Satudarah' outlaw motorcycle gang ('OMCG'). Reid caused a 45mm incised wound to the victim's left thigh and caused a small 5mm incised wound to the victim's hand. Evans then

44 *R v Sirl (No 3)* [2019] ACTSC 355.

45 *R v Sirl (No 4)* [2020] ACTSC 23.

46 *Sirl v The Queen; The Queen v Sirl* [2020] ACTCA 37.

47 *R v Stott* [2020] ACTSC 5.

48 *R v Evans; R v Reid* [2020] ACTSC 169.

picked up an electric guitar and hit the victim with it 8-10 times, breaking his right leg. He also picked up a speaker box and dropped it on the victim, fracturing three of his ribs, and kicked and punched him. There was then a short phone conversation between Stott and Evans. Soon after, Stott entered the victim's unit and demanded that the victim give her the gun. Collier found a number of gun parts in the victim's bedroom and handed them to Stott, who wrapped them in a blanket.

Approximately 21 minutes after the four men had gained access to the victim's apartment, all of the co-offenders left the unit. As they left the unit, Stott carried the gun parts wrapped in a blanket taken from the victim's unit, Collier carried two laptops, and Watson carried a steel bar. Two sets of car keys were also taken, one of which belonged to a black Holden Commodore that had been sold to the victim by Stott. Evans also took two of the victim's mobile phones. All five returned to Stott's car and left the Oaks Estate complex.

The victim managed to get the attention of a neighbour who called the police and paramedics. Police and ambulance services attended a short time later and the victim was transferred to Canberra Hospital. The co-offenders were charged with multiple offences arising out of this incident, reflecting their respective roles. Reid was also charged with being knowingly concerned in the taking of the victim's car the following night, and with attempting to pervert the course of justice. The Crown alleged Reid attempted to pervert the course of justice by visiting the victim at Canberra Hospital and asking him to withdraw his statement in return for his car.

The matter was set down for a two-week judge alone trial commencing on 25 November 2019. Upon the presentation of fresh indictments, the co-offenders each pleaded guilty to their respective roles. The pleas were accepted in full satisfaction of the original charges. The co-offenders were later sentenced to varying terms of imprisonment. Reid was sentenced to an aggregate term of imprisonment of five years and 11 months, with a non-parole period of three years four months. Evans was sentenced to four years, 11 months and 12 days, with a non-parole period of two years and nine months. Stott was sentenced to one year and seven months, suspended after 12 months imprisonment, subject to a good behaviour order for 12 months. Collier was sentenced to one year and six months, suspended after six months imprisonment, subject to a good behaviour order for 12 months. Watson was sentenced to one year and six months, suspended after six months imprisonment, subject to a good behaviour order for 18 months.

At the sentencing hearing of Reid and Evans, the Court had to consider the relevance of their membership of an OMCG. Ultimately, in the circumstances of this case in which there was no evidence that the offences had been committed in connection with their membership of an OMCG, the fact of their membership was only considered to a limited extent. The Court also considered the relevance of COVID-19 on sentencing and found that it could be taken into account because it would make their incarceration more onerous.

B.2.4.3 Crown Chambers prosecutions after recent RCIRCSA law reforms

In response to the recommendations in the *Criminal Justice Report* of the *Royal Commission into Institutional Responses to Child Sexual Abuse* ('RCIRCSA'), the ACT revised the laws on a number of child sexual offences, including the procedural provisions of these laws. A number of prosecutions have been based on these recent developments in the law. Some of these prosecutions are highlighted below.

R v CT

The sexual offence legislative reforms have enabled a successful prosecution of historical sex offences, particularly in the matter of *R v CT*.

A complaint of sexual offending by the offender (CT) was first made to the police in 2011 by his son (victim). A prosecution was commenced but was stayed by the court in 2012 as the law then provided a statutory limitation on the prosecution of historical offences. This law was, however, reformed in 2013.

In 2018, the offender was prosecuted for sexual offending against three boys in the 1970s and sentenced to a term of imprisonment. In the course of that prosecution, the ODPP engaged with the victim from the 2011 complaint and, with the victim's support, reinstated the 2011 prosecution based on the new course of conduct charging mechanism pursuant to section 66B of the *Crimes Act 1900*. This provision was introduced in December 2018 and enables a prosecution for the full course of sexual offending, not just isolated acts that are difficult for victims to recall with precision.

In April 2020, the offender pleaded guilty to a further series of historical child sexual offences from the 1970s, including matters involving his son who first complained to police in 2011. The offender was sentenced to a total term of 5½ years imprisonment with a non-parole period of two years.

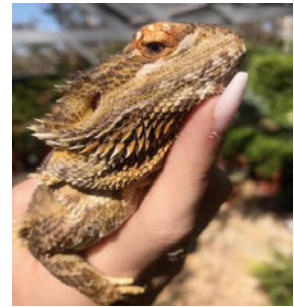
*R v DU*⁴⁹

The matter of *R v DU* involved the prosecution of a 40-year-old sports coach for sexual offending against a 16-year-old student. In the first prosecution of this type in the ACT, the offender pleaded guilty in the Supreme Court to four offences of engaging in sexual intercourse with a young person under special care, contrary to section 55A of the *Crimes Act 1900*. The SC acknowledged that the offences caused the victim and her family a great deal of trauma. On 20 February 2020, the offender was sentenced to a total term of three years imprisonment to be served by way of an intensive correction order.

49 *R v DU (No 4)* [2020] ACTSC 174.

*R v Jake Versteeg*⁵⁰

In early 2020, amendments to the *Evidence (Miscellaneous Provisions) Amendment Act 2019* included the introduction of a specific provision enabling a victim or witness to use a support animal while giving evidence. In the first application of this provision in the matter of *R v Jake Versteeg*, the ODPP applied to the Supreme Court for a bearded-dragon lizard to be a support animal for a victim of a sexual offence. The SC granted the application and the victim's pet was available to the victim to stroke and be in her line of sight while she gave evidence.



Victim's support animal – a bearded-dragon lizard

*R v KN*⁵¹

The matter of *R v KN* involved the prosecution of an offender for offences including maintaining a sexual relationship with a child contrary to section 56 of the *Crimes Act 1900*. The offender was convicted after a trial for sexual offending against two girls in the Supreme Court. The offender appealed against his conviction.

The Court of Appeal was concerned with the statutory interpretation of the offence provision (section 56 of the *Crimes Act 1900*). The CA determined that the amended provision did not properly reflect the intended *actus reus* of the offence, and that the provision had the effect of doing away with the 'cardinal principle' that there must be jury unanimity about the conduct founding an offence. Nevertheless, the convictions of the offender were confirmed in December 2019 as the trial judge had directed the jury in accordance with the prosecution position that such an offence is to be interpreted as including acts constituting a 'relationship'.

Following this decision, the ODPP engaged closely with the lawyers at the JACSD for purposes of legislative reform to the provision to ensure that the recommendation of the RCIRCSA was reflected in the provision.

B.2.5 Appeals

The Appeals Unit within the ODPP consists of a team of three prosecutors led by a Senior Advocate under the direction of the Director. Due to the increasing number and complexity of appellate work, the Appeals Unit has been expanded from what was originally a one prosecutor unit.

The ODPP conducts appeals in the Supreme Court, Court of Appeal and High Court of Australia as both a respondent and appellant. Appeals are conducted by the Director, Deputy Director, Crown Prosecutors and Senior Advocates within the ODPP.

B.2.5.1 Supreme Court

The appellate workload in the Supreme Court is always increasing. The majority of appeals lodged in the SC are against the severity of sentences imposed in the Magistrates Court.

⁵⁰ *R v Jake Versteeg* [2020] ACTSC 180.

⁵¹ Refer to *KN v The Queen* at B.2.5.2.1 on page 67.

In accordance with the principles which apply to Crown appeals, ODPP instituted appeals are rare and are limited to cases of public importance, correction of legal errors and manifestly inadequate sentences. The ODPP also responds to judicial review applications from the MC.

The total number of appeals in the SC for 2019-20 was 35 consisting of 33 defence appeals (against convictions and severity of sentence) and two Crown appeals.

B.2.5.1.1 *Appeals to the Supreme Court*

*Jakaj v Kinnane*⁵²

This matter was an application for judicial review of orders made in the Magistrates Court.

The appellant (Jakaj) had been charged with the offence of using a mobile phone while driving a motor vehicle, contrary to rule 300 of the *Australian Road Rules*. At the hearing before the Magistrates Court, the appellant who was self-represented, raised a number of jurisdictional issues which were dismissed by the magistrate. He was accordingly convicted of the charge and imposed with a fine of \$416.00.

The appellant sought judicial review (before the Supreme Court) of the magistrate's decision. The arguments he raised were purely questions of law and jurisdiction. The first defendant was the Magistrates Court, and the second defendant (Kinnane) was the police informant for the charge that was successfully prosecuted. The defendant claimed that the entire application was frivolous or vexatious and should have been dismissed.

Among some of the grounds of judicial review were whether magistrate had jurisdiction to conduct the hearing, whether the oath of office sworn by magistrate was lawful, that the magistrate had denied him procedural fairness, whether lawful procedure for passing legislation had been followed, and that the magistrate had erred in law by entering a not guilty plea on his behalf even after he had indicated that he was unable to plead due to the jurisdictional questions raised.

The application for judicial review was dismissed. The Supreme Court held that only one of the numerous complaints raised by the appellant had been substantiated. Nevertheless, it did not warrant the SC to exercise its discretion to grant relief.

This case demonstrates the often-complex legal issues that the ODPP has to deal with on appeals.

*Williams v IM*⁵³

This case was a Crown appeal from the Childrens Court involving the interpretation of section 26 of the *Criminal Code 2002* concerning the age of responsibility and capacity of child offenders.

The offender (young person) had appeared before the Childrens Court in relation to charges of aggravated robbery and attempted aggravated robbery. At the time of the offence, the offender was under 14 years of age. The offender, who was legally represented, had entered a plea of guilty to the charges. Notwithstanding the pleas of guilty, the charges against the offender were

⁵² *Jakaj v Kinnane* [2019] ACTSC 71.

⁵³ *Williams v IM* [2020] ACTSC 234.

dismissed as the magistrate found that the prosecution had failed to displace the 'presumption of *doli incapax*'.

The Crown appealed on the basis that the magistrate had erred in law. The Crown Prosecutor contended that the offender's pleas of guilty to the charges had constituted both formal admissions of the elements of the offences and an admission that the offender was criminally responsible for the offences.

On appeal, Murrell CJ found that the magistrate had erred in his understanding and application of the common law principle of *doli incapax*. Murrell CJ agreed with the Crown that the position in the ACT is governed by the provisions of the *Code*, and not the common law principle. Accordingly, by applying the provisions of the *Code*, the offender had an evidentiary burden to prove that the issue of 'lack of capacity' existed.

Murrell CJ concluded that had the offender wished to raise the issue of 'lack of capacity', then the proper course would have been to enter a plea of not guilty, and then seek to discharge the evidentiary burden in relation to absence of criminal responsibility. As the offender had not done so, the magistrate was in error in dismissing the charge.

This case is one of the first to consider the interaction between the common law principle of *doli incapax* and the provisions of the *Code* as it relates to the capacity of children.

B.2.5.2 Court of Appeal

The appellate workload in the Court of Appeal has significantly increased over the last three years. The majority of appeals lodged in the CA are against convictions (i.e. jury verdicts) and severity of sentence. Appeals in the CA are often very complex, particularly appeals against conviction. Typically, the Director, Deputy Director, Crown Prosecutors and Senior Advocates appear in the CA.

In accordance with Part 8AA of the *Supreme Court Act 1933*, the Crown has limited right of appeal against verdicts of acquittal. Crown appeals to the CA are uncommon and generally are against sentences considered to be erroneous and manifestly inadequate. Occasionally, the Crown may institute a reference appeal relating to the correction of legal error or settling of legal principle. A reference appeal does not change the outcome but is reserved to ensure the application of correct legal principles in furtherance of the administration of justice.

The number of self-represented appeals have increased. This presents a challenge both to the ODPP and CA. Those who are self-represented often have no clear points identified in the Notice of Appeal, and do not provide submissions. Although having to deal with such appeals can be time consuming, the CA has offered some leeway in the procedures to those who are not represented. The CA relies on the ODPP as a model litigant to assist in the conduct of such appeals.

The total number of appeals in the CA for 2019-20 was 39 consisting of 28 defence appeals (against convictions and severity of sentence) and 11 Crown appeals against inadequacy of sentence. There has been a more than doubling of the number of appeals compared to the average of 18 in years prior.

There was an increase of Crown appeals instituted in 2019-20. Crown appeals are meant to be rare and instituted sparingly. The appeals lodged by the ODPP in this period were against the inadequacy of sentences. The Crown seeks to ensure sentencing judges apply correct legal principles and sentences reflect the purposes of sentencing including adequate punishment for offences.

B.2.5.2.1 *Appeals to the Court of Appeal*

KN v The Queen^{54,55}

The offender had been convicted of a number of sexual offences against two young persons following a jury trial. The offences included one conviction for maintaining a sexual relationship with a young person (LL) contrary to section 56 of the *Crimes Act 1900*.⁵⁶

The appeal to the Court of Appeal raised the question of whether in relation to LL it was permissible for the appellant to be convicted of both maintaining a sexual relationship with LL, and committing specific offences of sexual intercourse against her in circumstances where the specific offences were relied upon to establish the relationship offence.

The appeal largely concerned the correct interpretation of section 56 of the *Crimes Act 1900*, and the elements the Crown needed to prove in relation to the offence.

In addressing this question, the CA considered case law relating to similar provisions in other Australian jurisdictions, and the *Criminal Justice Report of the Royal Commission into Institutional Responses to Child Sexual Abuse* released on August 2017.

The CA ultimately found that, perhaps contrary to some of the stated intentions of the provision, the offence under section 56 would be established by the Crown proving two or more sexual acts without the need to establish an additional requirement of a “sexual relationship”.

In this specific case, the trial judge’s directions instructed the jury as to the additional element of sexual relationship which the CA held only disadvantaged the prosecution. Accordingly, the offender failed to establish that a miscarriage of justice occurred.

Following the decision of the CA, assisted by supporting submissions from the ODPP, legislative amendments have since been made to section 56 of the *Crimes Act 1900*. This case demonstrates the complexity of the appellate work undertaken by this Office.

Middleton v The Queen^{57,58}

The offender had pleaded guilty to a number of serious child sex offences against two children aged seven and 10. The offender was sentenced to an aggregate term of imprisonment of seven years with a non-parole period of five years.⁵⁹ At the time the offender was sentenced he was in his 70s. The offender sought and was granted leave to appeal against his sentence by the Court of Appeal.

54 *KN v The Queen* [2019] ACTCA 37.

55 Refer to *R v KN* at B.2.4.3 on page 64.

56 *R v KN (No 2)* [2019] ACTSC 5.

57 *Middleton v The Queen* [2020] ACTCA 6.

58 Refer to *R v Peter Middleton* at B.2.4.2 on page 59.

59 *R v Middleton* [2018] ACTSC 198.

The basis of the offender's appeal was that the sentence imposed was manifestly excessive having regard to new evidence relating to his declining neurological health. The offender alleged that there was a miscarriage of justice in the original sentence proceedings as material was not placed before the judge concerning his intellectual functioning. In particular, the suggestion that he suffered from a form of dementia at the time of the said sex offences and thereafter. With regard to this ground of appeal, there was an application before the CA that fresh evidence be received. The fresh evidence that the appellant sought to rely on was in the form of medical reports.

Nevertheless, a short time before the scheduled hearing before the CA, it became apparent the sentencing judge had made a specific error in his sentencing. The sentencing judge had failed to have regard to the correct maximum penalties which applied to the sex offences. [The Crown had misinformed the judge that some of the charges of sexual intercourse were charges under section 55(1) of the *Crimes Act 1900* and carried a maximum penalty of 17 years imprisonment. When in fact the charges were under section 55(2) of the *Crimes Act 1900* and carried maximum penalties of 14 years imprisonment.] As a result, the offender was sentenced by reference to the incorrect maximum penalty. Although the Crown acknowledged the error (in line with its obligations as a model litigant), the Crown argued before the CA that the sentence that had already been meted out was lenient and therefore should not be interfered with.

Due to the new medical evidence sought to be led by the offender, the CA took the rare step of upholding the appeal and remitting the offender back to the Supreme Court for re-sentencing. The offender was re-sentenced in the SC and received a further term of imprisonment.⁶⁰

NO v The Queen⁶¹

The offender (appellant) was found guilty by a jury of a number of violent and sexual offences against his partner. The jury however had acquitted the offender on some charges.

The offender filed a notice of appeal, seeking the verdicts of guilty to be set aside and a verdict of not guilty to be entered instead. The grounds of the appeal were that the verdicts of guilty were unreasonable having regard to the evidence; and that the verdicts of guilty are inconsistent with the verdicts of not guilty.

The Court of Appeal dismissed the appeal. The CA reaffirmed the principles that differential verdicts do not necessarily mean the jury must have (as opposed to might) entertained a doubt with respect to the victim's credibility. The CA found the evidence adduced at trial firmly established the offender's guilt and accordingly there was no basis to intervene.

R v Nicholas; R v Palmer⁶²

The Crown appealed against sentences imposed on the respondents (Nicholas and Palmer) by the sentencing judge, asserting that the sentencing judge had erred by allowing a 20% discount for the respondents' pleas of guilty and that the sentences were manifestly inadequate.

On 7 February 2019, each respondent was sentenced for seven offences of aggravated burglary

⁶⁰ *R v Middleton (No 2)* [2020] ACTSC 123.

⁶¹ *NO v The Queen* [2019] ACTCA 33.

⁶² *R v Nicholas; R v Palmer* [2019] ACTCA 36.

(contrary to section 312 of the *Criminal Code 2002*) and one offence of aggravated robbery (contrary to section 310 of the *Criminal Code 2002*).⁶³ The offences of aggravated burglary occurred on four days between 16 and 25 July 2017. The offence of aggravated robbery occurred on 9 August 2017.

The maximum penalty for the offence of aggravated burglary is 20 years imprisonment and/or a fine of \$300,000. The maximum penalty for the offence of aggravated robbery is 25 years imprisonment and/or a fine of \$375,000.

The respondents were arrested on 9 August 2017. Each respondent was sentenced in the Supreme Court and each received aggregate sentences of seven years imprisonment, with a non-parole period of four years and three months.

The Crown appealed the offenders' sentences on the grounds that both were manifestly inadequate. On the appeal, the Crown submitted that, having regard to the terms of section 35(2) of the *Crimes (Sentencing) Act 2005* and common law principles, the sentencing judge should not have allowed a discount of 20% for the guilty pleas. The Crown submitted that, although the reduction of sentence for a plea of guilty was a discretionary matter, in this case, the discount was unreasonable.

The issues on the appeals were whether the sentencing judge had erred in allowing a 20% discount for the pleas of guilty, and whether the sentences imposed on either or both respondents were manifestly inadequate.

The appeal was allowed. The Court of Appeal held the sentencing judge had erred in allowing a 20% discount for the offenders' pleas of guilty and accordingly re-sentenced both offenders.

The following passage is an extract of the CA judgment.

"In the present case, the pleas were entered very late; less than a week before the commencement of the trial. The pleas may have been motivated by the fact that the trial was imminent and the Crown case ... had been strengthened by the decision to admit coincidence evidence.... The sentencing judge did not explain the reasons for allowing a discount of 20 per cent. ... in his Honour's view, there was reasonably high utilitarian value to the pleas ... That approach was wrong... the pleas had significant utilitarian value despite coming so late. The trial would have occupied three or four weeks. However, the strength (or weakness) of the Crown case was not a factor that should have significantly influenced the discount for the pleas. ... the sentencing judge gave no reason for substantially deviating from the usual range for plea discounts, nor did the circumstances provide a reason for the deviation. ... When determining the discount for the pleas of guilty, the sentencing judge erred in two respects that affected the outcome, each of which reflect an error... First, his Honour considered the strength of the Crown case at a time that was earlier than the time when the pleas were entered. Second, his Honour failed to consider "current sentencing practice" as required by s 33(1)(za) of the Sentencing Act, which—in the circumstances of the case—would have resulted in a discount of about 10 per cent. At the very least, such a substantial deviation called for an explanation."

63 *R v Nicholas; R v Palmer* [2019] ACTSC 16.

B.2.5.3 High Court

Appeals to the High Court ('HC') are less frequent. Nevertheless, the financial year saw an increase in the workload of HC matters in our Appeals unit.

Appeals in the jurisdiction of the High Court are highly complex. Majority of the cases in the HC involve responses to applications for special leave to appeal by offenders. The circumstances in which the HC will grant special leave are exceptional and are guided by the criteria found in section 35A of the *Judiciary Act 1903* (Cwlth). In criminal matters, applicants must usually demonstrate a point of general principle that is to be considered, that the decision is demonstrably wrong or that the administration of justice requires intervention to avoid a miscarriage of justice.

Applications for special leave to appeal may be dealt with on the papers or proceed to an oral hearing before a court of three justices. Where an appeal is granted the proceedings are heard before a bench of either five or seven justices. The Director typically appears in the High Court assisted by another senior prosecutor.

Besides one constitutional application, there were two applications for special leave to appeal in the financial year.

B.2.5.3.1 *Appeals to the High Court*

Potts v The Queen⁶⁴

The offender was convicted by a jury of a number of violent offences committed whilst he was in lawful custody.⁶⁵

The offender sought leave to appeal his convictions out of time.⁶⁶ The arguments of the offender included the interpretation of the provisions in the *Court Procedure Rules 2006* relating to the timeframe for lodging an appeal and if this is contrary to the *Human Rights Act 2004*, and whether the trial judge had erred in refusing to allow the jury to consider if the intoxication of the offender was involuntary and therefore denied the offender the possibility of an acquittal on all counts on which he was convicted. The CA held that the offender had no real prospect of success on any of the proposed grounds of appeal and leave to appeal his convictions out of time was refused.

The offender applied for special leave to appeal to the High Court. The application was considered by the HC on the papers. The HC found that the offender's application did not identify any reason to doubt the correctness of the CA's decision nor did it raise any point of general principle. Accordingly, the offender's application was dismissed.

UD v The Queen

For offences committed, the offender was awaiting trial by jury in the Supreme Court ('SC').

⁶⁴ *Potts v The Queen* [2019] HCASL 356.

⁶⁵ *R v Potts* [2018] ACTSC 299.

⁶⁶ *Potts v The Queen* [2019] ACTCA 17.

Due to the COVID-19 emergency, and the consequential amendments to the *Supreme Court Act 1933*⁶⁷ ('SCA') concerning the circumstances when an offender could be tried by jury, the SC indicated it intended to make an order pursuant to section 68BA of the SCA that the offender was to be tried by judge alone.⁶⁸ This was contrary to the offender's desire to be tried by jury. The offender challenged the constitutional validity of the making of the order, and the legislative validity of the amendments to the SCA.⁶⁹

The offender made an application pursuant to section 40 of the *Judiciary Act 1903* (Cwlth) to remove the issue of the constitutional validity of the legislation to the High Court. The HC (Justice Gordon, sitting as a single judge) granted the order for removal, and the case was set down to be determined by the full court (seven justices). However, due to the changing nature of the COVID-19 emergency, between the granting of the section 40 removal order, and the scheduled High Court hearing, the SC issued a practice direction to allow the recommencement of jury trials where it would be safe to do so. This particularly applied to single accused trials such as the offender's.

Following this, a further hearing was held before Gordon J. Her Honour concluded that given the offender could now have a trial by jury, the issues before the HC were effectively hypothetical, and there was no basis to proceed any further. Accordingly, her Honour revoked the section 40 order, and remitted the case back to the SC.⁷⁰ Her Honour made it clear however that it would not prevent the issue returning to the HC should an appropriate matter and plaintiff be identified.

*UQ v The Queen*⁷¹

The offender was convicted by a jury of a number of sexual offences against his children. Following his conviction, the offender appealed to the Court of Appeal primarily on the basis that there was a miscarriage of justice.

This miscarriage of justice was as a result of the Crown Prosecutor's closing address which was said to reverse the onus of proof, and breach the so-called rule in *Palmer v The Queen*,⁷² by inviting the jury to ask an impermissible question of "why would the complainants lie?".

The CA accepted that some of the comments in the Crown's closing address impermissibly invited the jury to speculate that question, however found that the trial judge's directions were sufficient to overcome any prejudice which was occasioned.

The offender made an application for special leave to appeal on the basis that the law was not settled in relation to motive to lie, and the consequences of when the jury are invited to speculate this question. The application proceeded to an oral hearing before the High Court. The HC dismissed the application, finding there was insufficient prospects of any appeal succeeding.

67 These amendments to the SCA were by virtue of the *COVID-19 Emergency Response Act 2020*.

68 *R v UD (No 2)* [2020] ACTSC 90.

69 *R v UD* [2020] ACTSC 88.

70 *R v UD (No 3)* [2020] ACTSC 139 - the trial proceeded before a judge and jury.

71 *UQ v The Queen* [2020] HCATrans 42.

72 (1998) 193 CLR 1.

B.2.6 Sexual Offences Unit

The Sexual Offences Unit ('SO Unit') comprises a specialist team of experienced prosecutors who review, coordinate and oversee all sexual offence matters at the ODPP. The prosecutors in the SO Unit recognise the need to minimise delays in prosecuting sexual offences, especially matters involving vulnerable witnesses, such as children and witnesses with communication difficulties. The SO Unit prosecutors conduct timely reviews of all new sexual offence matters to ensure that legal or procedural issues are identified at the earliest opportunity.

In order to minimise any re-traumatisation associated with legal proceedings, the SO Unit prosecutors promptly engage with victims and their family members to explain the legal journey ahead, identify and explain special measures that are available, and empower them with their rights as a victim of crime within the ACT.

The SO Unit works closely with the Witness Assistance Service⁷³ ('WAS') at the ODPP. The Witness Liaison Officers from WAS play a critical role in communicating with victims, informing them about the progress of their matters, and making appropriate referrals to other agencies to ensure that victims, their families and other vulnerable witnesses receive the support that they require in anticipation of, and following, court proceedings.⁷⁴

Over the last 12 months, the SO Unit prosecutors have successfully prosecuted matters pursuant to section 66B of the *Crimes Act 1900*⁷⁵ which captures a pattern of sexual offending without the need to particularise specific occasions of offending. The SO Unit has also promptly implemented the new legislative requirements on 'intermediaries' in the *Evidence (Miscellaneous Provisions) Act 1991*⁷⁶ within the ODPP to ensure that all vulnerable witnesses are able give their best evidence to the courts.⁷⁷

Senior prosecutors in the SO Unit have also managed to successfully persuade the courts to allow various comfort measures for victims whilst giving evidence, or reading aloud their victim impact statements, from the remote witness room. For example, one victim was allowed to have their pet bearded dragon in the remote witness room,⁷⁸ and another was permitted to have regular breaks with the court therapy dogs.

The SO Unit provides advice, support and training to the wider Office in the prosecution of sexual offences generally. It organised a presentation by Dr Jane Van Diemen from Canberra Hospital's Forensic and Medical Sexual Assault Care ('FAMSAC'), on 'Leading Forensic Evidence in Sexual Assault Trials', at the Office in late February 2020.

In order to introduce and familiarise the Office with the law on 'intermediaries',⁷⁹ the SO Unit arranged for the ODPP to have training from Professor Penny Cooper, a world-leading expert on how intermediaries can provide support to vulnerable witnesses, and the Program Director

73 Refer to B.2.8 (Witness Assistance Service) on page 85.

74 Refer to B.2.8 (Witness Assistance Service) on page 85.

75 Section 66B of the *Crimes Act 1900* - Course of conduct charge - child sexual offences.

76 Refer to Chapter 1B (Witness intermediaries - criminal proceedings) of the *Evidence (Miscellaneous Provisions) Act 1991*.

77 Refer to B.2.8.1 (Intermediary Program) on page 85.

78 Refer to *R v Jake Versteeg* on page 64.

79 Refer to Chapter 1B (Witness intermediaries - criminal proceedings) of the *Evidence (Miscellaneous Provisions) Act 1991*.

of ACT's Intermediary Program⁸⁰ from ACT's Human Rights Commission, Ms Kath Taplin. The training led to the Office being more amenable to refer to and use intermediaries at all stages of the prosecution in appropriate cases.

Over the financial year, the SO Unit continued to provide independent advice to various stakeholders who gave effect to the recommendations of the RCIRCSA. For example, the SO Unit has provided extensive advice to the JACSD regarding amendments to section 56 of the *Crimes Act 1900*.⁸¹

The SO Unit has continued to provide advice and training to ACT Policing's Sexual Assault and Child Abuse Team ('SACAT')⁸² on a range of issues including the implications of new legislative provisions, and ways in which to improve prosecutions of sex crimes. Electronic briefs of evidence have also impacted the efficiency of prosecutions and disclosure obligations.

The prosecutors in the SO Unit work hard on maximising the use of admissible evidence to prove sexual offences beyond reasonable doubt, and minimising trauma to victims. The SO Unit prosecutors also remain committed to ensuring that witnesses, particularly vulnerable witnesses, are provided the necessary support mechanisms available to enable them to give their best evidence to the court.

The ODPP's prosecution statistics for sexual offences for the financial year are provided below.

B.2.6.1 Sexual Offences: Trials and Sentences in the Supreme Court – 1 July 2019 to 30 June 2020

Description	Matters
Trials	
Trials	20
Trial Days in Court	118
Trial Outcomes	
Guilty Verdicts	11
Not Guilty Verdicts	6
Other	3
Sentencing Proceedings	
Accused sentenced after committal for sentence, after committal for trial/ changed plea or re-sentenced after breach	23
Notices declining to proceed further	1

80 Refer to B.2.8.1(Intermediary Program) on page 85.

81 Section 56 of the *Criminal Act 1900* - Sexual relationship with child or young person under special care.

82 SACAT is a specialised team that is dedicated to investigating sexual assaults committed against adults and children. Their priority is ensuring the safety and wellbeing, both mentally and physically, of victims and survivors of sexual assaults.

B.2.6.2 Breakdown of Sexual Offence matters in different courts – 1 July 2019 to 30 June 2020

The table below represents the number of sexual offence matters which were commenced and finalised in the financial year.

Description	Magistrates Court	Childrens Court	Supreme Court	Total
Sexual Offence matters commenced	69	5	29	103
Sexual Offence matters completed	69	6	41	116
Sexual Offence matters proved	36	3	33	72
Sexual Offence matters discontinued	0	0	1	1

B.2.6.3 Sexual Offences – Cases

Police v Dane Muench

The defendant entered a plea of not guilty to a charge of attempting to capture visual data in circumstances of indecency or invasion of privacy contrary to section 61B(1) of the *Crimes Act 1900*. The circumstances of the offending were that on 26 October 2016 in the changeroom of Kmart at the Tuggeranong Hyperdome there were attempts by the defendant to use his mobile phone to film a female as she was trying on clothes in a change room cubicle. The defendant was holding his mobile phone under the partition in an effort to film the cubicle occupied by the female. The defendant was captured by CCTV footage to be in the general vicinity of the store and had denied any involvement in the offending. There was no evidence that any pictures of the female in the change room were captured by the defendant.

Following a hearing in the Magistrates Court, the defendant was found guilty on 6 April 2018. The defendant appealed against his conviction to the Supreme Court,⁸³ and to the Full Court of Appeal⁸⁴. The defendant's case was that some person other than him had entered the change room adjacent to that of the female and attempted to film her. The defendant's appeals were dismissed as it was found that the evidence, considered as a whole, was capable of supporting a finding of guilt beyond reasonable doubt. Thus, the matter was sent back to the Magistrates Court for sentence.

On 26 June 2020, the defendant was sentenced in the Magistrates Court. The defendant was convicted and sentenced to perform 120 hours of community service work to be completed within 12 months. The defendant was also subject to a good behaviour order for 12 months.

R v John Cattle

The offender (John Walter Cattle) is an 84-year-old man. He was a former tennis coach at Forrest Tennis Club during the 1980s, where his duties included teaching tennis to children both individually and in groups.

⁸³ *Muench v McCue* [2019] ACTSC 20.

⁸⁴ *Muench v McCue* [2020] ACTCA 17.

The offender was charged with historic child sexual abuse of two complainants. The first child was 12 years old at the time of the alleged abuse in 1987. The second child was between 10 and 12 years old at the time of the alleged abuse in 1983–84. At the time of the alleged offences, the accused was the tennis coach of the complainants. The offending occurred in the clubhouse of Forrest Tennis Club where both complainants were taking tennis lessons. The offender was aged about 47 and 51 years old at the time of the offending. [The offending has had a serious impact on the complainants.]

In relation to the first complainant, the offender was charged with a course of conduct charge alleging that he indecently assaulted a person under the age of 16 years between 1 January 1983 and 31 December 1984. The acts relied upon included the offender holding and kissing the complainant (tongue-kissing) and having the complainant touch the offender’s genitals.

The Crown alleged that the acts in relation to the first complainant occurred on a number of occasions over a two-year period. The Crown relied upon the course of conduct mechanism for child sexual abuse offence as it was unable to prove discrete occasions of offending. Section 66B of the *Crimes Act 1900* allowed the Crown to proceed with the prosecution on the basis of the offender having engaged in a course of conduct. In the lead up to the trial, the defence challenged the Crown’s reliance on relatively new provisions in the *Crimes Act 1900* which allowed the Crown to charge these incidents as a single course of conduct charge. This challenge by the defence was unsuccessful and leave to appeal to the Court of Appeal was refused.

In relation to the second complainant, the offender was charged with three acts of indecency, allegedly committed on 4 April 1987. The three acts alleged were kissing the complainant, touching her breasts, and touching her genitals.

On 30 January 2020, the Supreme Court dealt with a number of pre-trial applications made by both the Crown (which sought to adduce tendency evidence against the offender), and the defence (seeking to stay the proceedings).⁸⁵ The Crown sought to lead tendency evidence that, *inter alia*, the offender had a sexual interest in young female children between 10 and 13 years of age; and that he used his position as a tennis coach to obtain access to, and seek out opportunities to be alone with them, to engage in sexualised activities with them. The Judge allowed the tendency evidence to be admitted in the trial. In relation to the application to stay the proceedings, the defence argued that ‘course of conduct’ in section 66B of the *Crimes Act 1900* should not be applied retrospectively unless the legislation clearly stated that to be the case.⁸⁶ The Crown argued that section 66B was merely procedural in nature but accepted the fact that in order for the section to have retrospective operation, there needed to be a clear statement of an intention for it to be so. The Judge held that the meaning of paragraph (b) of subsection 66B(1) was clear, and that section 66B could be used in the prosecution of offences committed before its commencement.

A jury was empanelled on 10 March 2020. During the trial, the COVID-19 pandemic began to worsen in Australia. Part way through the trial, the Supreme Court began to implement physical distancing. At one point, to ensure adequate spacing between jury members, half the jury were seated in the jury box on one side of the court room, and the other half in the dock on the other

⁸⁵ *R v Cattle* [2020] ACTSC 8.

⁸⁶ *R v Cattle* [2020] ACTSC 8.

side of the court room. This arrangement was short-lived with the jury ultimately being placed in a sealed off section of the public gallery, with a seat between them to ensure appropriate physical distancing. A spare courtroom was used for jury deliberations instead of the much smaller jury rooms.

The Crown's case predominantly relied upon the evidence of the complainants and complaint evidence with respect to the second complainant. The Crown also called an expert witness to give evidence about the fact that it is common for children who are sexually abused to not tell anyone about the abuse for many years (i.e. delayed disclosure).⁸⁷ As part of the defence case, the defence challenged the reliability of the complainant's evidence, noted the issues of delay, and the effect of this evidence and delay on the offender's ability to defend himself. The defence also called an expert to give evidence about the reconstructive process of memory and false memories.

Following two days of deliberations, and despite the jury, at one point, indicating that it could not reach a unanimous verdict, on 22 May 2020, the jury found the offender guilty of the count relating to the first complainant and guilty of one of the acts of indecency (kissing) relating to the second complainant.⁸⁸ The offender was acquitted of the remaining two acts of indecency. The offender was sentenced to two years imprisonment, wholly suspended subject to a good behaviour order. In the exceptional circumstances of this case, in which expert medical evidence indicated that the offender, now 84 years old, had terminal cancer which required extensive medical support and had a very short life expectancy, the Crown said that it did not wish to be heard against the sentence being suspended.

R v EN⁸⁹

In this case, the offender pleaded guilty to sexually abusing five male child victims.

The offender was a tutor at Canberra Grammar School from 1981 to 1985. His role placed him in charge of a dormitory where boarders in Years 9 and 10 resided. The five victims were aged between 14 and 17 when the offences occurred.

The offender gave the victims special privileges such as staying up late, watching television, smoking cigarettes and playing computer games. He encouraged physical affection between them including hugs, kisses and massages. He also encouraged the boys to read his pornographic magazines and use his blow-up sex doll. He would carry out 'sexual activity' with the boys individually or in the presence of two of them at the boarding house at night-time.

The offender pleaded guilty to two charges of maintaining a sexual relationship with a young person, and one charge of maintaining a sexual relationship with a person under special care contrary to section 56 of the *Crimes Act 1900*. The offender also pleaded guilty to two charges of indecent assault on a male contrary to section 81 of the *Crimes Act 1900* which carried a maximum penalty of five years imprisonment for each offence. The sentencing judge found that the maximum penalty for offences pursuant to section 56 of the *Crimes Act 1900* was

⁸⁷ *R v Cattle (No 2)* [2020] ACTSC 59.

⁸⁸ *R v Cattle (No 3)* [2020] ACTSC 135.

⁸⁹ *R v EN* [2019] ACTSC 354.

retrospectively reduced from 25 years imprisonment to five years imprisonment. The offender was sentenced to a head sentence of six years imprisonment with a fixed non parole period of four years imprisonment.

R v Mark Jones

The defendant, a 49-year-old male, entered a plea of guilty to one count of an act of indecency on a child, a 12-year-old boy. On 22 December 2019 the defendant was at a Kmart store in Tuggeranong when he approached the boy who was Christmas shopping with his family. The defendant reached out and touched the boy on his buttocks. The defendant followed the boy around the store before again touching the boy on the buttocks a second and a third time before the defendant left the store. The defendant's actions caused the boy to feel shocked.

The defendant was sentenced in the Supreme Court on 17 April 2020.⁹⁰ The Judge held that the offending was disturbing in that it involved a stranger indecently interfering with a child in a public place. The defendant did not have a criminal record. He was convicted and was sentenced to three months imprisonment, fully suspended upon entering into a good behaviour order for a period of 18-months and being subject to probation.

*R v NBB (No 5)*⁹¹

The offender was charged with eight counts of incest. Each count alleged the offender had engaged in sexual intercourse with his stepson, who was then seven or eight years of age, by inserting objects into his anus.

The victim's biological mother married the offender in 2013. Custody of the victim was shared equally between his mother and father. In August 2016, the victim (then aged eight years old) disclosed to his stepmother (his father's wife) that the offender had inserted shaving cream into his "bum". The victim subsequently disclosed to his stepmother and father that the offender had inserted other objects including a pencil, stick and his fingers into his anus. The victim's father contacted the police. The victim participated in an evidence-in-chief interview.

The offender was charged with offences against the victim in 2019.

Due to amendments made to section 68B of the *Supreme Court Act 1933* by the *COVID-19 Emergency Response Act 2020*, the offender was able to elect to be tried by a judge alone. In May 2020, the offender made such an election and a judge alone trial took place over three days between 24 and 26 June 2020.

The victim, who was aged 12 years old at the time of the trial, gave evidence in the presence of an intermediary.⁹² This was the first case in the Territory to use an intermediary. Prior to the trial, at a ground rules hearing, the Supreme Court considered a report prepared by the intermediary, and further evidence given by the intermediary about the ability of the victim to communicate and to answer questions. The intermediary made a number of recommendations about how the upcoming trial should be conducted to take into account the victim's communication needs to ensure he could properly and fairly give evidence. This included, *inter alia*, specific

⁹⁰ *R v Jones* [2020] ACTSC 92.

⁹¹ *R v NBB (No 5)* [2020] ACTSC 190.

⁹² Refer to B.2.8.1 (Intermediary Program) on page 85.

recommendations about how to frame questions, the use of communication aides and fidget toys, and the need to have additional breaks. All of the recommendations made by the intermediary were accepted by the parties and the Supreme Court directed the parties to comply with the recommendations.

A further recommendation considered at the ground rules hearing was that the presiding judge, together with counsel for the Crown and counsel for the accused, meet with and introduce themselves to the victim in person in a more informal setting prior to the victim giving evidence. The purpose of this was to help the victim to feel more comfortable when giving evidence. This recommendation was adopted by the parties. On the morning the victim was to give evidence, the parties, the presiding judge, the judge's associate, the intermediary, a sheriff's officer, the victim and his support person, all met in a jury room so that introductions could be made. All parties then moved into the court room in order to show the victim where he would be seen when he was giving evidence. The prosecution has no doubt that this process helped put the victim at ease and made the difficult process of giving evidence a little easier for him.

At the trial, the intermediary facilitated the victim to give evidence by, on occasion, interjecting where questions were not framed in accordance with the recommendations of the intermediary report. The intermediary also interjected when the victim used a non-verbal communication aide to indicate that he was feeling stressed and needed a break. The prosecution had also sought guidance from the intermediary in relation to how to frame specific questions, and how to broach particular topics, some of which were sensitive and embarrassing for the victim. With this guidance, the prosecution was able to ask questions that were more easily understood by the victim. This assisted the prosecution to clarify a number of matters with the victim's evidence. From the prosecution's perspective, the intermediary made a significant contribution to the victim's ability to give evidence and to respond to questioning.

Ultimately, the Supreme Court could not be satisfied beyond reasonable doubt of the guilt of the offender and he was acquitted on each count.

R v SQ⁹³

The offender pleaded guilty to three counts of sexual intercourse without consent, contrary to section 54 of the *Crimes Act 1900*, and two counts of committing an act of indecency, contrary to section 60 of the *Crimes Act 1900*.

The complainants were twin sisters, KU and BU. The offender had been in a relationship with the complainants' mother since 2003. In 2012, the complainants and their younger sister, who had been living with their father, moved back to live with their mother, who shared a home with the offender.

The complainants were 29 years old at the time of the offences. They suffer from a rare genetic disorder that is often associated with significant developmental delay. According to a psychologist, Dr Boer, the complainants are cognitively impaired, having a full-scale IQ in the first percentile and a "mental age" similar to that of an 11 or 12-year-old child. On the other hand, the complainants have relatively strong perceptual reasoning. Dr Boer diagnosed intellectual disability of mild severity.

93 R v SQ [2020] ACTSC 20.

In relation to KU, the offender digitally penetrated her vagina and touched her breasts and upper thighs. In relation to BU, the offender vaginally and anally raped her on two occasions. The offender told both victims to not report the offending to anyone. The offences were discovered when BU confided in her mother. When disclosing the offences to her mother, BU appeared to be afraid.

The offender was 40 years old at the time of the offences and had no criminal history. The offender expressed guilt and remorse to a clinical psychologist, Dr Clout. However, according to Dr Clout, the offender was more focused on the consequences for himself rather than the consequences for others. Dr Clout said that the offender presented with limited remorse and insight into his conduct.

The offender expressed a willingness to engage in psychological treatment and specialist programs, including sex offender treatment programs offered at the Alexander Maconochie Centre ('AMC'). He stated that he wanted to "understand" his behaviour. His early interest in treatment was also apparent from the fact that he voluntarily engaged with a psychologist in 2019, prior to his arrest.

The offender was sentenced to a head sentence of six years imprisonment with a fixed non-parole period of three years imprisonment.

R v Timothy King

Timothy King (defendant) a 54-year-old man, pleaded guilty to committing four acts of indecency on a teenage girl between 2012 and 2013. The defendant walked in on the girl three times while she was naked, making up reasons and excuses to do so. On one occasion he directed the girl to turn 360 degrees and expose her naked body to him, later admitting he found this sexually exciting. On another occasion, he cupped and massaged the girl's breasts and asked her not to tell anyone. The victim reported the abuse to police several years later. In a victim impact statement, the victim described to the court the lasting impact it had on her sense of self and mental well-being. The defendant was sentenced to four months imprisonment wholly suspended on entering into an 18-month good behaviour order.

B.2.7 Family Violence Unit

The family violence unit ('FV Unit') continues its work as a specialist team that oversees and prosecutes the majority of family violence matters within the Office. This year, the team has expanded to include a Supervising Prosecutor, two senior prosecutors and three prosecutors who are supported by two dedicated paralegals.

Members of this team regularly appear in a weekly FV list in the Magistrates Court, which deals with matters at the mention, pre-hearing mention and sentence stages. In the event that a plea of guilty is entered in court, an adjournment is often sought and granted to enable a victim to complete a victim impact statement. The impact that such offences have on victims can be extensive and ripple through all aspects of their lives.

A victim impact statement provides the victim with the opportunity to detail matters such as the physical, emotional and financial toll a crime has taken on them. It is a powerful and relevant piece of evidence in sentencing family violence offenders.

The FV Unit continues its existing practice of allocating matters at an early stage, particularly following a plea of not guilty. Once a matter is set down for hearing, it is allocated to a prosecutor who will review the brief of evidence and see the matter through to hearing. These hearings are usually listed in block lists allocated by the Magistrates Court to hear FV matters.

It is recognised by the Office that for many people, being involved in a criminal proceeding can be a stressful experience, particularly if the offences involve family violence. The FV Unit draws on support from the Witness Liaison Officers from the Witness Assistant Service ('WAS') at the ODPP, who provide essential support and information to vulnerable witnesses to enable them to understand and participate in the court proceedings.⁹⁴

The FV Unit continues to work closely with external agencies, in particular ACT Policing's Family Violence Coordination Unit. The Office is represented by a member of the FV Unit at a weekly case tracking meeting, which is attended by agencies such as the AFP, Victim Support ACT ('VSACT'), Domestic Violence Crisis Service ('DVCS'), Child and Youth Protection Services ('CYPS') and ACT Corrective Services ('ACTCS').

While every matter that comes through the Office is different, the FV Unit strives for consistency in its application of the Prosecution Policy⁹⁵ and other important decisions which are made about the conduct of a prosecution. In the last year, the introduction of the Record of Reviewable Decisions policy⁹⁶ within the Office provides an important means by which consistency and accountability can be achieved, particularly in deciding whether to completely discontinue a prosecution in relation to an identifiable victim. A recommendation is made by a prosecutor, which is subject to review by a Supervising Prosecutor before being approved or disapproved by the Assistant Director or Deputy Director. In certain cases, such as serious violent offences, an automatic review of the decision will be undertaken. In other cases, a victim may request a review of the decision to discontinue the prosecution.

94 Refer to B.2.8 (Witness Assistance Service) on page 85.

95 Refer to Appendix A on page 117 for the *Prosecution Policy of the Australian Capital Territory*.

96 Refer to Appendix B on page 134 for the *Director's Instruction No. 14.1 - Review of a Decision to Discontinue a Prosecution*. See further Appendix C on page 136 for the *Director's Instruction No. 14.2 - Reviewable Decisions to Discontinue – Contact with Complainants, Review Processes and Auditing*.

B.2.7.1 Family Violence Cases: Trials and Sentences in the Supreme Court – 1 July 2019 to 30 June 2020

Description	Matters
Trials	
Trials	4
Trial Days in Court	19
Trial Outcomes	
Guilty Verdicts	1
Not Guilty Verdicts	2
Other	1
Sentencing Proceedings	
Accused sentenced after committal for sentence, after committal for trial/changed plea or re-sentenced after breach	4
Notices declining to proceed further	1

B.2.7.2 Breakdown of FV cases in different courts – 1 July 2019 to 30 June 2020

The table below represents the number of matters which were commenced and finalised in the financial year. The restrictions imposed in response to the COVID-19 pandemic has not resulted in a dramatic increase in family violence prosecutions. There has been a slight increase in prosecutions in the Magistrates Court compared to last year. However, there has been a decrease of FV matters in the Childrens Court and Supreme Court.

Description	Magistrates Court	Childrens Court	Supreme Court	Total
FV matters commenced	576	35	17	628
FV matters completed	538	42	19	599
FV matters proved	450	38	4	492
FV matters discontinued	8	0	1	9

The statistics in the financial year also reveal that approximately 83% of FV matters completed in the Magistrates Court were proved, and that approximately 95 contested hearings were commenced, resulting in 60 that were found proved.

Over the financial year, an important legislative amendment was made to the *Crimes Act 1900*, following the decision in *R v Green (No 3)*⁹⁷. In this case, it was held that the offence of intentionally and unlawfully choking, suffocating or strangling another person, contrary to paragraph (a) of subsection 28(2) of the *Crimes Act 1900* required proof that the victim's breathing had stopped, not merely impeded or restricted. After consulting with the ODPP and others, the legislature clarified that this was not its intention and amended the definitions of 'choke', 'suffocate' and 'strangle'. The amendment identified the broader definition of 'choke' and

97 *R v Green (No.3)* [2019] ACTSC 96.

‘strangle’ to include applying pressure to any extent to a person’s neck, and defined ‘suffocate’ to include the obstruction or interference to a person’s respiratory system or accessory systems of respiration to any extent. This is in line with the submissions on law reform made by the ODPP, citing important research by Dr Vanita Parekh who is the Head of Clinical Forensic Medical Services at Canberra Hospital. According to Dr Parekh, even minor pressure on the neck can prove fatal. Indeed, Dr Parekh states that around 50% of people who report a choking event will have no visible marks, and only about 35% will have very minor marks. For this reason, Dr Parekh’s team requests radiologists in Canberra to provide free CT angiography to people reporting a choking event. This is to determine the injury within the vessels of the neck, to locate potentially lethal blood clots, and thus to treat the victim with anti-clotting agents.

Time and again, it has been recognised by the Courts that domestic violence is a scourge on our community. The FV Unit will continue its important work in providing a specialist prosecution service to the Canberra community in an effort to address this insidious issue.

B.2.7.3 FV Cases

Police v Duncan Gaul

Following a brief intimate relationship in early 2019, the defendant and the victim remained in amicable contact. An arrangement was made for the victim to go to the defendant’s new house one evening to help the defendant get her house cleaned and get settled, and in return the victim would get to use the defendant’s washing machine. Together, the defendant and the victim consumed a considerable amount of alcohol at the house. While the victim was cleaning the defendant’s fridge, a number of eggs fell out and broke. The defendant became enraged and launched an angry tirade against the victim, accusing her of promiscuity and disloyalty. Over the next hour, the defendant forcibly confined the victim by preventing her from leaving, denying the victim her bag, shoes, keys, wallet and phone, and dragging her from the exits of the house. The defendant picked up the victim by her breasts and shoulders and threw her around. The defendant dragged the victim around the house by her jaw and legs. The defendant choked the victim on multiple occasions, including putting both her hands around the victim’s neck and pressing a thumb into the victim’s neck. A medical report showed that the victim had sustained more than 56 individually identifiable injuries as a consequence. She suffered multiple bruises and lacerations to her head, face, neck, breasts and chest, arms, back and legs.

For the offences committed against the victim, the defendant pleaded guilty to one count of ‘choking/suffocating/strangling’, one count of ‘unlawfully confining’, and one count of ‘assaulting occasioning actual bodily harm’. A pre-sentence report, a Court Alcohol and Drug Assessment Service (‘CADAS’) report, a Forensic Mental Health report (‘FMH’) report were among the documents prepared for sentencing.

The defendant identifies as an intersex female and had commenced hormonal treatment. It was discovered that the defendant had experienced gender dysphoria for most of her life, likely contributing to other mental health concerns including suicidal ideation. The FMH report declined to support a diagnosis of bipolar affective disorder, instead identifying alcohol use disorder, major depressive episodes and borderline personality disorder as more consistent diagnoses.

The defendant's alcohol abuse was a significant feature that formed the basis of sentencing. The various reports demonstrated a long history of binge drinking and drug use. The defendant had an alcohol-related criminal history in the ACT, and FV related criminal history in NSW. The defendant reported consuming around 34 standard drinks on the night in question. The defendant continued to dispute the facts and demonstrated an absence of remorse for her conduct that formed the basis of her charges.

The defendant was sentenced to 24 months imprisonment for the 'choke' charge, 22 months imprisonment for the 'assault' charge, and 20 months imprisonment for the 'forcible confinement' charge. All three sentences were to be served concurrently by way of an intensive correction order.

Police v KX

The offender (KX) and the victim (BD) were in an on again, off again relationship that fluctuated. They shared a child. On an evening in January 2019, the offender and the victim left their child with the victim's parents and enjoyed a night out. They both drank a significant amount of alcohol. After having an argument about the victim's phone, they both decided to return home. They argued when they got home, and so the victim got into her car and left the house. She however drove back home when the offender called her on the phone and asked her to return.

Upon entering the house through the front door, the offender grabbed the victim by her hair and dragged her into the lounge room. The offender got on top of victim and punched her in the head repeatedly for about two to three minutes. The victim begged the offender to stop and covered her face with her arms. The offender told the victim to stop screaming. The victim decided to leave the house and was exiting when she realised she had urinated during the assault. She returned to the house. Once in the house, the offender barred the victim from leaving. The offender locked the doors to the house, took the victim's phone and keys, and told her she could not leave. The offender only allowed the victim to leave when she promised that she would conceal her injuries from her mother, to whom she was heading to to pick up their child.

A forensic medical examination conducted at Calvary Public Hospital revealed that the victim had suffered bruising to her right arm and shoulder, ears, forehead, eyes, the left side of her face, and abrasions on her nose and mouth.

The offender was charged with assault occasioning actual bodily harm ('AOABH') and forcible confinement. The offender pleaded guilty to the charge of AOABH but disputed how the injuries had been caused to the victim, contending that he had only punched the victim two to three times. He pleaded not guilty to the charge of forcible confinement. At the hearing, the victim and the offender gave evidence. The offender was convicted of both charges. The findings of fact were consistent with the victim's account, with the court finding it was inherently improbable that the significant injuries she sustained were consistent with the offender's account. The Court further found that the offender's conduct had effectively forcibly confined the victim.

During sentence, it was revealed that the offender had twice previously been imprisoned for assaulting the victim. He was on parole for assaulting the victim at the time of the January 2019 offences. The offender's parole had been cancelled prior to the hearing. He was sentenced to

18 months imprisonment for the charge of AOABH and nine months imprisonment for the charge of forcible confinement. The sentence was partially cumulative on the offender's existing term of imprisonment.

Police v LH

The defendant was at home, where she lived with her mother and infant daughter. The defendant and her mother began arguing in the kitchen, where her daughter was seated in a highchair. The defendant's boyfriend, who was a young person, was also present. The argument started when the defendant asked her mother for money to buy cigarettes, and her mother refused. This angered the defendant.

The defendant became increasingly agitated and aggressive during the argument. Her mother who became concerned for her granddaughter's safety, picked up the infant child. While the infant was in her grandmother's arms, the defendant hit the side of her mother's head with a closed fist, whilst also clipping her infant daughter's ear. The defendant's mother took her granddaughter to the bathroom and barricaded herself and the infant in the bathroom. She then called the police. In anger, the defendant kicked a wall of the house, causing a hole in the wall. Her boyfriend attempted to calm her down by holding her but was given a hard bite on the arm by the defendant. When the police arrived, the defendant was arrested for offences involving a family violence assault and property damage.

The defendant was charged with common assault against both her mother and her boyfriend, and with minor property damage for damaging a wall in her mother's house. The defendant pleaded guilty and made an application under section 334 of the *Crimes Act 1900* for the charges to be dismissed,⁹⁸ and for her to be referred to the ACT Civil and Administrative Tribunal ('ACAT') for a mental health order.⁹⁹ The defendant had no criminal history and had never received a disposition under section 334 before. The application for a dismissal under section 334 was opposed by the prosecution on the basis that the defendant did not suffer from a mental impairment, and in the alternative, that it was not appropriate to deal with the defendant under section 334.

The Magistrate stated that the evidence relied on in the defendant's application did not establish a mental impairment. However, rather than dismissing the application outright, the Magistrate referred the matter under subsection 334(8) of the *Crimes Act 1900*¹⁰⁰ to ACAT for it to assess whether the defendant had a mental impairment. A report which was prepared for ACAT by a psychologist found that the defendant did not suffer a mental impairment. The matter was referred back to the Magistrates Court and the defendant's section 334 application was dismissed.

98 Section 334 gives the Magistrates Court power to dismiss a charge where the court is satisfied that the accused is mentally impaired.

99 ACAT can receive a referral from the Supreme Court or Magistrates Court to determine whether a person has a mental impairment as defined in the *Criminal Code 2002*, or for the purpose of making a mental health order.

100 Section 334(8) provides that to determine whether an accused has a mental impairment, the Magistrates Court may make any orders it considers appropriate, including the following: (a) that the accused submit to the jurisdiction of the ACAT; (b) that the proceedings be adjourned; (c) that the person be released on bail.

The defendant was convicted and sentenced to two concurrent 12-month good behaviour orders in relation to the assault offences. Both had conditions imposed whereby the defendant was on probation under supervision of corrective services for 12 months and to attend programs as directed, particularly in relation to anger management, drug use and attitudes to violence. The defendant was also convicted and sentenced to a six-month good behaviour order with core conditions for the minor property damage offence.

B.2.8 Witness Assistance Service

The Witness Liaison Officers of the Witness Assistance Service ('WAS') at the ODPP contact and provide information on the criminal justice system to witnesses, update vulnerable witnesses at significant milestones of the court process, assist with referrals to support services, act as a liaison point between prosecutors and witnesses, and assist with preparing victim impact statements. The WAS also provides court support as a last resort when other supports are unavailable.

The WAS primarily focuses on assisting vulnerable witnesses in sexual offences and family violence matters and matters where children are required to give evidence. When referred by a prosecutor, the WAS may also assist with matters that involve crimes of a serious nature such as murder, and complex matters with multiple vulnerable witnesses.

The WAS liaises and collaborates with other major stakeholders and support agencies such as VSACT, DVCS, Canberra Rape Crisis Centre ('CRCC') and ACT Policing's Victim Liaison Office to ensure victims are offered the relevant support.

The WAS together with a representative from the FV Unit contribute to the ODPP's involvement in the Family Violence Intervention Program ('FVIP') case tracking which is a weekly interagency meeting that seeks to provide coordinated responses to family violence matters that come to the attention of police and proceed to prosecution. This forum is important in ensuring that relevant agencies including the AFP, ACTCS, CYPS, VSACT and DVCS are offered to or linked with victims of family violence throughout the court process, and to ensure that assistance is offered to those identified as not receiving or engaging support.

The WAS also provides ongoing monthly contribution to Wraparound,¹⁰¹ which is an integral part of the Sexual Assault Reform Program ('SARP') designed to a) ensure appropriate and adequate support is provided to victims who report sexual offences to the police; b) provide a coordinated response to victims' case management; and c) provide information to, and communicate with, victims throughout their involvement with the criminal justice process.

B.2.8.1 Intermediary Program

The ACT's Intermediary Program established within the ACT Human Rights Commission commenced in January 2020 and is actively providing intermediaries to assist the police and courts' engagement with vulnerable witnesses in criminal matters. Intermediaries help witnesses to communicate their best evidence.

101 Members of the Wraparound include the CRCC, ACT Policing, AFP, VSACT, Child and Risk Health Unit ('CARHU'), Care and Protection Services ('CPS'), FAMSAC and ODPP.

The creation of the Intermediary Program was in response to a finding of the RCIRCSA that vulnerable witnesses, such as children in sexual abuse cases, face extraordinarily significant communication barriers when giving evidence. Thus, one of the recommendations of the RCIRCSA was that states and territories establish intermediary schemes that are able to assist vulnerable witnesses give their evidence.

Intermediaries are officers of the court who have undertaken rigorous training in order to become accredited. Intermediaries effectively facilitate communication between the witnesses and the police, and between the witnesses, lawyers and others at court during the criminal trial process. The accredited intermediaries of the Intermediary Program assess the communication needs of witnesses and recommend effective communication techniques to enable police, lawyers and courts to elicit the best evidence from the witnesses.

It is, however, important to note that a witness intermediary is not a support person. Intermediaries are impartial participants in the process who are focused on helping the effective communication of evidence. Over the financial year, there were two young victims of sexual assault referred by the Office to the Intermediary Program.¹⁰²

B.2.8.2 Impact of COVID-19

The WAS at the ODPP continued to work throughout the COVID-19 lockdown period, especially between the months of March and June 2020. Many victims of family violence voiced their concerns over the impact of COVID-19 on their family life to the Office. Victims with matters set for hearing between the March to July timeframe also expressed disappointment that their matters had to be delayed to a later time in 2020 due to the lockdown.

During the COVID-19 lockdown period, the WAS organised phone conferencing and video conferencing for the 'meet and greet' sessions with witnesses and the 'proofing' meetings between prosecutors and witnesses, to maintain communication while observing the strict social distancing measures that had been implemented in the Office.

With social distancing and hygiene measures in place, vulnerable witnesses continued to give their evidence from remote witness rooms during the lockdown. Support agencies such as VSACT, DVCS and CRCC also observed the strict COVID-19 precautionary measures, and temporarily stopped having 'face to face' meetings with victims and prosecutors, and discontinued court support when vulnerable witnesses gave evidence.

As the Courts Canine Support Program¹⁰³ was also temporarily suspended during the COVID-19 lockdown, the court therapy dogs did not make their regular visits to the courts during this time.

¹⁰² Refer to *R v NBB (No 5)* on page 77.

¹⁰³ Attending court can be a stressful and confronting event for many people. This program aims to reduce the negative impact of court attendance by supporting victims of crime with a specially selected and trained Therapy Dog and Handler team.

B.2.8.3 Breakdown of WAS matters – 1 July 2019 to 30 June 2020

A breakdown of all matters involving the WAS in the financial year is provided below:

Offence type Categories	Number of WAS matters	Percentage*
Adult Sexual Assault	44	32.6
Child Sexual Assault	31	23
Historical Sexual Assault	17	12.6
Less Serious Violence Off (adult)	5	3.7
Less Serious Violence Off (child)	1	0.7
Serious Violence Offence (adult)	4	3
Serious Violence Offence (child)	1	0.7
Child Pornography	2	1.5
Other	28	20.7
Significant Trauma	1	0.7
Appeal	1	0.7
Total	135	100

* Figures have been rounded up after the first decimal point.

B.2.9 Confiscation of Criminal Assets

The *Confiscation of Criminal Assets Act 2003* ('COCA ACT') is an effective tool in the fight against serious crime. The ODPP continues to pursue the restraint and forfeiture of property in cases where there is clear evidence that property was either used in the commission of an offence or where the property is the proceeds of crime. Restraint and forfeiture of property can act as a significant deterrent to criminal activity.

The ODPP conducts confiscation proceedings under the COCA Act in the Magistrates Court and Supreme Court. Proceeds of crime and property used in the commission of offences are restrained and forfeited to the Territory through these proceedings. This ensures a person will not be enriched because of the commission of an offence and deprives persons of all benefits derived from criminal offending and any property used or intended to be used in relation to an offence.

The Office has a dedicated COCA team. This has ensured specialised prosecutors are ready and available to work on confiscation proceedings. This has helped facilitate the effective use of restraining orders, forfeiture orders and penalty orders under the COCA Act. This has also enabled the effective use of the auxiliary capabilities under the COCA Act to obtain information from third parties, and conduct compulsory examinations of offenders and their associates, in order to locate property that is or could be subject to forfeiture. The ODPP's confiscation team works closely with the AFP's Financial Investigations Team, as well as representatives from the Public Trustee and Guardian ('PTG').

The COVID-19 pandemic led to considerable delays in confiscation proceedings during the financial year. However, since July 2020 the Office has seen a noteworthy rise in successful applications for restraining orders.

Over the financial year, the ODPP had restrained property with an estimated accumulated value of \$1,936,062.40. A further estimated \$2,243,567.40 worth of accumulated property had been forfeited to the Territory. The restrained and forfeited property included 15 cars, one motorbike, 14 bank accounts and three horses. Despite the challenges posed by COVID-19, the ODPP had successfully obtained at least 13 restraining orders, six consent orders, three examination orders, one penalty order and one civil forfeiture order during the financial year.

B.2.9.1 COCA Cases

Jeremiah Deakin

On 20 February 2020, the ODPP obtained restraining orders against Jeremiah Deakin in relation to a large number of charges of obtaining property by deception. Included amongst the restrained property were three show jumping horses and a motor vehicle. A total of \$718,904.00 is alleged to have been obtained by deceptions which included posing as an agent from the Australian Security Intelligence Organisation ('ASIO').

Trinity Smith

In March 2020, the ODPP obtained a restraining order over cryptocurrency belonging to Trinity Smith. Smith had been convicted of importing and possessing illicit substances including MDMA, DMT and LSD. Smith made admissions to the police that she used cryptocurrency to purchase border-controlled drugs via the 'dark web' with a view to importing them into Australia via the post.

Cryptocurrencies are increasingly being used to facilitate criminal activity in Australia. However, this was the first-time cryptocurrencies had been restrained in the ACT. The ODPP obtained the restraining order through a restricted access proceeding in order to ensure the targeted cryptocurrencies were frozen before they could be disposed of. The Office restrained all Bitcoin, Litecoin and Ethereum in Smith's account with BTC Market. Restraining cryptocurrencies requires overcoming a number of technical challenges. Cooperation between the prosecutors, AFP, PTG and BTC Market was essential in successfully restraining Smith's property. This particular matter provides a model for future cases involving cryptocurrencies.

B.2.10 Work Health and Safety Prosecutions

The ODPP has a Work Health and Safety ('WHS') Unit which is comprised of a Supervising Prosecutor and a senior prosecutor who are dedicated to prosecuting offences under the *Work Health and Safety Act 2011* and who work closely with WorkSafe ACT in relation to matters proceeding to prosecution before the ACT Courts.

Work safety breaches can be dealt with in various ways including through out-of-court mechanisms such as enforceable undertakings.¹⁰⁴ However, where enforceable undertakings and/or other avenues of redress are either inappropriate or have been exhausted, prosecutions will be instituted by this Office in the ACT Industrial Court.

B.2.10.1 WHS Cases

Michael Watts

During the financial year, the ODPP continued with its prosecution of several individuals and corporations arising from a 2016 incident at the University of Canberra Hospital construction site. The incident involved an overloaded crane overturning and killing a worker (62-year-old Herman Holtz). At the time of the accident, the crane driver (Michael Watts) had been moving an 11-tonne generator. The trial of Watts was due to commence in the Supreme Court in February 2020 and was estimated to run for six weeks. However, following negotiations between the parties, Watts pleaded guilty to a charge of reckless conduct for failing to comply with a duty exposing persons to a risk of serious injury or death, a Category One offence under the *Work Health and Safety Act 2011*. Watts was sentenced in April 2020 by the Chief Justice of the Supreme Court to a one-year term of imprisonment, fully suspended upon entering a one-year good behaviour order. The proceedings against five other defendants remain ongoing in the Industrial Court.

Nikias Diamond Pty Ltd

The ODPP prosecuted a property developer, Nikias Diamond Property Development Pty Ltd, after a 16-year-old work experience student suffered severe injuries when he stepped off a ladder and fell six metres into an uncovered void on its construction site. Nikias Diamond pleaded guilty to a charge of failure to comply with a health and safety duty under the *Work Health and Safety Act 2011* and was convicted and fined \$180,000 by the Industrial Court.

B.2.10.2 Breakdown of WHS matters

The table below reflects the WHS matters prosecuted by the ODPP in the financial year.

Act	Matters (No.)	Proved/Fine Paid
<i>Work Health & Safety Act 2011 & Crimes Act 1900</i>	1	1 (proved)
<i>Work Health and Safety Act 2011</i>	2	1 (proved)
Total	3	2

¹⁰⁴ An enforceable undertaking is a legally binding agreement between Access Canberra and the person who proposes the undertaking. When an enforceable undertaking is accepted, any legal proceeding connected to the alleged WHS contravention is discontinued. Where legal proceedings have not been instituted, acceptance of the undertaking will mean that no proceedings will be commenced, subject to the undertaking not being contravened. (See https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/3044/~/-/act-work-health-and-safety-regulator-enforceable-undertakings)

B.2.11 Regulatory Matters

In addition to the normal and standard criminal offences charged by the AFP, the ODPP is also responsible for prosecuting a wide range of regulatory offences. These offences are referred to the Office from various regulatory agencies. For example, offences relating to the mistreatment of animals are referred by the RSPCA; offences relating to improper handling or preparation of food sold by restaurants or cafes are referred by ACT Health; and offences relating to excessive noise pollution by owners or occupiers of private homes are referred by the ACT Environment Protection Authority¹⁰⁵.

B.2.11.1 Breakdown of regulatory matters

The table below sets out the number of regulatory matters referred to the ODPP, and which proceeded to prosecution during the financial year from the following agencies:

- › The RSPCA
- › Domestic Animal Services
- › ACT Health
- › Access Canberra

Act	Matters (No.)	Proved/Fine Paid
<i>Animal Welfare Act 1992</i>	5	2 (proved)
<i>Domestic Animal Act 2000</i>	1	1 (proved)
<i>Food Act 2001</i>	2	2 (proved)
<i>Building Act 2004</i>	1	1 (proved)
Total	9	6 (proved)

The different regulatory agencies provide the ODPP with briefs of evidence with respect to potential regulatory offences, often with a recommendation as to potential charges. The evidence is then assessed by the Office, in consultation with the relevant regulatory agency, and a decision is made as to what charges (if any) should be laid.

In addition to the standard and typical matters referred to the ODPP by the RSPCA and ACT Health, a new category of a criminal act was referred to the Office in the financial year. This type of criminal act had never been prosecuted in the ACT previously. It concerned a corporation that carried out unauthorised building works on a building site in the ACT. This amounted to an offence under the *Building Act 2004*. In this particular matter, after reviewing the brief of evidence, the ODPP laid charges against the relevant corporation responsible for carrying out the unauthorised building works. Following negotiations between the parties, the corporation agreed to plead guilty to one charge under subsection 51(4) of the *Building Act 2004*. When the matter proceeded to sentence in the Magistrates Court, the corporation was convicted and fined \$50,000 for the offence.

¹⁰⁵ The Environment Protection Authority is established under the *Environment Protection Act 1997*.

B.2.12 Parking Matters

The ODPP also prosecutes parking infringements.¹⁰⁶ As shown in the table below, there was a total of 925 parking matters completed in the financial year. This was inclusive of 55 convictions, seven dismissed charges, and 11 proven charges but no convictions recorded. For the remaining parking infringements there was no evidence offered by the prosecution. Often this happens because the offender has responded to the infringement notice and paid the fine before the hearing date.

Parking matters managed by the ODPP in the financial year is reflected below.

	Matters (No.)
Conviction	55
Proved no conviction	11
Dismissed	7
Not Proved	1
Withdrawn	1
No Evidence to Offer	850
Total	925

B.2.13 List Team

Since late 2019, the ODPP has had a dedicated team of paralegals and prosecutor associates who prepare files and appear in the Magistrates Court daily lists, i.e. the A1 general list and A2 bail list. When the list team was first formed, junior prosecutors were aided by three prosecutor associates who appeared as advocates in court and four paralegals undertaking law degrees. These paralegals assisted in both the legal and administrative preparation of the files for court. The list team now is comprised of six prosecutor associates who handle the bulk of the list work in the MC. This enables junior prosecutors who previously appeared in lists matters to focus on hearings in the MC and other more complex work. The current list team also includes three paralegals who assist in the administrative preparation of files and providing material to defence practitioners.

While much of the MC's business was suspended between April and July 2020 during the height of the COVID-19 pandemic, mentions and A2 bail lists continued to be staffed by prosecutors each day. This ensured people in custody were able to apply for bail and their matters were progressed through the courts. There was also a notable increase in bail applications during this period relating to the pandemic. Prosecutors appearing in these bail applications were often required to address the Court on the preventative measures taken by ACTCS to ensure the welfare of defendants on remand at the AMC.

¹⁰⁶ Infringements are issued by Access Canberra and the AFP for breaching the current *Road Transport (Road Rules) Regulation 2017* and the *Road Transport (Safety and Traffic Management) Act 1999*.

Sentences in the A1 and A2 lists also continued during this period. However, a large number of matters where defendants had been summonsed to appear were vacated pursuant to the COVID-19 Practice Directions¹⁰⁷ issued by the MC. As a result, in late July 2020 the Court re-listed over 300 matters in a single week to work through the backlog.

B.2.14 ODPD Statistics (from 1 July 2019 to 30 June 2020)

The statistics used in this Annual Report are generated from the ODPD's Criminal Advocacy Support and Enquiry System ('CASES'). These statistics comply with the Australian Bureau of Statistics ('ABS') standards for the characteristics of defendants dealt with by criminal courts.¹⁰⁸ A fundamental aspect that is different is that the ABS standard reports against defendants rather than charges.

Because a different system is used by ACT Law Courts, there is potential for a divergence between statistics produced by this Office and those produced by the courts. In particular, if charges were finalised at different court appearances in the same case for a defendant and these were counted as finalised at each appearance rather than being aggregated as a single finalised defendant, there would be a greater number of matters recorded. This would particularly affect matters shown as discontinued by the prosecution. For example, often "back up" charges are discontinued at a particular appearance, but other charges against the same defendant that are part of the same unit of work continue on another day. If ABS rules are followed, the "back up" charges would not be counted as finalised separately. If they were incorrectly counted as having been finalised, then it would appear that more matters were discontinued than was in fact the case.

Generally, matters reported are those finalised within the reporting period. As set out in ABS 4513 "finalisation" describes how a criminal charge is concluded by a criminal court level. Matters are concluded, as explained by ABS 4513.0,¹⁰⁹ depending on the court involved. Of particular note, a transfer to another court level (for example a committal either for trial or sentence) concludes the matter in one court level and initiates it in another court level.

All offences in CASES are classified against the Australian and New Zealand Standard Offence Classification ('ANZSOC'). The ABS has formulated ANZSOC to provide uniform national statistics. The 16 divisions used for the classification of offences for statistical purposes within the ANZSOC are set out in ABS 1234.0.¹¹⁰ Where tables refer to matters being "disaggregated by matter type", this is a reference to the ANZSOC divisions. The National Offence Index ('NOI')¹¹¹ is a

107 *COVID-19 Measures (No 4)*, an interim practice direction, which was then revised in *COVID-19 Measures (No. 5)*. Refer to the Director's Foreword on page 33.

108 See *Criminal Court, Australia - National statistics about defendants dealt with by criminal courts including demographic, offence, outcome and sentence information* at <https://www.abs.gov.au/statistics/people/crime-and-justice/criminal-courts-australia/latest-release> (previously referred to as catalogue 4513.0).

109 See *Criminal Court, Australia - National statistics about defendants dealt with by criminal courts including demographic, offence, outcome and sentence information* at <https://www.abs.gov.au/statistics/people/crime-and-justice/criminal-courts-australia/latest-release> (previously referred to as catalogue 4513.0).

110 See *catalogue 1234.0, Australian and New Zealand Standard Offence Classification (ANZSOC)*, 2011 at <https://www.abs.gov.au/ausstats/abs@nsf/mf/1234.0>.

111 See *1234.0.55.001 - National Offence Index, 2018* at <https://www.abs.gov.au/ausstats/abs@nsf/mf/1234.0.55.001>

ranking of all ANZSOC groups and supplementary ANZSOC codes.¹¹² This ranking is based on the concept of ‘offence seriousness’. Where a finalised defendant has multiple charges, the principal offence is determined by the type of finalisation and/or the highest ranked ANZSOC using the NOI.

B.2.14.1 Total matters finalised by jurisdiction

Description	Matters
Childrens Court	259
Magistrates Court	4512
Industrial Court	2
Supreme Court	240
Court of Appeal	30
High Court	3
Total	5406

Note: Childrens Court, Magistrates Court and Industrial Court matters include committals to the Supreme Court. Supreme Court matters include Supreme Court appeals and matters where a Notice Declining to Proceed was filed.

¹¹² The NOI has been developed by the ABS as a statistical tool to enable the output of nationally comparable offence information within the field of crime and justice statistics. The NOI is a tool which provides an ordinal ranking of the offence categories in the ANZSOC according to perceived seriousness in order to determine a principal offence. The purpose of the NOI is to enable the representation of an offender by a single offence in instances where multiple offences occur within the same incident or where defendants have multiple charges in criminal cases.

B.2.14.2 Matters finalised disaggregated by matter type

Description	Matters
Homicide and related offences	
Childrens Court	1
Magistrates Court	7
Industrial Court	
Supreme Court	9
Court of Appeal	3
High Court	
Sub Total	20
Acts intended to cause injury	
Childrens Court	58
Magistrates Court	443
Industrial Court	
Supreme Court	32
Court of Appeal	6
High Court	1
Sub Total	540
Sexual assault and related offences	
Childrens Court	6
Magistrates Court	69
Industrial Court	
Supreme Court	41
Court of Appeal	7
High Court	1
Sub Total	124
Dangerous or negligent acts endangering persons	
Childrens Court	8
Magistrates Court	86
Industrial Court	
Supreme Court	6
Court of Appeal	2
High Court	
Sub Total	102

Description	Matters
Abduction and related offences	
Childrens Court	11
Magistrates Court	96
Industrial Court	
Supreme Court	12
Court of Appeal	1
High Court	
Sub Total	120
Robbery, extortion and related offences	
Childrens Court	31
Magistrates Court	66
Industrial Court	
Supreme Court	45
Court of Appeal	4
High Court	1
Sub Total	147
Unlawful entry with intent/burglary, break and enter	
Childrens Court	38
Magistrates Court	106
Industrial Court	
Supreme Court	25
Court of Appeal	4
High Court	
Sub Total	173
Theft and related offences	
Childrens Court	20
Magistrates Court	198
Industrial Court	
Supreme Court	13
Court of Appeal	
High Court	
Sub Total	231

Description	Matters
Deception and related offences	
Childrens Court	
Magistrates Court	23
Industrial Court	
Supreme Court	5
Court of Appeal	1
High Court	
Sub Total	29
Illicit drug offences	
Childrens Court	5
Magistrates Court	186
Industrial Court	
Supreme Court	29
Court of Appeal	1
High Court	
Sub Total	221
Weapons and explosives offences	
Childrens Court	17
Magistrates Court	88
Industrial Court	
Supreme Court	9
Court of Appeal	
High Court	
Sub Total	114
Property damage and environmental pollution	
Childrens Court	19
Magistrates Court	111
Industrial Court	
Supreme Court	5
Court of Appeal	
High Court	
Sub Total	135

Description	Matters
Public order offences	
Childrens Court	13
Magistrates Court	79
Industrial Court	
Supreme Court	2
Court of Appeal	
High Court	
Sub Total	94
Road traffic and motor vehicle regulatory offences	
Childrens Court	18
Magistrates Court	1573
Industrial Court	
Supreme Court	2
Court of Appeal	1
High Court	
Sub Total	1594
Offences against justice procedures, government security and government operations	
Childrens Court	10
Magistrates Court	234
Industrial Court	
Supreme Court	4
Court of Appeal	
High Court	
Sub Total	248
Miscellaneous offences	
Childrens Court	4
Magistrates Court	1147
Industrial Court	2
Supreme Court	1
Court of Appeal	
High Court	
Sub Total	1154

Description	Matters
Coronial	
Childrens Court	
Magistrates Court	
Industrial Court	
Supreme Court	
Court of Appeal	
High Court	
Sub Total	0
Total	5046

B.2.14.3 Committals to the Supreme Court

Description	Matters
Childrens Court	16
Magistrates Court	169
Industrial Court	1
Total	185

B.2.14.4 Plea of Guilty after Committal for Trial

Description	Matters
Plea of guilty after committal for trial	82
Plea of guilty after trial listed	59
Total matters subpoenas issued	56
Plea of guilty on day of trial	21
Plea of guilty within one week of trial	16
Plea of guilty within 2-4 weeks of trial	9
Plea of guilty more than 4 weeks before trial	13

B.2.14.5 Committals to the Supreme Court disaggregated by matter type

Description	Childrens Court		Magistrates Court		Industrial Court		Total
	Trial	Sentence	Trial	Sentence	Trial	Sentence	
Homicide and related offences	1		5	1			7
Acts intended to cause injury			17	3			20
Sexual assault and related offences	2		20	7			29
Dangerous or negligent acts endangering persons			1	5			6
Abduction and related offences	2		9	1			12
Robbery, extortion and related offences	5	3	22	11			41
Unlawful entry with intent/ burglary, break and enter	1	1	15	11			28
Theft and related offences			6	3			9
Deception and related offences				1			1
Illicit drug offences			6	5			11
Weapons and explosives offences	1		3	3			7
Property damage and environmental pollution			5	4			9
Public order offences			1				1
Road traffic and motor vehicle regulatory offences							0
Offences against justice procedures, government security and government operations			2				2
Miscellaneous offences			2				2
Total	12	4	114	55	0	0	185

B.2.14.6 Supreme Court Matters

Description	Matters
Trials	
Trials	39
Trial Days in Court	195
Trial Outcomes	
Guilty Verdicts	17
Not Guilty Verdicts	14
Other**	6
Awaiting verdict	2
Sentencing Proceedings	
Accused sentenced after committal for sentence, after committal for trial/changed pleas or re-sentenced after breach	125
Accused re-sentenced after breach	17
Total sentencing proceedings	142
Notices declining to proceed further	21

***Note: This includes trials which resulted in a hung jury or were aborted. Such matters are not “finalised” for the purposes of the table on ‘Total matters finalised by jurisdiction’ at B.2.14.1 at page 93 and the table on ‘Matters finalised disaggregated by matter type’ at B.2.14.2 on page 94.*

B.2.14.7 Appeals

Description	Defence Appeals	Crown Appeals	Total
Supreme Court	33	2	35
Court of Appeal	28	11	39
High Court	3		3
Total	64	13	77

Note: These include appeals which were discontinued, withdrawn, or in respect of which leave to appeal was refused; and matters where the appeal hearing was completed during the reporting period and the decision was reserved.

B.3 Scrutiny

The ODPP is subject to scrutiny from the ACT Auditor-General and the ACT Ombudsman. There were no relevant reports during the financial year. From time to time, the Director appears before various committees of the Legislative Assembly. During the financial year, the Director appeared at the 2018-19 Annual Report Hearing on 6 November 2019. The Director was also scheduled to appear at the Estimates hearings toward the end of the financial year. However, this has been delayed due to the delayed budget.

B.3.1 Audit of Reviewable Decisions

Pursuant to the recommendations in the *Criminal Justice Report* of the RCIRCSA,¹¹³ *Director's Instruction No. 14.1*¹¹⁴ and *Director's Instruction No. 14.2*¹¹⁵ were issued. These Director's Instructions are in relation to decisions to discontinue prosecutions, and the review of such decisions. *Director's Instruction 14.2* specifically provides that an audit is to be conducted on decisions that have been subject to review during the financial year. This is to ensure that the relevant procedures have been complied with by the Office in relation to the reviews of decisions to discontinue prosecutions. Thus, an Audit Committee was formed at the end of the financial year to look into all the automatically reviewable decisions during the financial year. The *Audit Report* and its accompanying *Record of Reviewable Decisions - Audit 2019-2020* are located in Appendix D (page 144) and Appendix E (page 145) respectively.

B.4 Risk Management

The ODPP's risk management arrangement is primarily managed under the broader risk management framework of the JACSD to provide a more consistent, holistic and synergistic approach to risk management. The approach basically emphasises that the management of risk is the responsibility of all employees within the Office. This methodology underpins the Office's governance framework and provides strategies that are linked to the nature, aims and objectives of ODPP and reflect a risk management approach to business.

113 Refer to recommendations 40-43 of the *Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice Report, Parts III to VI, 2017)*.

114 Refer to Appendix B on page 134 for *Director's Instruction No. 14.1 - Review of a Decision to Discontinue a Prosecution*.

115 Refer to Appendix C on page 136 for *Director's Instruction No. 14.2 - Reviewable Decisions to Discontinue - Contact with Complainants, Review Processes and Auditing*.

B.5 Internal Audit

The ODPP's internal audit arrangements are primarily managed under the broader enterprise risk management framework of the JACSD. The focus of internal audit within ODPP is to review and provide opportunity for business operations and controls as part of the ODPP's governance framework and continuous improvement.

The JACSD's responsibility under the *Financial Management Act 1996* includes the maintenance of an Audit Performance and Improvement Committee ('APIC') to consider governance structures as outlined in the ACT Government's Internal Audit Framework. The APIC is an integral part of the governance arrangements of the JACSD, with particular emphasis being placed on better practices, continuous improvement, internal control mechanisms, risk management strategies, internal audit and ethical behaviour and integrity. Details of the APIC's arrangements can be found in the JACSD's 2019-20 Annual Report¹¹⁶.

B.6 Fraud Prevention

The ODPP has a Fraud and Corruption Prevention Plan ('FCPP'), prepared in accordance with the requirements of the ACTPS Integrity Policy¹¹⁷. The FCPP has been circulated to all staff.

The ODPP's fraud and corruption measures are also integrated into the JACSD's FCPP, which provides the framework for raising awareness of, and reducing and managing instances of fraud and corruption in the JACSD.

There have been no reports or allegations of fraud or corruption received and/or investigated during the financial year.

¹¹⁶ <https://www.justice.act.gov.au/about-us/annual-reports>

¹¹⁷ This policy is issued by CMTEDD, and is designed to protect public money and property, protect the integrity, security and reputation of our public sector agencies while maintaining a high level of services to the community consistent with the good government of the ACT.

B.7 Freedom of Information

The *Freedom of Information Act 2016* ('FOI Act') commenced on 1 January 2018, replacing the *Freedom of Information Act 1989*.

Under the FOI Act, the ODPP must make information proactively available via an open access scheme. If the information is not available on the Open Access Website,¹¹⁸ the person seeking information is encouraged to contact the ODPP before resorting to the more formal FOI procedure. In many cases it may be possible to access information more quickly and efficiently through such an approach. However, if a formal access application is necessary under the FOI Act, then the application must include the following details:

- › a clear description of the documents requested
- › an email or postal address of the applicant
- › evidence of identity if seeking personal information
- › authority for an agent to act if the applicant has engaged a lawyer or is represented by a third party

The FOI application may be sent in writing to the ODPP postal address or by email to foiactdpp@act.gov.au. Further information on FOI applications can be found on our website at <https://www.dpp.act.gov.au/publications/freedom-of-information>

The ODPP is also required to maintain a disclosure log¹¹⁹ in accordance with section 28 of the FOI Act. Information provided to an applicant through an FOI request is published on the disclosure log between three and 10 working days after the decision notice has been sent out to the applicant. The disclosure log includes the following information:

- › the FOI application
- › the decision notice
- › the documents / information released pursuant to the request

Nevertheless, applications for personal information will not be published on the disclosure log.

118 <https://www.act.gov.au/open-access>

119 <https://www.dpp.act.gov.au/publications/freedom-of-information>

B.7.1 FOI Access Applications

Information about freedom of information access applications made under the FOI Act during the financial year is provided below.

Access Applications	Total
On hand at the beginning of the financial period	0
Received during the financial period	9
Finalised / completed	5
On hand at the end of the financial period	1
Decided within timeframe (section 40)	8
Decided outside timeframes but within extended timeframes agreed to with the applicant (section 40)	0
Decided outside timeframes but within extended timeframes agreed to with the Ombudsman (section 40)	0
Not decided within the statutory timeframes in the FOI Act, i.e. deemed decisions.	0
Where a fee or charge was applied	0
For Ombudsman review (section 74)	0
Applications made to ACAT	0
Decisions confirmed through Ombudsman review (section 82(2)(a))	0
Decisions varied through Ombudsman review (section 82(2)(b))	0
Decisions set aside and substituted through Ombudsman review (section 82(2)(c))	0
Where a decision gave full access (section 35(1)(a)).	1
Where a decision gave partial access (section 35(1)(c)).	3
Where a decision refused access (section 35(1)(c)).	1
Decisions to publish open access information (section 24(1))	24
Decisions not to publish open access information (section 24(1))	3
Decisions not to publish a description of open access information withheld (section 24(1))	0
Requests made to amend personal information	0

B.8 Community Engagement and Support

The ODPP is not typically involved in consultation with the community on policy issues or prosecutorial decisions. It does, however, consult and interact with the AG, legal profession, AFP and ACTPS regulatory agencies on the development of policies, procedures and protocols. The ODPP's contribution to public policy is primarily through the JACDS. In addition, the Office does consult the victims about proposed decisions not to prosecute particular matters.

The following sponsorship was provided by the Director during the year ending 30 June 2020.

No.	Organisation/Recipient	Project Description	Outcomes	Amount
1	University of Canberra	Sponsorship of prize in Criminal Law	Promotes excellence in criminal law studies, highlights the Office as a centre of excellence in the criminal law and contributes to the quality of criminal lawyers in the ACT	Engraved Medal and cash prize up to a total value of \$250
2	Australian National University	Sponsorship of prize in Criminal Law	Promotes excellence in criminal law studies, highlights the Office as a centre of excellence in the criminal law and contributes to the quality of criminal lawyers in the ACT	Engraved Medal and cash prize up to a total value of \$250
3	The DPP Plate	Perpetual trophy awarded annually to best mooting team in a contest between the two ACT universities	Promotes excellence in advocacy, highlights the Office as a centre of excellence in advocacy, and contributes to the quality of criminal advocates in the ACT	Engraving costs

B.9 Aboriginal and Torres Strait Islander Reporting

In 2019 (calendar year), the ODPP launched its Office Employment Diversity Statement ('OEDS'), which aims to have a workforce commensurate with the community most impacted by its functions. The goal for the Office was to increase the number of ATSI staff to more than 5% of its workforce, to match the demographic representation of the broader population in Australia. We have exceeded this target.

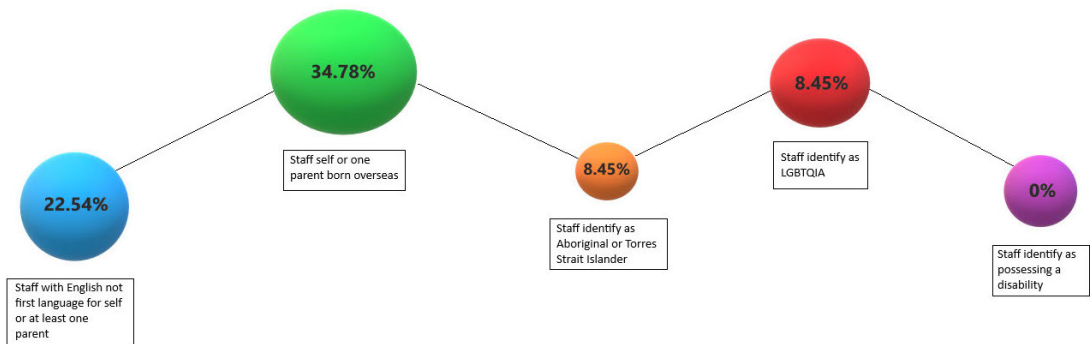
Also in 2019, the Office initiated a 'work experience placement program' with the University of Canberra, aimed at indigenous students studying law at its Canberra Law School. The ODPP received a good response upon launching the placement program and hosted its first student on a 12-month placement from September 2019. Over the last 12 months, the work experience placement program was extended to the Australian National University. As a consequence, the Office is now employing three indigenous prosecutor associates in its Crown Chambers, and hopes to expand the program further in 2021. This is the first program of its type in this Office and aims to get more ATSI lawyers appearing in court in gowns and wigs.

B.9.1 Office Employment Diversity Statement

The ODPP's OEDS is as follows:

- › This ODPP aims to promote employment equality, diversity and inclusion for those of all ages, colours, races, ethnic or national origins, sexual orientation, marital and parental status, physical impairment, disability and religious beliefs.
- › The ODPP recognises, respects, promotes and celebrates the value of diversity and adopts inclusive policies and strategies, and aims to have diversity within the ODPP workforce commensurate with the community most impacted by its functions.
- › The ODPP aims to have the number of ATSI staff not less than 5% of staff.
- › The ODPP aims to be an inclusive environment for LGBTQIA people, people of all religions, all races, and disabled people.
- › The ODPP will report annually on the percentage of its staff identifying with the following criteria;
 - (a) English not first language for self or at least one parent.
 - (b) Self or at least one parent born overseas.
 - (c) Identifies as ATSI.
 - (d) Identifies as LGBTQIA.
 - (e) Identifies as possessing a disability.

Employment Diversity Statement



Figures taken from self-reported staff survey June 2020

B.10 Work Health and Safety

The ODPP's Health and Wellbeing Policy outlines its commitment to the provision of a healthy and safe workplace. The Office had two elected Health and Safety representatives in the financial year.

Due to the challenging nature of work at the ODPP, staff are encouraged to avail themselves of the Employee Assistance Program ('EAP') and the services of specialised psychologists.¹²⁰

The Office works proactively with staff to prevent work related injuries, by offering ergonomic workstation assessments, and ergonomic office equipment, ensuring that staff are set up at their respective workstations or offices in a safe and correct manner. Further, the ODPP's WEGIES¹²¹ is used as a forum to assess office or work-related injury data and develop injury prevention programs for implementation and monitoring within the Office.

No reports or notices were given under the *Work Health and Safety Act 2011* and no directions were issued during the financial period.

The Office continued to ensure that its focus was on preventative measures during the financial year, by offering staff the following support:

- › Health and wellbeing checks;
- › Managing vicarious trauma training;¹²²
- › Mental Health First Aid training;
- › ACT government-funded influenza vaccine;
- › Fire Warden training;
- › First Aid training;
- › Work life balance;¹²³
- › Respect, Equity and Diversity training.

B.10.1 Notifiable incidents

Figures shown in the following table are based on data provided by the CMTEDD's Workplace Injury Performance Unit.

Events Notified to WorkSafe	*Total Incidents*	Total Worker Incidents	Harassment Contacts
0	7	7	6

*Note: Dates of incidents is in the range 1/07/2019 to 30/06/2020.

120 Refer to B.11 (Human Resources Management) on page 108.

121 Refer to B.1.5.2 (Working Environment Group) on page 43.

122 Refer to B.11 (Human Resources Management) on page 108.

123 Refer to B.11 (Human Resources Management) on page 108.

B.11 Human Resources Management

The ODPP has continued to support its staff wellbeing in a variety of ways including health and wellbeing initiatives and other professional training opportunities.¹²⁴ The Office has maintained its focus on supporting staff in dealing with the complex, challenging and confronting nature of work.

The health and wellbeing initiatives at the Office, inclusive of the EAP and counselling sessions with specialist psychologists, has continued from previous years. These health and wellbeing sessions are optional, and staff are regularly encouraged to make full use of these services. The sessions afford an opportunity for staff to debrief and have personal and confidential discussions about any work-related stresses or personal issues.

During the financial year, about 80% of the staff at the Office participated in a training program by Blue Knot Foundation on ‘Managing Vicarious Trauma’. The aim of the program is to build compassion towards people who have experienced trauma, to prevent victim-blaming, and pathologising, and to make the services of the ODPP and its workplace appropriately responsive and trauma informed. This training program focused on how one recognises signs of vicarious trauma within themselves, and how to effectively communicate and guide victims and witnesses dealing with trauma. The program offered strategies and tips for dealing with vicarious trauma.

The Office continues to collaborate and promote opportunities in support of staff leading a healthy lifestyle. As mentioned in B.1.5.2, these are co-ordinated through the WEGIES.¹²⁵

Legal staff also had the opportunity to participate in the training and seminar sessions organised as part of the ODPP’s CPD program.¹²⁶ It has however been rather unfortunate that the Office was compelled to suspend its CPD program during the COVID-19 lockdown period.

In terms of flexible work arrangements offered to staff over the financial year, three employees at the ODPP worked part-time, and a further five employees had flexibility in the workplace. The Office acknowledges and is supportive of the need for staff to maintain a healthy work life balance. As such the ODPP constantly looks for means and ways of enabling a work arrangement that works well for both the Office and its staff.

B.11.1 ARIns Reporting

A member of staff was remunerated pursuant to the terms of Attraction and Retention Initiatives (‘ARIns’). Information on the remuneration payable under ARIns has not been disclosed due to the small number in operation within the Office and the need to retain the confidentiality requirements of these agreements.

¹²⁴ Refer to B.10 (Work Health and Safety) on page 107.

¹²⁵ Refer to B.1.5.2 (Working Environment Group) on page 43.

¹²⁶ Refer to B.1.5.3 (Continuing Professional Development - Ad hoc Committee) on page 43.

B.11.1.1 Agency profile

Branch/Division	FTE	Headcount
Director of Public Prosecutions	85.0	90
Total	85.0	90

B.11.1.2 FTE and headcount

	Female	Male	Total
FTE by Gender	54.6	30.3	85.0
Headcount by Gender	59	31	90
% of Workforce	65.6%	34.4%	100.0%

B.11.1.3 Classifications

Classification Group	Female	Male	Total
Administrative Officers	5	2	7
Executive Officers	1	4	5
Legal Support	20	10	30
Prosecutors	30	13	43
Senior Officers	3	1	4
Statutory Office Holders	0	1	1
Total	59	31	90

B.11.1.4 Employment category by gender

Employment Category	Female	Male	Total
Casual	0	1	1
Permanent Full-time	46	22	68
Permanent Part-time	8	0	8
Temporary Full-time	5	8	13
Temporary Part-time	0	0	0
Total	59	31	90

B.11.1.5 Equity and workplace diversity

The ODPP's equity and diversity strategies form part of the JACSD's Respect, Equity and Diversity Framework. Consistent with the ACTPS diversity and equity framework, the employment policies and practices of the Office

- (a) support a work environment that is respectful, courteous, inclusive, collaborative, equitable and productive;
- (b) ensure equality of opportunity; and
- (c) are family friendly and cognisant of the demands placed on employees with family responsibilities.

	Headcount	% of Total Staff
Aboriginal and/or Torres Strait Islander	5	5.6%
Culturally & Linguistically Diverse	7	7.8%
People with a disability	0	0.0%

B.11.1.6 Age profile

Age Group	Female	Male	Total
Under 25	5	4	9
25-34	31	15	46
35-44	16	8	24
45-54	5	2	7
55 and over	2	2	4

B.11.1.7 Average years of service by gender

Gender	Female	Male	Total
Average years of service	5.8	6.3	6.0

B.11.1.8 Recruitment and separation rates

Classification Group	Recruitment Rate	Separation Rate
Total	21.4%	11.4%

B.12 Ecologically Sustainable Development

The ODPP is committed to the principles of ecologically sustainable development, and whilst opportunities for significant contributions in this regard are limited, the following continuing efforts and waste reduction initiatives are maintained at the Office:

- › a recycling program with each member of staff having a separate recycling container and larger containers located throughout the Office;
- › the use of recycled paper and toner cartridges;
- › purchasing consumable items with recycling properties;
- › a policy of 'double sided' photocopying;
- › electricity conservation by maintaining a lights off policy after hours or when staff are absent from work; and
- › minimising power by ensuring computers are turned off at the end of each day.

B.12.1 Sustainable development performance – current and previous financial year

	Unit	Current FY	Previous FY	Percentage change
DPP staff and area				
DPP staff	FTE	85	79.7	6.64%
Workplace floor area	Area (m ²)	1591	1591	0%
Stationary energy usage				
Electricity use	Kilowatt hours	115804	154474	-25.03%
Natural gas use	Megajoules	N/A	N/A	N/A
Diesel	Kilolitres	unavailable	unavailable	
Transport fuel usage				
Electric vehicles	Number	N/A	N/A	N/A
Hybrid vehicles	Number	N/A	N/A	N/A
Hydrogen vehicles	Number	N/A	N/A	N/A
Total number of vehicles	Number	Nil	Nil	N/A
Fuel use – Petrol	Kilolitres	N/A	N/A	N/A
Fuel use – Diesel	Kilolitres	N/A	N/A	N/A
Fuel use – Liquid Petroleum Gas (LPG)	Kilolitres	N/A	N/A	N/A
Fuel use – Compressed Natural Gas (CNG)	Gigajoules	unavailable	unavailable	
Water usage				
Water use	Kilolitres	unavailable	Unavailable	
Resource efficiency and waste				

	Unit	Current FY	Previous FY	Percentage change
Reams of paper purchased	Reams	2633	2859	-7.9%
Recycled content of paper purchased	Percentage	100%	100%	0
Waste to landfill	Litres	36240	30000	20.86%
Co-mingled material recycled	Litres	34560	30000	15.2%
Paper & Cardboard recycled (incl. secure paper)	Litres	86160	69360	24.22%
Organic material recycled	Litres	0	0	0
Greenhouse gas emissions				
Emissions from stationary energy use	Tonnes CO ₂ -e	0	52	100%
Emissions from natural gas use (non-transport)	Tonnes CO ₂ -e	N/A	N/A	N/A
Emissions diesel use (non-transport)	Tonnes CO ₂ -e	N/A	N/A	N/A
Emissions from transport fuel use	Tonnes CO ₂ -e	N/A	N/A	N/A
Total emissions	Tonnes CO ₂ -e	52	52	100%

Notes

1. Please note that some data reported for FY 2018-19 in the table above may differ slightly from figures reported in the 2018-19 Annual Report. These are due to updates to agency occupancy and historical consumption data, and annual adjustments to ACT specific electricity emissions factors. Where actual data is not available, the Enterprise Sustainability Platform provides estimations using an accruals function. Accruals are calculated from the average annual daily consumption of the most current 12 month period applied for the number of days of missing data.
2. No water consumption data is captured in the ESP for the ODPP's occupancy. The ACT Government is not formally billed for its water consumption as it is factored into the landlord's rent.
3. Greenhouse gas emissions for electricity consumption have been calculated using the following emissions factors based on the latest ACT Electricity Emissions Factor Report released in 2020: a factor of 0.255 kilogram (kg) CO₂-e / kilowatt hour (kWh) or 0.255 tonne (t) CO₂-e / megawatt hour (MWh) has been used to calculate electricity emissions (Scope 2) for the 2018-19 period. It is based on actual historical data and is a retrospective adjustment of the original 0.507 factor (Scope 2) used for 2017-18 annual reporting; and the ACT met its 100% renewable electricity target in 2019-20. This is the first year that the ACT Government will be reporting zero greenhouse gas emissions from electricity use. The ACT Government is committed to maintaining 100% renewable electricity supply beyond 2020.

C. Financial Management Reporting

C.1 Financial Management Analysis

The ODPP is a downstream agency. Both its workload and timeframes for service delivery are externally imposed. The level of Supreme Court work continues to increase in both time and complexity, while Magistrates Court work remains high. The Office has now secured additional funding going forward which will go some way towards dealing with the increases in workload.

C.2 Financial Statements

The financial transactions of the Office for the year ending 30 June 2020 are subsumed within the audited financial statements of the JACSD. Any data that is provided below should be read in conjunction with those financial statements.

For information related to the budget outcomes please refer to the JACSD's audited financial statements for 2019-20 (Output 1.4).¹²⁷ It should be noted that total expense in Output 1.4 include the JACSD's allocated overheads.

C.3 Capital Works

The following capital works projects are still ongoing.

Capital Project	Original Completion Date	Revised completion Date	Original Project Value	Revised Project Value	2019-2020 Expenditure	Commentary
More support for families and inclusion More resources for the Director of Public Prosecutions	Jun-20	Dec-20	\$100,000	0	\$62,317	Work in progress
Screwdriver Ready Project 1	Jun-20		\$625,000	0	\$625,000	Phase 1 completed

Contact details capital works officer:

Mercy Wilkie
Office Manager
Phone: 02 6207 5399

¹²⁷ Refer to C.6 (Statement of Performance) on page 115.

C.4 Asset Management

The ODPP is located in the Reserve Bank building, adjacent to the Supreme Court and Magistrates Court buildings. The location is strategic being in close proximity to where the Office conducts most of its business.

90 staff occupied a total floor space of 1,591m². The current utilisation rate is 17.67m² per employee which is a slight decrease from 17.8m² in the last period. The utilisation rate is based on a benchmark of 15m² per employee. Factors relevant to the utilisation rate include the need to provide facilities such as witness interview rooms, waiting rooms for vulnerable witnesses, a conference room, the criminal law resource centre, areas for professional staff undertaking sensitive and confidential work, and areas for confidentially dealing with acutely personal and intimate issues.

Energy reduction opportunities are limited due to the building being leased. However, strategies for reducing energy consumption are being pursued wherever possible.

The assets of the Office are mainly comprised of the Office fit out (partitioning and cabling) and the criminal law resource centre. Total replacement costs are estimated at \$2m.

C.5 Government Contracting

For year ending 30 June 2020, the following suppliers of goods, services and works with a value greater than \$25,000 were undertaken.

Output Class	Name of Contractor	Description or Reason for Contract	Expenditure 2019-20	Date services commenced	Procurement Type
1.4	Thomson Reuters	Research Resources	\$61,833.00	01 July 2019	Single Select
	Itec Pty Ltd	Case Management System	\$50,000.00	01 July 2019	Single Select

C.6 Statement of Performance

The following is extracted from the JACSD's audited financial statements for the financial year:

Output Class 1 Justice Services - Output 1.4 Public Prosecutions

Description: Prosecution of summary and indictable matters, at first instance and on appeal, provision of assistance to the Coroner, and provision of witness assistance services.

	2019-20 Original Target	2019-20 Amended Target	2019-20 Actual	YTD Variance
Total Cost (\$'000)	15,071		14,092	(6%)
Controlled Recurrent Payments (\$,000)	13,860		13,613	(2%)
Accountability Indicators	80%		79%	1%
(a) Percentage of cases where court timetable is met in accordance with Courts' rules				
(b) Average cost per matter finalised	\$3,000		\$2,792	7%

Variations given are from amended targets (where present) or from original targets (where no amended target exists).

D. Territory Records

The ODPP has a current Records Management Program (“the Program”) that has been approved by the Director. A copy has been provided to the Director of Territory Records. Records Management Procedures have been created and implemented throughout the Office in accordance with the Program. Appropriate training and resources are available to staff throughout the Office to put the Program into effect.

Pursuant to section 19 of the *Territory Records Act 2002*, the Director of Territory Records approved the Records Disposal Schedule - Public Prosecution Records for the Office. Refer to *Territory Records (Records Disposal Schedule – Public Prosecutions Records) Approval 2018 (No 1)* being Notifiable Instrument NI2018—710, effective 14 December 2018.

The ODPP’s policy and procedures include specific arrangements for preserving records containing information that may allow people to establish links with their ATSI heritage. The Office is working on improving the process for established links via CASES.

The Office has responded to the commencement of Part 3 of the *Territory Records Act 2002* which refers to ‘accessing an agency’s records’. Nevertheless, the Director of Territory Records has not made any section 28 declaration under Part 3 of the *Territory Records Act 2002*. The section 28 declaration is in relation to the application of the provisions of the FOI Act.

E. Appendices

Appendix A

Pursuant to section 12(4) of the *Director of Public Prosecutions Act 1990* the Annual Report must include a copy of each direction or guideline given by the Director pursuant to section 12 of the Act that is in force at the end of the reporting period. This appendix includes the Prosecution Policy of the Australian Capital Territory.

Prosecution Policy of the Australian Capital Territory

1 Introduction

- 1.1 On 1 July 1991 the *Director of Public Prosecutions Act 1990* (the Act) came into effect. It established an Office of the Director of Public Prosecutions (DPP) controlled by the Director of Public Prosecutions (the Director) for the Australian Capital Territory.
- 1.2 The Act ensures the effective removal of the prosecution process from the political arena by affording the Director an independent status in that process. While under section 20 of the Act the Attorney-General may give directions or furnish guidelines to the Director in relation to the performance or exercise by the Director of his or her functions or powers, such a direction or guideline must be of a general nature and must not refer to a particular case. Further, the Attorney-General must not give a direction or furnish a guideline unless he or she has consulted with the Director. Any such direction or guideline is a notifiable instrument and must be presented to the Legislative Assembly.
- 1.3 The Act also ensures that the prosecutor's role will be independent of police and other investigative agencies. Of course, in practice, there will need to be cooperation and consultation between the respective bodies. Nonetheless, once an investigation has culminated in a prosecution, any decision as to whether or not it should proceed will be made independently by the DPP. In the ACT that independence extends to summary prosecutions as well.
- 1.4 The Director's functions are also carried out independently of the courts: as the High Court has said, "*our courts do not purport to exercise control over the institution or continuation of criminal proceedings, save where it is necessary to do so to prevent an abuse of process or to ensure a fair trial*".
- 1.5 The purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a court what the prosecution considers to be credible evidence relevant to what is alleged to be a crime. Accordingly, prosecutors have strikingly been called "ministers of justice". A prosecutor represents the community: as Deane J has observed, he or she must "*act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one*".

- 1.6 Although the role of the prosecutor excludes any notion of winning or losing, the prosecutor is entitled to present the prosecution's case firmly, fearlessly and vigorously, with, it has been said "*an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings*".
- 1.7 Further, the prosecution's right to be treated fairly must not be overlooked. Indeed, in the Australian Capital Territory, the *Human Rights Act 2004*, provides that everyone - the accused, members of the community and victims of crime - has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- 1.8 The ACT is a human rights compliant jurisdiction, and all staff of the DPP must be mindful of the principles underlying the *Human Rights Act* and its purpose, as they conduct the business of the DPP. In particular they are responsible for respecting, protecting and promoting the human rights that are set out in that Act.
- 1.9 This policy is not intended to cover every conceivable situation which may be encountered during the prosecution process. Prosecutors must seek to resolve a wide range of issues with judgment, sensitivity and common sense. It is neither practicable nor desirable too closely to fetter the prosecutor's discretion as to the manner in which the dictates of justice and fairness may best be served in every case.
- 1.10 From time to time, the Director may issue directions or furnish guidelines pursuant to section 12 of the Act. This policy supersedes the previous policy and guidelines and directions.

2 The Decision to Prosecute

General criteria

- 2.1 It is not the case that every allegation of criminal conduct must culminate in a prosecution. The decision to prosecute should not be made lightly or automatically but only after due consideration. An inappropriate decision to prosecute may mean that an innocent person suffers unnecessary distress and embarrassment. Even a person who is technically guilty may suffer undue hardship if, for example, he or she has merely committed an inadvertent or minor breach of the law. On the other hand, an inappropriate decision not to prosecute may mean that the guilty go free and the community is denied the protection to which it is entitled. It must never be forgotten that the criminal law reflects the community's pursuit of justice and the decision to prosecute must be taken in that context.
- 2.2 Further, the resources available for prosecution are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue, with appropriate vigour, those cases worthy of prosecution.

- 2.3 Whilst a number of general principles may be articulated, it is not possible to reduce such an important discretion to a mere formula. Plainly, the demands of fairness and consistency will be important considerations, but the interests of the victim, the accused and the general public must all be taken into account. (In this context the term “the accused” includes an alleged offender, a defendant and an accused.)
- 2.4 The decision to prosecute can be understood as a two-stage process. First, does the evidence offer reasonable prospects of conviction? If so, is it in the public interest to proceed with a prosecution?
- 2.5 The initial consideration will be the adequacy of the evidence. A prosecution should not be instituted or continued unless there is reliable evidence, duly admissible in a court of law, that a criminal offence has been committed by the person accused. This consideration is not confined to a technical appraisal of whether the evidence is sufficient to constitute a prima facie case. The evidence must provide reasonable prospects of a conviction. If it is not of sufficient strength any prosecution would be unfair to the accused and a waste of public funds.
- 2.6 The decision as to whether there is a reasonable prospect of a conviction requires an evaluation of how strong the case is likely to be when presented in Court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact. The prosecutor should also have regard to any lines of defence which are plainly open to or have been indicated by the accused, and any other factors which are properly to be taken into account and could affect the likelihood of a conviction.
- 2.7 The factors which need to be considered will depend upon the circumstances of each individual case. Without purporting to be exhaustive they may include the following:
- (a) Are the witnesses available and competent to give evidence?
 - (b) Do they appear to be honest and reliable?
 - (c) Do any appear to be exaggerating, defective in memory, unfavourable or friendly towards the accused, or otherwise unreliable?
 - (d) Do any have a motive for being less than candid?
 - (e) Are there any matters which may properly form the basis for an attack upon the credibility of a witness?
 - (f) What impressions are the witnesses likely to make in court, and how is each likely to cope with cross-examination?
 - (g) If there is any conflict between witnesses, does it go beyond what might be expected; does it give rise to any suspicion that one or both versions may have been concocted; or conversely are the versions so identical that collusion should be suspected?
 - (i) Are there any grounds for believing that relevant evidence is likely to be excluded as legally inadmissible or as a result of some recognised judicial discretion?

- (j) Where the case is largely dependent upon admissions made by the accused, are there grounds for suspecting that they may be unreliable given the surrounding circumstances?
- (k) If identity is likely to be an issue, is the evidence that it was the accused who committed the offence sufficiently cogent and reliable?
- (l) Where several accused are to be tried together, is there sufficient evidence to prove the case against each of them?

2.8 If the assessment leads the prosecutor to conclude that there are reasonable prospects of a conviction, he or she must then consider whether it is in the interest of the public that the prosecution should proceed. In many cases the interests of the public will only be served by the deterrent effect of an appropriate prosecution. Mitigating factors may always be put forward by an offender when the court is considering the appropriate sentence to be imposed, and it will usually be appropriate that they be taken into account only in that manner. Generally, the more serious the offence the more likely it will be that the public interest will require that a prosecution be pursued.

2.9 Nevertheless, the Director is invested with significant discretion, and, in appropriate cases, must give serious consideration to whether the public interest requires that the prosecution be pursued. Many factors may be relevant to the public interest, and the weight which should be accorded to them will depend upon the circumstances of each case. Without purporting to be exhaustive those factors may include the following:

- (a) the seriousness or, conversely, the triviality of the alleged offence;
- (b) whether it is of a “technical” nature only;
- (c) any mitigating or aggravating circumstances;
- (d) the youth, age, physical health, mental health or special vulnerability of the accused, a witness or victim;
- (e) the antecedents and background of the accused;
- (f) the staleness of the alleged offence;
- (g) the degree of culpability of the accused in relation to the offence;
- (h) the effect on public order and morale;
- (i) the obsolescence or obscurity of the law;
- (j) whether the prosecution would be perceived as counterproductive, for example, by bringing the law into disrepute;
- (k) the availability and efficacy of any alternatives to prosecution;
- (l) the prevalence of the alleged offence and need for deterrence, both personal and general;
- (m) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
- (n) whether the alleged offence is of considerable public concern;

- (o) any entitlement of a person or body to criminal compensation, reparation or forfeiture if prosecution action is taken;
- (p) the actual or potential harm occasioned to any person as a result of the alleged offence,
- (q) the attitude of the victim of the alleged offence to a prosecution;
- (r) the need to give effect to regulatory priorities;
- (s) the likely length and expense of a trial;
- (t) whether the accused is willing to cooperate in the investigation or prosecution of others, or the extent to which he or she has already done so;
- (u) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
- (v) whether the alleged offence is triable only on indictment; and
- (w) the need to maintain public confidence in such basic institutions as parliament and the courts.

2.10 Plainly the decision to prosecute must **not** be influenced by:

- (a) the race, ethnic origin, social position, marital status, sexual preference, sex, religion or political associations or beliefs of the accused or any other person involved (unless they have special significance to the commission of the particular offence or should otherwise be taken into account as a matter of fairness to the accused);
- (b) any personal feelings concerning the alleged offender or victim;
- (c) any political advantage, disadvantage or embarrassment to the government or any political group or association; or
- (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

Prosecution of juveniles

2.11 Special considerations apply to the prosecution of juveniles. In this context a juvenile is a child (a person who is under 12 years old) or a young person (a person who is 12 years old or older, but not yet an adult). The best interests of the juvenile must always be considered. Juveniles should be encouraged to accept responsibility for their behaviour, and should be dealt with so as to provide them with the opportunity to develop in socially responsible ways. Prosecution of a juvenile must always be regarded as a severe step. Generally, a much stronger case can be made for methods of disposal which fall short of prosecution unless the seriousness of the alleged offence or the circumstances of the juvenile concerned dictate otherwise. In this regard, ordinarily the public interest will not require the prosecution of a juvenile who is a first offender in circumstances where the alleged offence is not serious.

2.12 Different considerations may apply in relation to traffic offences where infringements may endanger the lives of the young driver and other members of the community.

- 2.13 In deciding whether or not the public interest warrants the prosecution of a juvenile regard should be had to such of the factors set out in paragraph 2.9 as appear to be relevant and to the following matters:
- (a) the seriousness of the alleged offence;
 - (b) the age, apparent maturity and mental capacity of the juvenile;
 - (c) the available alternatives to prosecution and their likely efficacy;
 - (d) the sentencing options available to the court if the matter were to be prosecuted;
 - (e) the family circumstances of the juvenile particularly whether those with parental responsibility appear willing and able to exercise effective discipline and control over the juvenile;
 - (f) the juvenile's antecedents including the circumstances of any previous cautions that he or she may have been given; and
 - (g) whether a prosecution would be likely to have an unduly harsh effect on the juvenile or otherwise be inappropriate, having regard to such matters as the vulnerability of the juvenile and his or her family circumstances.
- 2.14 Under no circumstances should a juvenile be prosecuted solely to secure access to the welfare powers of the court.

Prosecution of Corporations

- 2.15 As a general rule a reference in an Act to a person includes a reference to a corporation as well as an individual. Consequently, a corporation may be liable for any criminal offence except those that by their very nature cannot be committed by an artificial entity, for example sexual offences. From time to time the question arises whether it will be appropriate for a corporation to be charged with an offence, instead of, or as well as, an individual.
- 2.16 A thorough enforcement of the criminal law against corporate offenders, where appropriate, will have a deterrent effect, protect the public, and support ethical business practices. Prosecuting corporations, where appropriate, will capture the full range of criminality involved and thus lead to increased public confidence in the criminal justice system. Prosecution of a corporation should not be seen as a substitute for the prosecution of criminally culpable individuals such as directors, officers, employees, or shareholders. Prosecuting such individuals provides a strong deterrent against future corporate wrongdoing. Equally, when considering prosecuting individuals, it is important to consider the possible liability of the company where the criminal conduct is for corporate gain.
- 2.17 As a general rule it is best to have all connected offenders - corporate and individual -prosecuted together at the same time.
- 2.18 There will be occasions when it will be appropriate to charge a natural person with being an accessory to an offence committed by a corporation, notwithstanding that there is no charge against the corporation itself. The situations where this might be appropriate may

include where the corporation has ceased to exist, or is in administration, liquidation or receivership.

- 2.19 It should be noted that the fact that a corporation is insolvent will not of itself preclude the prosecution of the corporation.
- 2.20 In deciding whether the prosecution of a corporation is required in the public interest, without purporting to be exhaustive, the public interest factors at paragraph 2.9 and those set out below may be relevant. The weight which should be accorded to them will depend upon the circumstances of each case:
- (a) a history of similar conduct (including prior criminal and regulatory enforcement actions against it), and conversely, the lack of such a history;
 - (b) whether the corporation had been previously subject to warnings, sanctions or criminal charges and had nonetheless failed to take adequate action to prevent future unlawful conduct, or had continued to engage in the conduct;
 - (c) whether the corporation's board of directors or a high managerial agent of the corporation engaged in the conduct or authorised or permitted the commission of the alleged offence;
 - (d) whether the conduct alleged is part of, or was encouraged or tolerated by, an existing corporate culture within the corporation;
 - (e) the failure of the corporation to create and maintain a corporate culture requiring compliance with the contravened law, or conversely, the existence of a genuinely proactive and effective corporate culture encouraging compliance;
 - (f) the failure of the corporation to provide adequate systems for giving relevant information to relevant people in the corporation;
 - (g) failure to report wrongdoing within a reasonable time of the offending coming to light;
 - (h) a genuinely proactive approach adopted by the corporate management team involving self-reporting and remedial actions, including the compensation of victims;
 - (i) the availability of alternative civil or regulatory remedies that are likely to be effective and more proportionate;
 - (j) whether the offending represents isolated actions by individuals, for example by a rogue director;
 - (k) the fact that the offending is not recent in nature, and the corporation in its current form is effectively a different body to that which committed the offences;
 - (l) whether the corporation is in administration, liquidation or receivership.

Discontinuing a prosecution

- 2.21 Generally the considerations relevant to the decision to prosecute set out above will also be relevant to the decision to discontinue a prosecution. The final decision as to whether a prosecution proceeds rests with the Director. However, wherever practicable, the views

of the police (or other referring agency) and the views of the victim will be sought and taken into account in making that decision. Of course, the extent of that consultation will depend on the circumstances of the case in question, and in particular on the reasons why the Director is contemplating discontinuing the prosecution. It will be for the Director to decide on the sufficiency of evidence. On the other hand, if discontinuance on public interest grounds is contemplated, the views of the police or other referring agency, and the views of the victim will have greater relevance.

3 Other Decisions in the Prosecution Process

Choice of Charges

- 3.1 In many cases the evidence will disclose conduct which constitutes an offence against several different laws. Care must be taken to choose charges which adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will enable the court to impose a sentence commensurate with the gravity of the conduct. It will not normally be appropriate to charge a person with a number of offences in respect of the one act but in some circumstances it may be necessary to lay charges in the alternative.
- 3.2 The charges laid will usually be the most serious available on the evidence. However, it is necessary to make an overall appraisal of such factors as the strength of the evidence, the probable lines of defence to a particular charge and whether or not trial on indictment is the only means of disposal. Such an appraisal may sometimes lead to the conclusion that it would be appropriate to proceed with some other charge or charges.
- 3.3 The provisions of a specific Act should normally be relied upon in preference to the general provisions of the *Crimes Act or Criminal Code* unless such a course would not adequately reflect the gravity of the criminal conduct disclosed by the evidence.
- 3.4 There is a particular need for restraint in relation to conspiracy charges. Whenever possible, substantive charges should be laid reflecting the offences actually committed as a consequence of the alleged conspiracy. However, there are occasions when a conspiracy charge is the only one which is adequate and appropriate on the available evidence. Where conspiracy charges are laid against a number of accused jointly it is important to give due consideration to any risk that a joint trial may be unduly complex or lengthy or may otherwise cause unfairness to one or more of the accused.
- 3.5 Under no circumstances should charges be laid with the intention of providing scope for subsequent charge negotiation.

Mode of trial

- 3.6 Summary disposition usually provides the speediest and most efficient disposition of justice. In relation to some indictable offences, the prosecution has the power to elect whether those matters are dealt with summarily. In other cases the consent of the prosecution may be required before an indictable matter can be dealt with summarily.

- 3.7 In making the election or giving or withholding consent for summary disposal, each case is to be considered on its merits. The over-riding consideration is to achieve justice. The principal matter to be considered will be whether in the circumstances the Magistrates Court can adequately deal with the matter should it proceed to sentence. In turn, that will depend on:
- › the nature and circumstances of the alleged offending;
 - › any other matters that a court would have to consider in sentencing the alleged offender, were the offence to be proved; and
 - › the criminal history if any of the alleged offender.
- 3.8 Other factors to be considered are:
- › whether the alleged offence is part of a series of related alleged offences, and if so whether it is appropriate to deal with those alleged offences summarily;
 - › whether there are any co-offenders of the alleged offender, and if so whether it is appropriate for the alleged offender to be dealt with together with the co-offenders; and
 - › any delay, increased costs or adverse effects upon witnesses likely to be occasioned by proceeding on indictment.
- 3.9 Under no circumstances will the election be made, or consent given or withheld, for tactical reasons.

Consent to prosecution

- 3.10 The Director has been authorised to give consent to the prosecution of a number of offences. This is to ensure that prosecutions are not brought in inappropriate circumstances. The reason for the requirement for consent is a factor which should be taken into account in deciding whether to prosecute. For example, consent may be required to ensure that mitigating factors are taken into account, or to prevent prosecutions in trivial matters. In such cases the question of consent is really bound up in the decision whether to prosecute. Other cases may involve a use of the criminal law in sensitive or controversial areas, such as conspiracy, or may involve important considerations of public policy, such as administration of justice offences.

Charge negotiation

- 3.11 Charge negotiation involves negotiations between the defence and the prosecution in relation to the charges to be proceeded with. Such negotiations may result in the accused pleading guilty to a fewer number of charges, or to a less serious charge or charges, with the remaining charges either being not being proceeded with or being taken into account on a schedule. It may also result in agreement for matters to be dealt with summarily. In some cases it may involve agreement about the content of the statement of facts to be put before the court.

- 3.12 There are obvious benefits to the criminal justice system from a plea of guilty. The earlier it is achieved, the greater will be the benefits accruing to the accused, the victim, witnesses and the community. Accordingly, negotiations between the defence and the prosecution are to be encouraged. They may occur at any stage and may be initiated by the prosecution or the defence. Charge negotiations must be based on principle and reason, and not on expediency. A clear record of the negotiations must be kept in the interests of transparency and probity.
- 3.13 A plea of guilty may be accepted following appropriately authorised plea negotiations if the public interest is satisfied on consideration of the following matters:
- (a) whether the plea reasonably reflects the essential criminality of the conduct and provides an adequate basis for sentencing;
 - (b) whether it will save a witness, particularly a victim or other vulnerable witness from the stress of testifying in a trial;
 - (c) the desirability of prompt and certain dispatch of the case;
 - (d) the need to avoid delay in the dispatch of other pending cases;
 - (e) the time and expense involved in a trial and any appeal proceedings;
 - (f) any deficiencies in the available evidence;
 - (g) in cases where there has been a financial loss to any person, whether the defendant has made restitution or arrangements for restitution;
 - (h) the views of the police or other referring agency; and
 - (i) the views of the victim, where those views are available and if it is appropriate to take those views into account.
- 3.14 An alternative plea will not be considered where its acceptance would produce a distortion of the facts and create an artificial basis for sentencing, where facts essential to establishing the criminality of the conduct would not be able to be relied upon, or where the accused asserts or intimates that he or she is not guilty of an offence to which he or she is offering to plead guilty.
- 3.15 Sentencing of offenders is a matter for the court. It is not to be the subject of agreement or purported agreement between the prosecution and defence.

Jury selection

- 3.16 In exercising the right to challenge or stand aside prospective jurors the prosecution must not attempt to select a jury which is not representative of the community including as to age, sex, ethnic origin, marital status or economic or social background.

Retrials

- 3.17 Where a trial has ended without a verdict, prompt consideration should be given to whether or not a retrial is required. Factors to be considered include:
- (a) the reason the trial ended, that is, whether the jury was unable to agree or other reason;

- (b) whether or not another jury would be in any better or worse position to reach a verdict;
 - (c) the seriousness of the alleged offence;
 - (d) the cost to the community;
 - (e) the cost to the accused;
 - (f) whether the accused has spent time in custody;
 - (g) the views of the victim.
- 3.18 Where two juries have been unable to agree upon a verdict, a third or additional trial will be directed only in exceptional circumstances.

Sentence

- 3.19 The prosecution has an active role to play in the sentencing process.
- 3.20 As the High Court has said, a prosecutor should draw to the attention of the court what are submitted to be the facts that should be found, the relevant principles that should be applied and what has been done in other (more or less) comparable cases. It is not the role of the prosecutor to proffer some statement of the specific result he or she considers should be reached, or a statement of the bounds within which that result should fall.
- 3.21 If it appears there is a real possibility that the court may make a sentencing order that would be inappropriate and not within a proper exercise of the sentencing discretion, the prosecutor may make submissions on that issue. This will be particularly so if, where a custodial sentence is appropriate, the court is contemplating a non-custodial penalty, or where a conviction is appropriate, the court is contemplating a non-conviction order.
- 3.22 Where facts are asserted on behalf of an accused which are contrary to the prosecutor's instructions or understanding, the prosecutor should press for a trial of the disputed issues, if the resolution of such disputed facts is in the interests of justice or is material to sentence.
- 3.23 Co-operation by convicted persons with law enforcement agencies should be appropriately acknowledged and, if necessary, tested at the time of sentencing. On no occasion will it be appropriate for material such as police testimony as to an accused's assistance to authorities, to be handed directly to the court. Such material should be given to the prosecutor and tendered to the court by the prosecutor at the prosecutor's discretion.
- 3.24 Where an offender is unrepresented, the prosecutor should, as far as practicable, assist the court by putting all known relevant matters before the court, including such matters as may amount to mitigation.
- 3.25 A prosecutor should not in any way fetter the discretion of the Director to appeal against the inadequacy of a sentence (including by informing the court or an opponent whether or not the Director would, or would be likely to, appeal, or whether or not a sentence imposed is regarded as appropriate and adequate).

4 Disclosure

- 4.1 The prosecution is under a continuing obligation to make full disclosure to the accused in a timely manner of all material known to the prosecution which can be seen on a sensible appraisal by the prosecution:
- › to be relevant or possibly relevant to an issue in the case;
 - › to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; or
 - › to hold out a real as opposed to fanciful prospect of providing a lead to evidence which goes to either of the previous two matters.
- 4.2 The prosecution is also under a duty to disclose to the defence information in its possession which is relevant to the credibility or reliability of a prosecution witness, for example:
- › a relevant previous conviction or finding of guilt;
 - › a statement made by a witness which is inconsistent with any prior statement of the witness;
 - › a relevant adverse finding in other criminal proceedings or in non-criminal proceedings;
 - › evidence before a court, tribunal or Royal Commission which reflects adversely on the witness;
 - › any physical or mental condition which may affect reliability;
 - › any concession which has been granted to the witness in order to secure the witness's testimony for the prosecution.
- 4.3 The prosecution must fulfil its duty of disclosure as soon as reasonably practicable. The prosecution's duty of disclosure continues throughout the prosecution process and any subsequent appeal.
- 4.4 In fulfilling its disclosure obligations the prosecution must have regard to the protection of the privacy of victims and other witnesses. The prosecution will not disclose the address or telephone number of any person unless that information is relevant to a fact in issue and disclosure is not likely to present a risk to the safety of any person.
- 4.5 The prosecution duty of disclosure does not extend to disclosing material:
- › relevant only to the credibility of defence (as distinct from prosecution) witnesses;
 - › relevant only to the credibility of the accused;
 - › relevant only because it might deter an accused from giving false evidence or raising an issue of fact which might be shown to be false; or
 - › for the purpose of preventing an accused from creating a forensic disadvantage for himself or herself, if at the time the prosecution became aware of the material it was not seen as relevant to an issue in the case or otherwise disclosable.

- 4.6 The prosecution may refuse to disclose material on the grounds of public interest immunity or legal professional privilege.
- 4.7 Where material has been withheld from disclosure on public interest grounds, the defence should be informed of the claim of immunity and the basis for the claim in general terms unless to do so would reveal that which it would not be in the public interest to reveal. In some cases it will be sufficient to delay rather than withhold disclosure. For example if disclosure might prejudice ongoing investigations, disclosure could be delayed until after the investigations are completed.
- 4.8 Legal professional privilege will ordinarily be claimed against the production of any document in the nature of an internal DPP advice or opinion. Legal professional privilege will not be claimed in respect of any record of a statement by a witness that is inconsistent with that witness's previous statement or adds to it significantly, including any statement made in conference and any victim impact statement, provided the disclosure of such records serves a legitimate forensic purpose.
- 4.9 The duty on the prosecution to disclose material to the accused imposes a concomitant obligation on the police and other investigative agencies to notify the prosecution of the existence and location of all such material. If required, in addition to providing the brief of evidence, the police or other investigative agency shall certify that the prosecution has been notified of the existence of all such material.

5 **The Unrepresented Accused**

- 5.1 Particular care must be exercised by a prosecutor in dealing with an accused without legal representation. The basic requirement, while complying in all other respects with this policy, is to ensure that the accused is properly informed of the prosecution case so as to be equipped to respond to it, while the prosecutor maintains an appropriate detachment from the accused's interests.
- 5.2 So far as practicable, oral communications with an unrepresented accused should be witnessed. Communications should be promptly noted in all cases. A record should be maintained of all information and material provided to an unrepresented accused. Prosecutors may also, where appropriate, communicate with the accused through the court.
- 5.3 A prosecutor has a duty to ensure that the trial judge gives appropriate assistance to the unrepresented accused.
- 5.4 While a prosecutor has a duty of fairness to an accused, it is not a prosecutor's function to advise an accused about legal issues, evidence, inquiries and investigations that might be made, possible defences, or the conduct of the defence.

6. Private Prosecutions

- 6.1 Not all prosecutions are initiated by police officers or other officials acting in the course of their public duty. The right of a private individual to institute a prosecution has been described as “*a valuable constitutional safeguard against inertia or partiality on the part of authority*”. Nevertheless, the right is open to abuse and to the intrusion of improper personal or other motives. Further, there may be considerations of public policy why a private prosecution, although instituted in good faith, should not proceed, or at least should not be allowed to remain in private hands. Consequently, section 8 of the Act enables the Director to take over the conduct of prosecutions initiated by another person. Thereafter the prosecution may be continued or brought to an end.
- 6.2 Section 13 of the Act provides that where the Director has taken over the conduct of a private prosecution or is considering doing so the informant must provide to the Director a full report of the circumstances giving rise to the prosecution together with copies of the statements of any witnesses and other documentary evidence, and furnish any further information the Director requires. In addition, section 14 enables the Director to seek police assistance in investigating the matter. These provisions enable a full assessment to be made of the prosecution case before any decision is made or, alternatively, after the matter has been taken over.
- 6.3 Given the large range of circumstances which may give rise to a private prosecution it is impracticable to lay down inflexible rules as to the manner in which the discretion will be exercised. In general, however, a private prosecutor will be permitted to retain the conduct of the proceedings unless:
- (a) there is insufficient evidence to justify the continuation of the prosecution, that is to say, there is no reasonable prospect of a conviction being secured on the available evidence;
 - (b) the prosecution is not in the public interest;
 - (c) there are reasons for suspecting that the decision to institute a private prosecution was actuated by improper motives or otherwise constituted an abuse of the prosecution process; or
 - (d) it would not be in the interests of justice for the conduct of the prosecution to remain within the discretion of a private individual having regard to the gravity of the offence and all the surrounding circumstances.
- 6.4 Where a private prosecution is instituted to circumvent an earlier decision of the Director not to proceed with a prosecution for the same offence, it will usually be appropriate to take over the prosecution with a view to bringing it to an end.

7. Undertaking That A Person Will Not Be Prosecuted

- 7.1 The Director has a power under the Act to give an undertaking that a person will not be prosecuted for a specified offence or in respect of specified acts or omissions. Where such an undertaking has been given, no proceedings may subsequently be instituted in

respect of the offence or conduct so specified. The undertaking may be given subject to such conditions (if any) as the Director considers appropriate.

- 7.2 In principle it is desirable that the criminal justice system should operate without the need to grant any concessions to persons who have participated in the commission of offences or who have guilty knowledge of their commission. It is obviously a grave step to grant, in effect, immunity from prosecution to someone apparently guilty of a serious offence. However it has long been recognised that exceptional cases do arise in which the interests of justice demand that such a course be pursued.
- 7.3 As a general rule an accomplice should be prosecuted irrespective of whether he or she is to be called as a witness, subject of course to the usual evidentiary and public interest considerations being satisfied. If tried and convicted or acquitted with respect to the offences in issue, the person will then be a compellable witness for the prosecution, without the need for the issuing of an undertaking. Upon pleading guilty the accomplice who is prepared to co-operate in the prosecution of another can expect to receive a substantial reduction in the sentence that would otherwise have been appropriate.
- 7.4 The central issue in deciding whether to give an accomplice an undertaking under the Act is whether it is in the overall interests of justice that the opportunity to prosecute the accomplice in respect of his or her own involvement in the crime in question should be foregone in order to secure that person's testimony in the prosecution of another. The factors to be considered include:
- (a) the importance of the evidence which may be obtained as a result of the undertaking;
 - (b) the extent of the criminal involvement of the person seeking the undertaking compared with that of the accused;
 - (c) whether the person seeking the undertaking has given a full and frank statement of his or her prospective evidence, including an acknowledgement of his or her own role in the offences in issue;
 - (d) the character, credibility and previous criminal record of the person concerned;
 - (e) whether any inducement has been offered to the person to give the evidence sought; and
 - (f) whether there is any other means of obtaining the evidence in question, including by granting the person a more limited undertaking such as under section 9(1) or section 9(4) of the Act.
- 7.5 Any undertaking given by the Director will generally be subject to the condition that the recipient of the undertaking will give evidence as and when called to do so, and that any evidence the person is called upon to give will be given truthfully, accurately and on the basis that the person will withhold nothing of relevance.
- 7.6 Requests for consideration of the giving of an undertaking will usually come from the police. Where such a request is made, the Director should be provided with a full copy of the brief of evidence against the principal offender, a copy of the brief or other material

against the proposed witness, a full and frank statement signed by the proposed witness, and a comprehensive report adverting to each of the standard indemnity criteria, as listed above. Given that undertakings will rarely be given, it is prudent for investigators to consult with the Director as soon as practicable if they intend requesting an undertaking for a potential witness in criminal activity under investigation.

- 7.7 Where an accomplice receives any concession from the Director in order to secure his or her evidence, for example, whether as to choice of charge, or the grant of an undertaking under the Act, the terms of the agreement or understanding between the prosecution and the accomplice should be disclosed to the court and to the defence.

8. **Victims of Crime**

- 8.1 In exercising their functions, the Director and all members of the staff of the DPP must have regard to the governing principles in the *Victims of Crime Act 1994*.
- 8.2 Victims are to be accorded sympathetic and dignified treatment. They have a right to information about the progress of investigations and the prosecution of the offender, including the charges and any modifications to the charges. A victim should be told about any decision not to proceed with a charge against the accused. Further, a victim should be told about the trial process and of the rights and responsibilities of witnesses, and be given an explanation of the outcome of criminal proceedings, including of any sentence and its implications. Victims must be informed of the outcome of finalised court proceedings in a timely fashion.
- 8.3 There should be concern for the safety and wellbeing of victims, including protecting them from unnecessary contact with the accused and defence witnesses during the course of a trial or hearing.
- 8.4 A number of agencies which exercise a function in the administration of justice are responsible for ensuring these principles are adhered to, including the DPP, police, and victim support agencies. Those agencies must work together in a complementary way.
- 8.5 Consideration must be given in the early stages of contact with the victim, and/or their families, to involvement in the case by the witness assistance service of the DPP. In all appropriate cases, victims should be advised of the service and where necessary referred to it.
- 8.6 Victims may make victim impact statements pursuant to Part 4.3 of the *Crimes (Sentencing) Act 2005*. Prosecutors should ensure that the opportunity to prepare an adequate victim impact statement has been given, and that when one is prepared it contains relevant material to assist the court in the sentencing process. They must also ensure that victims are aware of their right to present the statement as a written statement or a statement given orally in court.

9. **Publication of Reasons**

- 9.1 Where the Director decides to exercise the power conferred by the Act to decline to proceed further with a prosecution, reasons may be given to any enquirer with a legitimate interest in the matter. For example, the person said to be the victim of the alleged offence or those responsible for the investigation will normally be informed. It is acknowledged that the community through the media have a legitimate interest in the administration of justice and where a person has been publicly committed for trial there will generally be no objection to the reasons for any decision not to proceed with such a trial being made public.
- 9.2 However reasons will not be given where to do so might give rise to further harm or serious embarrassment to a victim, a witness or to the accused, or where such a step might significantly prejudice the administration of justice. Similarly, even where reasons are given it may be necessary to limit the amount of detail disclosed. Under no circumstances will the Director engage in public debate concerning the reasons.
- 9.3 Reasons will not normally be given for a decision to discontinue proceedings before there has been any public hearing, because to do so would involve publishing allegations against members of the community in circumstances where there is insufficient evidence to substantiate them or, for some other reason, a prosecution would not be justified.

Appendix B

Director's Instruction No. 14.1 – Review of a Decision to Discontinue a Prosecution

Background

Under applicable instructions,¹²⁸ a decision to discontinue a prosecution or significantly amend a statement of facts must not be taken without first consulting the complainant (with child complainants, this includes the parent or guardian).

In relation to matters involving an identifiable victim, such consultations should take place unless there are compelling reasons not to do so.

It must be recognised that a decision to discontinue in particular a sexual offence is a matter of potentially great moment for a complainant. Specific rules apply therefore for discontinuing an entire proceeding involving an identifiable victim (as to which, see Director's Instruction 14.2 - Reviewable Decisions to Discontinue – Contact with Complainants, Review Processes and Auditing).

Procedure for review of a decision to discontinue

In such cases, if a decision to discontinue is in prospect, the prosecutor must not only consult the complainant but also advise the complainant that if they are dissatisfied with a decision to discontinue a matter, they can ask that the decision be reviewed by the DPP.

The procedure is:

- › The prosecutor consults the complainant and records their views.
- › If the complainant is opposed to the discontinuation of the matter, the prosecutor is to inform the complainant that, if a decision is made to discontinue, they may ask that the decision be reconsidered by the DPP.
- › The prosecutor prepares a recommendation on discontinuance to the Deputy Director or Assistant Director, which sets out all material matters including the views of the complainant.
- › If a decision is made to discontinue the matter, then a record of the decision and the reason for it is made.
- › If a complainant has indicated dissatisfaction with the decision, then the matter will be reviewed by the Director (this may be an automatic review or a review at request: see Director's Instruction 14.2 - Reviewable Decisions to Discontinue – Contact with Complainants, Review Processes and Auditing).
- › In reviewing the decision, the Director will take into account the views of the complainant, the reason for the decision and any other material matters that are relevant including any matters relevant from the brief of evidence.

¹²⁸ Director's Instruction No. 1: Discontinuing Prosecutions and significantly amending Statements of Facts in the Supreme Court; and Director's Instruction No. 2 - Causing prosecutions to be brought to an end and significantly amending statements of facts in the Magistrates Court.

Audit of compliance

A record must be taken of each of the steps in the process on the Record of Reviewable Decisions form (RORD). At the completion of each financial year a RORD audit will be conducted in relation to each matter discontinued in that year, to establish whether the procedure set out in this instruction has been complied with.

The audit will be undertaken by an audit committee appointed by the Director. The results of the audit will be published in the annual report of the Director for the year in question.

Appendix C

Director's Instruction No. 14.2 – Reviewable Decisions to Discontinue – Contact with Complainants, Review Processes and Auditing

Aim of Instruction

The purpose of this Instruction is to ensure compliance with recommendations 40-43 of the Royal Commission into Institutional Responses to Child Sexual Abuse (*Criminal Justice Report*, Parts III to VI, 2017):

DPP complaints and oversight mechanisms

40. *Each Australian Director of Public Prosecutions should:*

- a. *have comprehensive written policies for decision-making and consultation with victims and police*
- b. *publish all policies online and ensure that they are publicly available*
- c. *provide a right for complainants to seek written reasons for key decisions, without detracting from an opportunity to discuss reasons in person before written reasons are provided.*

41. *Each Australian Director of Public Prosecutions should establish a robust and effective formalised complaints mechanism to allow victims to seek internal merits review of key decisions.*

42. *Each Australian Director of Public Prosecutions should establish robust and effective internal audit processes to audit their compliance with policies for decision-making and consultation with victims and police.*

43. *Each Australian Director of Public Prosecutions should publish the existence of their complaints mechanism and internal audit processes and data on their use and outcomes online and in their annual reports.*

It must be recognised that a decision to discontinue in particular a sexual offence is a matter of potentially great moment for a complainant. Specific rules therefore apply for discontinuing an offence with an identifiable complainant.

This Instruction should also be read in line with:

- › **Decisions to Discontinue Prosecutions – Victims' Right of Review Director's Guideline***;
- › **The ACT DPP Prosecution Policy***;
- › **Director's Instruction No. 1:** Discontinuing prosecutions and significantly amending Statements of Facts in the Supreme Court*;
- › **Director's Instruction No. 2:** Causing prosecutions to be brought to an end and significantly amending statements of facts in the Magistrates Court and Children's Court*;

- › **Director’s Instruction No.7:** Charge negotiations in the Supreme Court*;
- › **Director’s Instruction No. 13:** Guidelines for contact with complainants in sexual offence matters*;
- › **Director’s Instruction No.14.1:** Review of a decisions to discontinue a prosecution*;
- › **Internal RORD Audit Form;** and
- › **Template:** email to complainant re right of review.

**These documents are available on the ODPP website.*

Application

This Instruction outlines the procedure to be followed when making a reviewable decision in a prosecution involving an identifiable complainant.

A **reviewable decision** means a decision to discontinue the entirety of a prosecution involving an identifiable complainant. This includes:

- › a decision to withdraw all charges or discontinue proceedings involving the complainant (including by filing a Notice Declining to Proceed Further in a Prosecution);
- › a decision to offer no evidence (NETO) in proceedings involving the complainant.

A reviewable decision does not include:

- › a decision to significantly amend a Statement of Facts;
- › a decision to reduce a charge/s to less serious charge/s, or to a fewer number of charges, in satisfaction of an indictment or information.

A reviewable decision does not include a decision not to bring proceedings involving a complainant. However, where the Office has provided an opinion to an investigative agency that no charge/s are to be laid in a matter, that opinion is a reviewable decision subject to the agency requesting a review in its own right, or on behalf of a complainant.

For the purposes of this Instruction, a complainant is a complainant in a prosecution conducted by the DPP, and also includes:

- › a close family member or partner of a deceased person in homicide cases; and
- › where appropriate the views of a child complainant should be sought directly, however if not appropriate, a parent or guardian of a child complainant.

After a reviewable decision has been made, there are two types of review process available:

- › review at request; or
- › automatic review.

A decision that is subject to **automatic review** means that the decision will be reviewed without requiring the complainant to request a review. A decision that is subject to **review at request** will be reviewed only when a request for review is made by the complainant, in accordance with this procedure.

The type of review process available depends on the charge for which the prosecution will be discontinued. If a decision is made to discontinue more than one charge, the review process available will be the one which applies to the most serious charge.

Type of prosecution	Type of review available
Homicide offence ¹²⁹	Automatic review
Sexual offence ¹³⁰	
Serious violent offence ¹³¹	
Less serious violent offence ¹³²	Review at request
Any other offence against an identifiable complainant named in the information	

Recommending a Discontinuance

1. Prosecutor with carriage of a matter considers that a reviewable decision should be made. This can be at own initiative, following defence representations, or a request by the complainant or informant.
2. Prosecutor fills out a **RORD** (Record of Reviewable Decisions) on CASES.

At this point, the prosecutor should contact the complainant to ascertain the complainant's views unless there are compelling reasons not to do so. If there are compelling reasons not to contact the complainant, these should be documented in the RORD.

Contact with the complainant may be made through the Witness Liaison Officer or the informant. A file note should be created and saved in Folder 22 on CASES, documenting contact with the complainant and recording their views. If the complainant is unable to be contacted, reasonable attempts at contacting them must be documented in the file note.

The prosecutor should not only consult the complainant, but also advise them that if they are dissatisfied with a decision to discontinue a matter they can ask that the decision be reconsidered by the DPP.

3. Prosecutor saves all supporting documentation for RORD into Folder 22 on CASES.
4. Prosecutor sends RORD to supervising lawyer:
 - › For FV offences – FV supervising lawyer;
 - › For sexual offences – SO supervising lawyer;
 - › For all other matters – supervising lawyer of team.

129 A 'homicide offence' includes any offence where the death of a person has occurred.

130 The offences listed in the *Evidence (Miscellaneous Provisions) Act 1991*, section 41.

131 The offences listed in the *Evidence (Miscellaneous Provisions) Act 1991*, section 40.

132 The offences listed in the *Evidence (Miscellaneous Provisions) Act 1991*, section 39.

5. Supervising lawyer records recommendation in RORD, and sends this document by email (copying in the prosecutor) to:
 - a. for strictly indictable matters¹³³ – the Deputy Director (or, if unavailable, the Assistant Director);
 - b. for summary/indictable matters, or summary-only matters¹³⁴ – the Assistant Director (or, if unavailable, the Deputy Director).
6. Deputy Director or Assistant Director records decision in RORD, including the reason/s for the decision.
7. Deputy Director or Assistant Director sends email to prosecutor and supervising lawyer, advising of decision and obligation on prosecutor to contact the complainant, informant, defence, court and witnesses in accordance with this Instruction.
8. If the decision is to proceed, the prosecutor must advise the informant and the complainant.
9. If the decision is to discontinue, and the decision is subject to automatic review, go to 'Reviewing a discontinuance'.
10. If the decision is to discontinue, and the decision is subject to review at request, the prosecutor must advise the informant and the complainant of the decision. First contact with the complainant should be made by phone, and a file note should be made of this conversation.

The prosecutor should explain to the complainant the reasons for the decision, as well as the right to seek a review. When giving reasons for the decision, the prosecutor should be mindful that the decision may be overturned on review. The prosecutor should ensure that any reasons given would not interfere with the conduct of a future trial, if it were to proceed.

Immediately after advising the complainant by phone, the prosecutor should send a follow-up email to the complainant. This email should set out the decision, the right to seek an internal review, how to apply for a review and how the review process works, including the right to seek written and oral reasons following review.

11. The file should be marked **SUBJECT TO REVIEW** on the front cover, and kept until the end of the review period. As far as possible, the prosecutor should refrain from communicating the decision to discontinue to the court or defence until the complainant has positively communicated that they will not request a review, or **7 days** have elapsed since the decision was communicated to the complainant.

133 See *Crimes Act 1900*, section 375.

134 See *Crimes Act 1900*, section 375 and *Legislation Act 2001*, section 190.

Reviewing a discontinuance

1. If the decision is subject to automatic review, go to step 3.
2. If the decision is subject to review at request, the complainant has 7 days to request a review of the decision from the time they were first informed of the decision.¹³⁵ The complainant may request a review either over the phone or by email.

The prosecutor should send an email to the complainant, acknowledging receipt of the request and advising of a timeframe for when the complainant will be notified of the outcome of review.

3. If the matter calls for an automatic review, or a review is requested in accordance with this Instruction, this must be brought to the attention of the Director¹³⁶ **as soon as possible**. The prosecutor should provide the Director with the CASES reference (with all relevant documentation saved therein) and a copy of the brief of evidence.
4. The Director has 7 days to review the decision (depending on the timeframe of the matter),¹³⁷ having regard to the documents saved on Folder 22 in CASES (including the file note documenting the complainant's views, the RORD and supporting documents and any request for review by complainant) and the brief of evidence. The decision will be considered in accordance with the Prosecution Policy.

The Director must consider the case afresh, by examining all the evidence and the views of the complainant, and forming an independent view of the sufficiency of the evidence, the prospects of conviction and the public interest considerations, before scrutinising the approach taken by the original decision-maker, including the reason/s for the decision.

The Director may ask police to obtain additional evidence or refer to legal authorities not considered by the original decision-maker.

5. Once the review is complete, the Director should record in the RORD whether the original decision is endorsed/not endorsed and notify the prosecutor and Deputy/Assistant Director of the outcome.
6. The prosecutor must then contact the complainant to explain the outcome of review. If the decision to discontinue is endorsed, the prosecutor should inform the complainant prior to informing the court, and should offer the complainant the right to both:
 - a. discuss the reasons for the decision with the Director in person (in the presence of a Witness Liaison Officer or support person, if desired); and

¹³⁵ Depending on the court timetable, this timeframe may be shorter. If the request is received outside of this timeframe, the prosecutor should immediately raise this with the Director for further consideration.

¹³⁶ If the Director is unavailable, the matter should be reviewed by either the Deputy Director or the Assistant Director, depending on who made the original decision.

¹³⁷ If a trial is listed to commence within 7 days of a decision to discontinue, the request for review must be made as soon as possible, as the timeframe for the review process will be shorter. In some cases, it may not be possible to review the decision before notice of the decision is communicated to the court. In those circumstances, the decision will still be reviewed by the Director, but the matter may not be able to be prosecuted.

- b. receive a letter containing the Director’s written reasons for the decision (which must be requested within **14 days** of the final decision being communicated to the complainant).¹³⁸
7. If written reasons are requested for the decision, the Director should:
 - a. Provide written reasons to the complainant within **14 days**;
 - b. Consult with any allocated Witness Liaison Officer prior to providing written reasons to the complainant;
 - c. Ensure that written reasons are not provided in circumstances where:
 - i. statutory or other restrictions prohibit or limit the release of such information;
 - ii. the giving of reasons may affect a related case (for example, the prosecution of a co-offender) which is before the court.
 - d. If the circumstances in 7(c) are present at the time of the request, the request should remain under active review, so that if and when the circumstances are no longer applicable, further consideration may be given to the provision of reasons at that time.
 8. Following the giving of reasons for the decision, the Witness Liaison Officer should follow up with the complainant to ensure that they are referred to agencies for further support as required.

Audit of compliance

A record must be made of each of the steps in the above process on the RORD. At the end of each financial year, an audit will be conducted in relation to reviewable decisions in that year, to establish whether the procedures set out in this Instruction have been complied with, and to target areas of non-compliance for future training and monitoring.

Auditing of compliance will be conducted based on the following records on CASES:

- › Document: RORD (Record of Reviewable Decisions) – Discontinuing a matter involving an identifiable complainant
- › Document: File note – complainant contact re discontinuance
- › Document: Email to complainant – right to review
- › Document: Letter providing reasons for discontinuance

It is therefore **crucial** that each of the above documents be saved and entered into CASES by the prosecutor, the Deputy Director / Assistant Director, and the Director.

The audit will be undertaken by an Audit Committee, appointed by the Director towards the end of the financial year. The Audit Committee should hold at least 3 meetings for the purpose of auditing reviewable decisions and recording compliance with the procedures set out in this Instruction.

¹³⁸ If the request is received outside of this timeframe, the prosecutor should immediately raise this with the Director for further consideration.

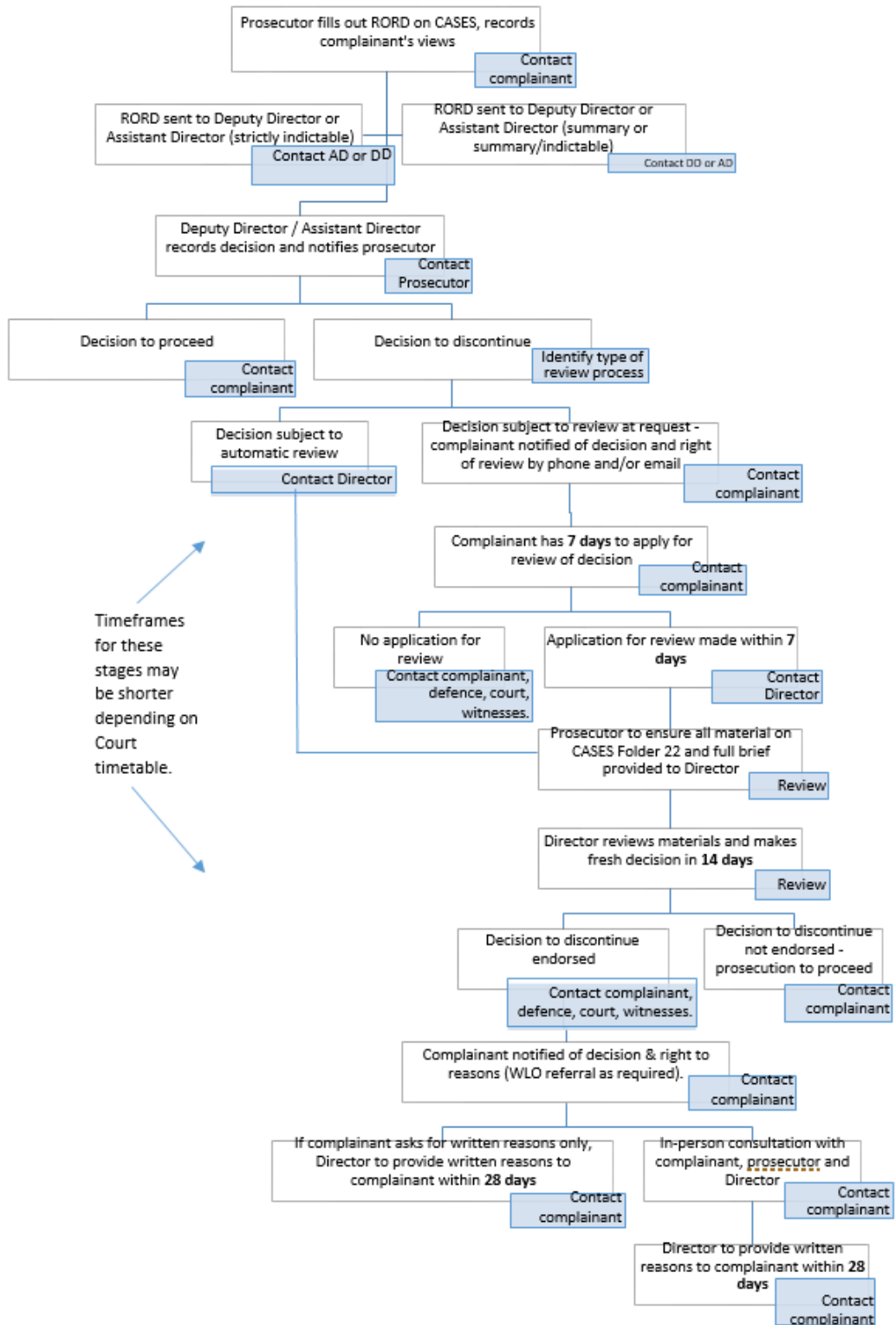
The results of the audit should be recorded on the 'Internal RORD Audit Form', which must be placed on the file. If, during the audit, it is discovered that the procedure undertaken in relation to a reviewable decision was not followed in accordance with this Instruction, the Audit Committee must review and consider the basis of that decision.

At the end of the financial year, the Audit Committee must provide copies of all completed Internal Audit Forms to the Director, and raise any areas of persistent non-compliance with the Director. The Audit Committee must also prepare a short annual report for the Director outlining relevant information, including:

- > the number of files audited;
- > the types of matters audited (e.g. 'sexual offence');
- > the level of compliance with the procedures in this Instruction;
- > a breakdown and summary of any compliance issues, and suggested measures for addressing those issues in the Office.

The results of the audit will be published in the annual report of the Director for the year in question.

Reviewable decisions flow-chart



Timeframes for these stages may be shorter depending on Court timetable.

Appendix D

Audit Report on Legal Compliance of Procedures Relating to Reviewable Decisions¹³⁹

Shane Drumgold SC
Director of Public Prosecutions, ACT

Pursuant to *Director's Instruction 14.2 on Reviewable Decisions*, an audit committee comprising myself, Tania O'Rourke and Melanie Blair, conducted an internal audit of the records of all reviewable decisions to discontinue prosecutions made between 1 July 2019 to 30 June 2020.

We conducted the audit in accordance with the requirements laid out in *Director's Instruction 14.2*. In performing our tests of compliance, we examined whether the procedures set out in *Director's Instruction 14.2* have been complied with.

The attached document, the *Record of Reviewable Decisions - Audit 2019-2020*,

- shows that there were 12 reviewable decisions in the financial year ended June 2020;
- describes the type of offences of these reviewable decisions;
- the level of compliance with the procedures in *Director's Instruction 14.2*,
- provides a breakdown and summary of any compliance issues; and
- proposed suggested measures for addressing those issues in the Office.

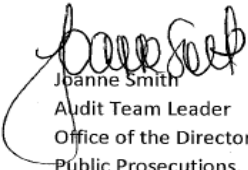
Our examination of these reviewable decisions against the relevant procedural steps in *Director's Instruction 14.2* disclosed an inconsistency in the *Director's Instruction* in terms of the actual timing for the audits to be carried out. The first paragraph of the section on *Audit of compliance* (page 8) states that at the completion of each financial year, an audit will be conducted in relation to reviewable decisions in that year. However, the fourth paragraph of this section provides that the Audit Committee should meet at least 3 times per financial year for the purpose of auditing reviewable decisions and recording compliance with procedures. This suggests that the audit is carried out over the course of the financial year. The Audit Committee has highlighted this irregularity to the Director and proposed that the *Audit of compliance* section of *Director's Instruction 14.2* be amended to not only address this error but provide more clarity on future audit exercises of reviewable decisions. [The relevant changes have since been made to *Director's Instruction 14.2*.]

This Audit Report is prepared solely for the purposes of the Office of the Director of Public Prosecutions' 2019-2020 Annual Report.

For the purposes of this Audit Report, the Audit Committee was appointed by the Director at the end of the 2019 - 2020 financial year on 23 July 2020, and held three separate meetings on 31 July 2020, 14 August 2020 and 8 October 2020 to conduct the required examination of documents against the relevant procedures in *Director's Instruction 14.2*.

8 October 2020

Date


Joanne Smith
Audit Team Leader
Office of the Director of
Public Prosecutions, ACT

¹³⁹ This audit report refers to the record of decisions that have been automatically reviewed by the ODPP over the financial year.

Appendix E

Record of Reviewable Decisions - Audit 2019-2020¹⁴⁰

No	Defendant	Cases no	Offence type	Compliance with <i>Director's Instruction 14.2</i>	Status of Prosecution	Additional comments
1	ASIKHIA, Ohio	201911915	Property and violent offences	Procedural steps laid out in <i>Director's Instruction 14.2</i> have been complied with in relation to this record of reviewable decision.	Prosecution did not proceed	The complainant was notified of the decision to not proceed and was in agreement with the outcome. She admitted she had lied in her statement and police believe she was remorseful for her actions.
2	[REDACTED]	201814244	Property and serious violent offences	Procedural steps laid out in <i>Director's Instruction 14.2</i> have been complied with in relation to this record of reviewable decision.	Prosecution did not proceed	The matter involves a number of co-defendants and different matters, some of which proceeded, and others are still ongoing. The complainant was not able to be contacted. He is extremely hostile and was only able to be spoken to by the prosecution in the first instance when he was arrested on a warrant.
3	EDET, Mkp-Uto	201912060	Sexual offences and assault offences	Procedural steps laid out in <i>Director's Instruction 14.2</i> have been complied with in relation to this record of reviewable decision.	Prosecution proceeded	The matter is still proceeding. The complainants have been kept updated and informed throughout the whole process.
4	[REDACTED]	201816153	Sexual assault offences	Procedural steps laid out in <i>Director's Instruction 14.2</i> have been complied with in relation to this record of reviewable decision.	Prosecution proceeded	The matter proceeded. The mother of the complainant was consulted with and advised of each step and decision.

¹⁴⁰ This is a record of decisions that have been automatically reviewed by the ODPP over the financial year.

5	GLAVINIC, Justin	201813683	Assault occasioning actual bodily harm and common assault offences	Procedural steps laid out in <i>Director's Instruction 14.2</i> have been complied with in relation to this record of reviewable decision.	Prosecution did not proceed	Victims were members of the AFP – they were informed of the decision and advised it would be followed up with a more formal response after the matters were all concluded.
6	MAYNE, Phillip	201912729	Inflict actual bodily harm with intent to engage in sexual intercourse, assault occasioning actual bodily harm, contravene family violence order	Procedural steps laid out in <i>Director's Instruction 14.2</i> have been complied with in relation to this record of reviewable decision.	Prosecution did not proceed	This was an automatic reviewable matter. Once the decision was made to not proceed with the matter, the victim was contacted and advised of the decision. The victim was also given the opportunity to discuss why the particular charge of assault occasioning actual bodily harm was not proceeding. The victim declined this option.
7	GODFREY, Benjamin	201814051	Recklessly inflict grievous bodily harm	Procedural steps laid out in <i>Director's Instruction 14.2</i> have been complied with in relation to this record of reviewable decision. (The allocated prosecutor no longer works in the Office. The RORD process was completed and complied with as per the policy, however confirmation as to how the complainant was notified is unable to be obtained, but there is notes about them being consulted re the decision)	Prosecution did not proceed	The review of the decision to discontinue prosecution commenced the day of the <i>Basha Enquiry</i> . The matter was reviewed as soon as possible, it only became evident on the first day of the trial and the jury was empanelled that a <i>Basha Enquiry</i> was required.
8	TAYLOR, Robert	201916500	Contravene family violence order	Procedural steps laid out in <i>Director's Instruction 14.2</i> have been complied with in relation to this record of reviewable decision.	Prosecution did not proceed	The victim was notified that she could request further information re the decision if needed. The reasonings for not proceeding with the matter were explained to her also.

9	KEMMIS- LODDING, Riley	201915632	Aggravated robbery	Procedural steps laid out in <i>Director's Instruction 14.2</i> have been complied with in relation to this record of reviewable decision.	Prosecution did not proceed	The victim was notified that he could request further information re the decision if needed. We would be in contact if anything further was required from him re any outstanding charges.
10	RHODES, Jenard	201915627	Aggravated robbery, receive stolen property	Procedural steps laid out in <i>Director's Instruction 14.2</i> have been complied with in relation to this record of reviewable decision.	Prosecution did not proceed	The victim was notified that he could request further information re the decision if needed. We would be in contact if anything further was required from him re any outstanding charges.
11	ABDULLAHI, Osama	201915629	Aggravated robbery, receive stolen property	Procedural steps laid out in <i>Director's Instruction 14.2</i> have been complied with in relation to this record of reviewable decision.	Prosecution did not proceed	The victim was notified that he could request further information re the decision if needed. We would be in contact if anything further was required from him re any outstanding charges.
12	ARAK, Elrank	201915628	Aggravated robbery, receive stolen property	Procedural steps laid out in <i>Director's Instruction 14.2</i> have been complied with in relation to this record of reviewable decision.	Prosecution did not proceed	The victim was notified that he could request further information re the decision if needed. We would be in contact if anything further was required from him re any outstanding charges.

Joanne Smith
Audit Team Leader

21 August 2020

F. Index of Cases

F.1 Magistrates Court

<i>Police v Lee Robert Townsend</i>	page 46
<i>Police v Luke Schneider</i>	page 47
<i>Police v Tiarna Joan Thomas</i>	page 47

F.2 Supreme Court

<i>R v Bell (No 2)</i> [2020] ACTSC 83	page 53
<i>R v Butler</i>	page 49
<i>R v Kaihea (No 2)</i> [2020] ACTSC 82	page 53
<i>R v Smith (a pseudonym)</i> [2020] ACTSC 142	page 51
<i>R v Turnbull</i>	page 49
<i>The Queen v Budack</i>	page 49
<i>The Queen v CN</i>	page 49
<i>The Queen v Henderson (No. 2)</i> [2020] ACTSC 147	page 50
<i>ZL v Corey</i> [2020] ACTSC 143	page 51

F.3 Crown Chambers

<i>KN v The Queen</i> [2019] ACTCA 37	page 67
<i>Middleton v The Queen</i> [2020] ACTCA 6	page 67
<i>R v Booth</i> [2019] ACTSC 345	page 55
<i>R v Bradley Grey</i>	page 54
<i>R v Collier</i>	page 61
<i>R v CT</i>	page 63
<i>R v DU (No 4)</i> [2020] ACTSC 174	page 63
<i>R v Evans</i>	page 61
<i>R v Evans; R v Reid</i> [2020] ACTSC 169	page 61
<i>R v Grey</i> [2019] ACTSC 104	page 55
<i>R v Grey (No 2)</i> [2019] ACTSC 315	page 55
<i>R v Grey (No 3)</i> [2020] ACTSC 43	page 55
<i>R v Jake Versteeg</i> [2020] ACTSC 180	page 64
<i>R v KN (No. 2)</i> [2019] ACTSC 5;	page 67
<i>R v Lachlan Chancellor</i> [2019] ACTSC 191	page 57
<i>R v Middleton</i> [2018] ACTSC 198	page 59

<i>R v Middleton (No 2)</i> [2020] ACTSC 123	page 59
<i>R v Peter Forster-Jones</i>	page 58
<i>R v Reid</i>	page 61
<i>R v Sirl (No 2)</i> [2019] ACTSC 388	page 60
<i>R v Sirl (No 3)</i> [2019] ACTSC 355	page 61
<i>R v Sirl (No 4)</i> [2020] ACTSC 23	page 61
<i>R v Stott</i> [2020] ACTSC 5	page 61
<i>R v Vickerstaff (No 2)</i> [2019] ACTSC 343	page 55
<i>R v Watson</i>	page 61
<i>R v Welsh</i> [2019] ACTSC 344	page 55
<i>Sirl v The Queen; The Queen v Sirl</i> [2020] ACTCA 37	page 61

F.4 Appeals

<i>Jakaj v Kinnane</i> [2019] ACTSC 71	page 65
<i>KN v The Queen</i> [2019] ACTCA 37	page 67
<i>Middleton v The Queen</i> [2020] ACTCA 6	page 67
<i>NO v The Queen</i> [2019] ACTCA 33	page 68
<i>Potts v The Queen</i> [2019] ACTCA 17	page 70
<i>Potts v The Queen</i> [2019] HCASL 356	page 70
<i>R v KN (No 2)</i> [2019] ACTSC 5	page 67
<i>R v Middleton</i> [2018] ACTSC 198	page 67
<i>R v Middleton (No 2)</i> [2020] ACTSC 123	page 68
<i>R v Nicholas; R v Palmer</i> [2019] ACTSC 16	page 69
<i>R v Nicholas; R v Palmer</i> [2019] ACTCA 36	page 68
<i>R v Potts</i> [2018] ACTSC 299	page 70
<i>R v UD</i> [2020] ACTSC 88	page 71
<i>R v UD (No 2)</i> [2020] ACTSC 90	page 71
<i>R v UD (No 3)</i> [2020] ACTSC 139	page 71
<i>UD v The Queen</i>	page 70
<i>UQ v The Queen</i> [2020] HCATrans 42	page 71
<i>Williams v IM</i> [2020] ACTSC 234	page 65

F.5 Sexual Offences

<i>Muench v McCue</i> [2019] ACTSC 20	page 74
<i>Muench v McCue</i> [2020] ACTCA 17	page 74
<i>Police v Dane Muench</i>	page 74
<i>R v Cattle</i> [2020] ACTSC 8	page 75
<i>R v Cattle (No 2)</i> [2020] ACTSC 59	page 76
<i>R v Cattle (No 3)</i> [2020] ACTSC 135	page 76
<i>R v EN</i> [2019] ACTSC 354	page 76
<i>R v Jones</i> [2020] ACTSC 92	page 77
<i>R v Mark Jones</i>	page 77
<i>R v NBB (No 5)</i> [2020] ACTSC 190	page 77
<i>R v SQ</i> [2020] ACTSC 20	page 78
<i>R v Timothy King</i>	page 79

F.6 Family Violence Unit

<i>R v Green (No 3)</i> [2019] ACTSC 96	page 81
<i>Police v Duncan Gaul</i>	page 82
<i>Police v KX</i>	page 83
<i>Police v LH</i>	page 84

F.7 Confiscation of Criminal Assets

<i>Jeremiah Deakin</i>	page 88
<i>Trinity Smith</i>	page 88

F.8 Work Health and Safety

<i>Michael Watts</i>	page 89
<i>Nikias Diamond Pty Ltd</i>	page 89

G. Index of Legislation

LEGISLATION PAGE(S)

Director's Foreword	
<i>COVID-19 Emergency Response Act 2020</i>	33, 35
Section 119 of the <i>Public Health Act 1997</i>	33
Section 68B of the <i>Supreme Court Act 1933</i>	35
Section 68BA of the <i>Supreme Court Act 1933</i>	33, 35
<i>Supreme Court Act 1933</i>	33, 35
Organisational Overview	
<i>Director of Public Prosecutions Act 1990</i>	39, 40
<i>Public Sector Management Act 1994</i>	39, 41
Supreme Court	
Section 54(1) of the <i>Crimes Act 1900</i>	51
Section 60(1) of the <i>Crimes Act 1900</i>	51
Section 12A of the <i>Crimes (Sentencing) Act 2005</i>	53
Section 17 of the <i>Crimes (Sentencing) Act 2005</i>	52
<i>Firearms Act 1996</i>	49
Section 68B of the <i>Supreme Court Act 1933</i>	49, 50, 51
Crown Chambers	
Section 55A of the <i>Crimes Act 1900</i>	63
Section 56 of the <i>Crimes Act 1900</i>	64
Section 66B of the <i>Crimes Act 1900</i>	63
<i>Evidence (Miscellaneous Provisions) Amendment Act 2019</i>	64
<i>Road Transport (Safety and Traffic Management) Act 1999</i>	57
Appeals	
<i>Court Procedure Rules 2006</i>	70
<i>COVID-19 Emergency Response Act 2020</i>	71
<i>Human Rights Act 2004</i>	70
Rule 300 of the <i>Australian Road Rules</i>	65
Section 56 of the <i>Crimes Act 1900</i>	67
Section 33(1)(za) of the <i>Crimes (Sentencing) Act 2005</i>	69
Section 35(2) of the <i>Crimes (Sentencing) Act 2005</i>	69

LEGISLATION	PAGE(S)
Section 26 of the <i>Criminal Code 2002</i>	65
Section 310 of the <i>Criminal Code 2002</i>	69
Section 312 of the <i>Criminal Code 2002</i>	69
Section 35A of the <i>Judiciary Act 1903</i> (Cwlth)	70
Section 40 of the <i>Judiciary Act 1903</i> (Cwlth)	71
Part 8AA of the <i>Supreme Court Act 1933</i>	66
Sexual Offences Unit	
Chapter 1B of the <i>Evidence (Miscellaneous Provisions) Act 1991</i>	72
<i>COVID-19 Emergency Response Act 2020</i>	77
Section 54 of the <i>Crimes Act 1900</i>	78
Section 56 of the <i>Crimes Act 1900</i>	73, 76
Section 60 of the <i>Crimes Act 1900</i>	78
Section 61B(1) of the <i>Crimes Act 1900</i>	74
Section 66B of the <i>Crimes Act 1900</i>	72, 75
Section 81 of the <i>Crimes Act 1900</i>	76
Section 68B of the <i>Supreme Court Act 1933</i>	77
Family Violence Unit	
Section 28(2)(a) of the <i>Crimes Act 1900</i>	81
Section 334 of the <i>Crimes Act 1900</i>	84
Section 334(8) of the <i>Crimes Act 1900</i>	84
Confiscation of Criminal Assets	
<i>Confiscation of Criminal Assets Act 2003</i>	87
Work Health and Safety Prosecutions	
<i>Work Health and Safety Act 2011</i>	88, 89
Regulatory Matters	
<i>Animal Welfare Act 1992</i>	90
<i>Domestic Animal Act 2000</i>	90
<i>Food Act 2001</i>	90
Section 51(4) of the <i>Building Act 2004</i>	90

Parking Matters

<i>Road Transport (Safety and Traffic Management) Act 1999</i>	91
--	----

Internal Audit

<i>Financial Management Act 1996</i>	102
--------------------------------------	-----

Freedom of Information

<i>Freedom of Information Act 1989</i>	103
<i>Freedom of Information Act 2016, - sections 24(1), 35(1)(a), 35(1)(c), 40, 74, 82(2)(a), 82(2)(b), 82(2)(c)</i>	103, 104

Territory Records

<i>Part 3 of the Territory Records Act 2002</i>	116
<i>Section 19 of the Territory Records Act 2002</i>	116
<i>Section 28 of the Territory Records 2002</i>	116

H. Index of Tables and Figures

Age profile	page 110
Agency profile	page 109
Appeals	page 100
Average years of service by gender	page 110
Breakdown of FV cases in different courts	page 81
Breakdown of regulatory matters	page 90
Breakdown of Sexual Offence matters in different courts	page 74
Breakdown of WAS matters	page 87
Breakdown of WHS matters	page 89
Capital Works Projects	page 113
Classifications	page 109
Committals to the Supreme Court	page 98
Committals to the Supreme Court disaggregated by matter type	page 99
Community engagement and support - sponsorships	page 105
Employment category by gender	page 109
Equity and workplace diversity	page 110
Family Violence Cases: Trials and Sentences in the Supreme Court	page 81
FOI Access Applications	page 104
FTE and headcount	page 109
Government Contracting - suppliers of goods, services and works	page 114
Matters finalised disaggregated by matter type	page 94
ODPP Core Team	page 42
Office Employment Diversity Statement - demographics	page 106
Organisational Structure	page 42
Parking matters	page 91
Plea of Guilty after Committal for Trial	page 98
Recruitment and separation rates	page 110
Sexual Offences: Trials and Sentences in the Supreme Court	page 73
Statement of Performance - financial statement (Output 1.4 DPP)	page 115
Supreme Court Matters	page 100
Sustainable development performance - current and previous financial year	page 111
Total matters finalised by jurisdiction	page 93
WHS notifiable incidents	page 107

I. Alphabetical Index

DEFINED TERM	PAGE(S)
Aboriginal or Torres Strait Islander ('ATSI')	37, 105, 106, 116
ACT Civil and Administrative Tribunal ('ACAT')	84, 104
ACT Fire & Rescue, Hazardous Materials ('HAZMAT')	47
ACT Human Rights Commission	73, 85
ACT's Intermediary Program	73, 85, 86
Attraction and Retention Initiatives ('ARIns')	108
audio-visual link ('AVL')	48, 59
<i>Canberra's Recovery Plan</i>	34
Canine Support Program	86
Continuing Professional Development ('CPD')	37, 43, 54, 108
<i>COVID-19 Business Continuity Plan ('BCP')</i>	34
<i>COVID-19 Easing of Restrictions Roadmap</i>	34
<i>COVID-19 Measures (No 4)</i>	33, 92
<i>COVID-19 Measures (No. 5)</i>	33, 34, 92
<i>COVID-19 Measures - revised arrangements</i>	34
COVID-19 pandemic	49, 51, 75, 81, 88, 91
Criminal Advocacy Support and Enquiry System ('CASES')	36, 45, 92, 116, 138, 140, 141
Criminal Case Conferencing	35, 45
<i>Criminal Justice Report of the Royal Commission into Institutional Responses to Child Sexual Abuse</i>	63, 67, 101, 136
Criminal Party Conferencing	45
<i>Director's Instruction No. 14.1</i>	80, 101, 134, 137
<i>Director's Instruction No. 14.2</i>	80, 101, 136
<i>Disability Justice Strategy</i>	37
<i>doli incapax</i>	66
Drug and Alcohol Sentencing List ('DASL')	45, 46, 52, 53
Employee Assistance Program ('EAP')	107, 108
excluded offences	51
Forensic and Medical Sexual Assault Care ('FAMSAC')	72, 85
Fraud and Corruption Prevention Plan ('FCPP')	102
freedom of information	36, 103, 104
health and wellbeing	34, 43, 107, 108
Integrated Court Management System ('ICMS')	36
Intensive Correction Order ('ICO')	48, 49, 63, 83
intermediaries	72, 73, 85, 86
intermediary	48, 73, 77, 78, 85, 86

DEFINED TERM	PAGE(S)
<i>Legal Professionals Enterprise Agreement 2018-2021</i>	44
Magistrates Court Users Forum ('MCUF')	45
non-conviction order	52, 127
notifiable instrument	39, 116, 117
Office Employment Diversity Statement ('OEDS')	37, 105, 106
Outlaw Motorcycle Gang ('OMCG')	54, 61, 62
<i>Practice Direction 1 of 2020, Special Arrangements in response to COVID-19</i>	33, 48
Prosecution Policy	40, 46, 80, 117, 136, 140
<i>Public Sector Management Standards 2016</i>	41
Record of Reviewable Decisions ('RORDs')	80, 101, 135, 137, 138, 139, 140, 141, 142, 145
<i>Royal Commission into Institutional Responses to Child Sexual Abuse ('RCIRCSA')</i>	36, 63, 64, 67, 73, 86, 101, 136
Sexual Assault Reform Program ('SARP')	85
social distancing	33, 34, 48, 51, 86
Supreme Court Registrar's Trial Directions List ('SC Registrar's TD List')	48
victim impact statement	56, 72, 79, 80, 85, 129, 132
work health and safety	36, 88, 89, 107
Working Environment Group ('WEGIES')	43, 107, 108
Wraparound	85