



ACTDPP
OFFICE OF THE DIRECTOR
OF PUBLIC PROSECUTIONS



ACT
Government

ANNUAL REPORT 2017-2018

DIRECTOR OF PUBLIC PROSECUTIONS





Ethos: the spirit of the community

The DPP logo is based on the statue of '*Ethos*' by Thomas Dwyer Bass (6 June 1916 – 26 February 2010) which stands in Civic Square in front of the Legislative Assembly. *Ethos* was conceived by its creator as representing the spirit of the community of Canberra. It is a particularly apposite symbol for the DPP, which acts for, and represents, the community.

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Glossary

Acronyms

AFP	Australian Federal Police
CASES	name of the case management system of the Office
DPP	Director of Public Prosecutions
DVCS	Domestic Violence Crisis Service
FTE	full time equivalent employees
FV	family violence
FVEIC	family violence evidence in chief interview
JACS	Justice and Community Safety Directorate
VSACT	Victim Support ACT
WAS	Witness Assistance Service

Technical Terms

accused	person charged with an offence, usually an indictable offence
complainant	person against whom it is alleged a crime has been committed, usually used in the context of sexual assault
Crown	the prosecutor in the Supreme Court or Court of Appeal
defendant	a person charged with an offence
Director	the Director of Public Prosecutions
directorate	administrative unit of the ACT Public Service
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>
head of service	person appointed to head the ACT Public Service under Division 3.2A of the <i>Public Sector Management Act 1994</i>
indictable offence	an offence required or able to be dealt with in the Supreme Court
Office	the Director and staff assisting the Director
victim	a person who suffers harm arising from an offence

Director's Overview



Director of Public Prosecutions Jon White SC

I am about to relinquish my role of Director after 10 very fulfilling years. In this, my final annual report, I want to look back over the achievements and challenges of my time as Director.

When I arrived at the DPP in 2008, I found an organisation which was moribund. Morale was low. The Office lacked the most elementary structure, such as instructions as to who had authority to make important prosecutorial decisions. Everything had to be rebuilt, from staff policies, to petty cash procedures and records management. The litigation performance of the Office was poor, as exemplified by the fact that no conviction had been obtained in a murder case for more than a decade.

In the 10 years since, thanks to the hard work of my team, the Office has been transformed. Now, the Office is one the community can be proud of, and is a leader amongst Australian DPPs.

It was not just the Office that needed changing. The DPP can make a significant contribution to the overall culture of the legal community. When I was appointed, the Office was by no means as respected as it should have been, either by the courts or the legal profession. That respect has now been earned. And the culture of the legal profession has been greatly improved.

The success of the last 10 years has rested on the wonderful contributions of so many people. In this report, I have included short biographies of some of those who have contributed so much to the Office and the community. But exceptional as those officers have been, there are so many others who have contributed that I cannot even start to name them.

There have been so many achievements by my team that I will not attempt to list them all. Instead, I will attempt a broad brush summary.

REFORMING THE OFFICE

Improving corporate governance and the amenity of the Office

I commenced my term just one week after the appointment of Emma Flukes as General Manager, Corporate. Emma has guided a complete revision of the amenity of the Office, creating usable kitchen spaces, proper conference rooms, modernising furniture and so on. Indeed there has been almost no aspect of the work of the Office - from records management, to the promulgation of a complete set of staff policies and management plans, to financial procedures - that has not been revised and improved under Emma's guidance. This work, the extent of which tends to go unseen and unacknowledged by many, has been absolutely vital for the healthy functioning of the Office.

Case Management

The biggest internal reform in the last 10 years was the introduction in 2009 of a computerised case management system. This has led to a vast improvement in the management of cases, and the recording of statistics. It has also allowed for a completely new system of allocating work, a complex task when one considers that this Office covers summary and indictable matters.

Another step I undertook early in my term was to issue a clear set of Director's Instructions, particularly governing the authority of officers to make prosecutorial decisions. Previously, the lines of authority had been very unclear. We have also introduced a rigorous programme requiring prosecutors to produce an indictment, case statement and associated documents immediately after a matter is committed for trial. The form of the case statement is innovative and comprehensive, incorporating a reference to the elements of each offence on the indictment, and how those elements will be proved. This means that when an indictment has been signed, which is immediately after committal for trial, the Crown has considered whether there is sufficient evidence to justify the indictment, and how the case will be proved. That material is also available to the defence. Other Australian DPPs are now introducing similar requirements.

Professionalisation of the paralegal branch

The last 10 years have seen a complete revision of the roles of paralegals. Professionalism has been introduced, with mandatory qualification requirements of either a Certificate IV or study towards a law degree. The role of Paralegal Manager has been upgraded to be a significant part of the management structure. And paralegals now do much of the preparation work on files particularly in relation to list matters in the Magistrates Court - work previously carried out by prosecutors. This has been very successful in creating a stimulating and challenging work environment for paralegals, and freeing prosecutors for more difficult work such as the preparation of hearings.

Prosecutor Associates

Recently, a new classification of Prosecutor Associates has been introduced. These officers will be either recently graduated in law or about to graduate, and they are responsible for instructing prosecutors in Supreme Court trials. These are rewarding roles for lawyers at the start of their legal careers, and also relieve more experienced prosecutors of the necessity of instructing, freeing them up for more complex work.

Family Violence

The ACT has a proud tradition of being at the forefront of the prosecution of family violence matters. I have strengthened the family violence unit and championed many significant law reforms, including the introduction of evidence in chief interviews which have been transformative for family violence prosecutions.

Increased focus on confiscation of criminal assets

With increased funding, the Office has been able to establish a specialised team which deals with the confiscation of criminal assets. This team has had an immediate result as is detailed elsewhere in this report. This is an important development, as law enforcement will increasingly rely upon disruption of criminal activity in the face of the rise of cross border and transnational crime, and technologically sophisticated criminals.

Work health and safety

There has been a particular focus on the skills required to prosecute these difficult matters. A dedicated prosecutor now works on these prosecutions, after the allocation of extra resources which acknowledged the appalling work safety record of ACT, and the introduction of the new uniform work health and safety legislation in 2011.

E-briefs

My Office has pioneered the use of e-briefs. All major matters such as murders now come to the Office entirely in electronic form and are served on defence in electronic form. Furthermore this Office has been innovative in the use of devices such as iPads to enable juries to access information in electronic form. This is more convenient and understandable to modern juries. We are not far off having all matters proceed in this way.

The Strategic Review

There is no doubt that the failure to convince the government that extra resources were required for the Office, in a climate where the workload and the complexity of the work was increasing steeply, has been one of the most frustrating aspects of my role. In this, the lack of fiscal independence from JACS played a key role, as the DPP never had a voice at the table advocating for it when key fiscal decisions were made. However, the government was finally prevailed upon to initiate a strategic review into the Office, and has now accepted the recommendations of that review, carried out by the Nous Group. As a result, the Office has now secured increased funding, and a commitment from the government to fund crown prosecutor positions within the next year. The new senior positions will enable the Office properly to prosecute the many complex matters which are now arising in the Territory. Partly the rise in the number and complexity of matters is simply a function of the increasing ACT population, an increase which is higher than most regions in Australia. But there is also a growing issue of organised crime and increased sophistication of criminal activities. Although it has been a great source of frustration to me as the Director, given the government's commitment to ongoing funding, I can hand on to my successor knowing that the future is bright.

LITIGATION

The real test of a prosecution agency is its litigation record. Prosecutors are “ministers of justice”. As the Prosecution Policy notes, a prosecutor represents the community: 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”*. 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”*.

In my time as Director, the Office has embodied these principles. It is fair to say this was quite a change in culture, and was not universally welcomed by those who were used to a less firm, fearless and vigorous prosecution.

There have been many significant trials conducted by the Office. Murder trials, often with complex scientific or psychological issues, have been prosecuted. An example of such a case was the murder trial of Vogneski, where the Crown relied on tendency evidence to establish that the victim had been murdered by the accused. This was one of the first examples in Australia where tendency evidence was used in a significant case outside the area of sexual offending. Another significant achievement has been the prosecution of cases where evidence of psychiatrists retained by the defence, who opined that the accused was suffering from a mental impairment, has been successfully challenged. Again, this Office is at the forefront Australia wide in this area, and Deputy Director Shane Drumgold is an acknowledged leader.

There have been many other complex prosecutions including complex frauds, conspiracies such as a conspiracy to murder or conspiracy to distribute drugs and – as a growing area, the prosecution of organised crime.

Prosecuting sexual offences

A major focus of mine has been on improving the prosecution of sexual offences. I have established a specialist unit for sexual offences. The Office has been at the cutting edge of the use of tendency evidence in sexual offending cases. We have pioneered the calling of expert evidence to assist a jury in understanding the ways in which victims of sexual offending sometimes react, and also to explain the way children who are victims of sexual offending recall the traumatic circumstances of the offending. We have appealed on points of law that needed clarification such as the elements that go to make up sexual offences. We have taken significant Crown appeals with a view to improving sentencing standards in this important area. This Office notably prosecuted the ADFA Skype case which has been somewhat of a watershed in the prosecution of sexual offences in Australia. The statistics in this area are telling: not only are a greater number of matters being prosecuted, the success rate and possibly most tellingly of all, the rate at which offenders now plead guilty to these offences has significantly increased.

I contributed on a number of occasions to the hearings of the Royal Commission into Institutional Responses to Child Sexual Abuse. And since the Commission has reported, I have been working closely with government to ensure that its recommendations are adopted.

Appeals by the Crown

In criminal matters the Crown's right of appeal is closely circumscribed. However, judicious resort to Crown appeals can do much to influence the course of the development of the law.

In my time as Director, I have instituted and conducted many significant Crown appeals. There have been Crown appeals on matters of law which have established important principles the significance of which flow well beyond the boundaries of the ACT. And there have been a number of Crown appeals on sentence which have helped shape sentencing principles in the Territory.

Significant Crown appeals on matters of law

I will briefly refer to some of the more significant matters that I have conducted in my time as Director. During that time I have appeared in a number of matters in the High Court, and hundreds of matters in the Court of Appeal of the ACT.

The procedure for reference appeals allows the Crown to raise with the Court of Appeal a question of law arising from a proceeding and obtain a ruling on that question without the result of the proceeding below being affected. *DPP v Edwin Nair* [2009] ACTCA 17 was a reference appeal to the Court of Appeal. This case considered an important matter in relation to section 38 of the *Evidence Act* which relates to unfavourable witnesses. At trial the trial judge had refused the Crown's application to cross examine a witness it had called pursuant to section 38. In doing so the trial judge had purported to impose a requirement relevant to common law principles dealing with hostile witnesses, but as the Court ruled in upholding the appeal, those requirements were not relevant to an application under section 38.

In *DPP v Walker* [2011] ACTCA 1, another reference appeal, the trial judge had ruled that in an allegation of sexual assault, the Crown had to elect whether it relied upon knowledge of the accused that the other person did not consent to the sexual intercourse, or alternatively recklessness as to whether the person consented. Upholding the Director's appeal, the Court of Appeal ruled that the Crown was not required to particularise either knowledge or recklessness, but could rely on both.

DPP v AW [2013] ACTCA 35 was a reference appeal concerning the correct elements of the offence of committing an act of indecency in the presence of a young person. The trial judge had directed the jury that an element of the offence was that when he performed the indecent act the accused was aware that the act was indecent according to contemporary standards of sexual morality. In agreeing with the Crown's arguments, the court held that the Crown simply needed to prove that the accused meant to commit an act that was indecent (that is an act which offended against community standards). It was not necessary for the Crown to prove that the accused was aware that what he was doing was indecent according to community standards.

DPP v Booth [2018] ACTCA 8 was a reference appeal which considered the meaning of "claim of right" under the Criminal Code. The Court of Appeal upheld the Crown's contention that the trial judge had erred in directing the jury that claim of right was relevant to cases of burglary and robbery. The ruling confirmed that the concept of claim of right under the Criminal Code was narrower than the concept under the common law.

Sometimes, matters of practice and procedure are crucially important in achieving justice. In *R v AI, AD & JR* [2013] ACTCA 16 the Crown appealed to the Court of Appeal against the severance of an indictment in a case of conspiracy to murder. The Crown appeal was upheld and the trial of the accused proceeded as a joint trial. The case involved important principles of severance in circumstances where a number of accused are before the court accused of the same offence.

In *R v King* [2013] ACTCA 23, the Crown appealed against an order purporting to sever the indictment against a cricket coach who was accused of a number of sexual offences involving members of the team. The key issue was whether there was evidence from which it could be inferred that King had abused his position of authority over the victims. The Court of Appeal accepted the Crown's contention that it was merely necessary for the Crown to prove that the accused was in a position of authority over the complainants and that the complainants' consent had been obtained through the abuse of that position, and it was not necessary to further show that the accused did some act connected with his position calculated to deprive the apparent consent of the complainants of any reality. The matter was sent back for trial on that basis and King was subsequently convicted.

In *R v Quzag* [2015] ACTCA 36, the issue was the jurisdiction of the Court of Appeal to grant bail to a person who had appealed to the court from a conviction or sentence. In upholding the Crown appeal, the court ruled that the jurisdiction to grant bail was incidental to the court's jurisdiction to grant a stay and was dependent on that stay first being granted.

Trials involving the evidence of young children, which is inevitably unsworn evidence raise difficult issues. In *R v Muller* [2013] ACTCA 15, the Crown appealed to the Court of Appeal against a finding that a witness who was a young person was not competent to give unsworn evidence. The Court of Appeal overturned the trial judge's ruling, and established important principles for the way in which it is established that a person may give unsworn evidence.

Special leave to appeal to the High Court is rarely granted to the Crown, especially when a successful appeal with reverse an acquittal earned in the courts below. However in the *R V GW* [2016] HCA 6, the High Court granted the DPP leave to appeal and upheld the appeal in a case which considered important principles to do with unsworn evidence given by a child. A six year old child was a key prosecution witness in the trial of her father on the charge of committing an act of indecency in her presence. There was no dispute that the child was competent to give evidence, but the trial judge determined that she was not competent to give sworn evidence and instead the child gave unsworn evidence. Defence counsel asked the trial judge to direct the jury that the child's evidence was given unsworn because the child did not comprehend the obligation to tell the truth. The trial judge refused to give the directions sought, but the accused successfully appealed on this ground to the Court of Appeal. On appeal to the High Court, the Crown contended that the defence position amounted to a requirement that the jury be warned that the child evidence might be unreliable because it was unsworn. The High Court held that the assessment of the reliability of evidence was for the trier of fact (the jury) and the uniform Evidence Act was neutral in its treatment of the weight that may be given to evidence whether it was sworn or unsworn. Further, there was no requirement to warn the jury that the child's evidence may be unreliable because it was unsworn. The principles established by this case have proved to be very significant in the prosecution of child sexual offences in jurisdictions where the uniform Evidence Act applies.

The Queen v Holliday [2017] HCA 35 was another rare instance where the High Court granted leave to the Crown to appeal against an adverse ruling in the Court of Appeal. The case considered technical issues under the Criminal Code and established that it was not possible to prosecute a person for inciting a person to procure the commission of an offence.

Significant Crown appeals on sentence

The Crown appeals against sentence sparingly. In essence, the purpose of a Crown appeal is to lay down principles for the governance and guidance of sentencing courts. The Crown appeals where the sentence imposed was so inadequate as to shock the public conscience. During my time as Director, I have instituted Crown appeals against sentence when important principles of the adequacy of sentences being imposed by the courts were at stake. A brief discussion of some of the more important Crown appeals against sentence follows.

In *R v Campbell* [2010] ACTCA 20, the sentencing judge had imposed a non-custodial sentence for an offence where the offender had stabbed the victim with a knife. The court accepted the Crown contention that the use of a knife was an aggravating factor which should be reflected in the sentence imposed, and overturning the sentence, substituted a sentence which included a custodial component.

In *R v Creighton* [2011] ACTCA 13, the Crown appealed against a sentence imposed on a driver who had pleaded guilty to two counts of culpable driving causing death and another count of culpable driving causing grievous bodily harm. The Court dismissed the Crown's appeal, albeit with some reluctance (and relying partly on the soon to be discredited "principle" of double jeopardy, see further below). However this case proved the impetus for a revision of the penalties in the area of culpable driving which were soon after significantly increased by the legislature.

R v Hutchinson [2014] ACTCA 29 was an important case concerning sentences for the common offence of burglary. In significantly increasing the sentence, the court emphasised matters that were to be regarded as aggravating in relation to the offence of burglary, such as the fact that occupants were at home at the time of the burglary, or that the burglary was of a residential premises. Further, the offending was premeditated. This case has proved to be important in establishing current sentencing practice in relation to the offence of burglary.

In *R v Toumo'ua* [2017] ACTCA 9 the Crown successfully appealed against sentences imposed for burglaries which had yielded significant quantities of cash for the offender. The sentencing judge had allowed a discount of 25% for guilty pleas that were entered relatively late by the offender and were associated with limited demonstrated remorse. The Crown also appealed against an inadequate nonparole period. The sentencing judge had referred in sentencing the offender to "a practice if not actually a principle" to the effect that a relatively low period of full time custody may be adequate where an offender is not apparently "a direct danger to the community". The Court of Appeal accepted the Crown's arguments that the discount for a plea of guilty had been excessive, and that the nonparole period was inadequate, and the practice or principle referred to by the sentencing judge did not exist.

And in *R v Flowers* [2014] ACTCA 13, the Crown successfully appealed against a very low nonparole period. The case established important principles for the way in which the nonparole period – the period of custody actually to be served by an offender – is set by a sentencing judge.

But it is in the area of sentencing for sexual offending that the greatest impact has been made. In *R v Cooper* [2012] ACTCA 9, the Crown appealed against a sentence for an offender of previous good character who pleaded guilty to the possession of child exploitation material. The Crown appeal was upheld and the sentence significantly increased, the court noting that in such cases the need for general deterrence greatly diminished the credit to be given to an offender's prior good character. This decision reversed a history of low sentences being given for this type of offending in the Territory.

R v Chatfield [2012] ACTCA 32 was a matter of great importance to principles surrounding Crown appeals against sentence. The offender had pleaded guilty to appalling incidents of sexual offences. Not only did the Court of Appeal uphold the Crown appeal and increase the sentences imposed, the court accepted that in re-sentencing the respondent to the appeal, the Court (contrary to previous practice) should not have regard to the "principle" of double jeopardy. Prior to this case, courts on appeal had exercised restraint in re-sentencing even if the court accepted that the original sentence had been inadequate, on the basis this exposed an offender to "double jeopardy". But in this case the Court accepted that if on re-sentencing the Court had regard to the "principle" of double jeopardy, the court would not be imposing a sentence which is of a severity appropriate in all the circumstances of the offence.

R v Williams [2014] ACTCA 30 was a very significant case emphasising the need for community protection in cases of offending against children. The offender had committed an appalling sexual assault on a child in public. He was a registered child sex offender and indeed was *en route* to make his annual report to police at the time he committed the offences. In upholding the Crown appeal and increasing the sentence, the court particularly emphasised the offender's previous extensive record and bleak prospect for rehabilitation and the importance of protecting the community from the offender.

And recently in *R v Summerfield* [2018] ACTCA 20, the court upheld a Crown appeal involving sexual offences against children. The offender then aged 18, had engaged in ongoing sexual offending against two girls, aged 13 and 15. As a result the 13 year old girl had become pregnant. In sentencing the offender, the sentencing judge repeatedly referred to the "relationship" between the offender and each of the girls, apparently by way of mitigation. In the Court of Appeal, the Crown took issue with the characterisation of the "relationships" as being "genuine" but, more importantly, argued that the circumstances were not mitigatory. The Court of Appeal agreed, and in increasing the sentences, stated that the use of the word "relationship" to describe sexual involvement between a young person and an adult was "*inherently problematic*" and should be avoided.

LAW REFORM

My Office has contributed significantly to law reform within the Territory. Prosecutors are uniquely well placed to identify deficiencies in current criminal laws, and the potential for improvement in procedures. Contribution to law reform has presented challenges. The Office has never been resourced to provide policy advice and all prosecutors carry a significant advocacy load. Nevertheless many prosecutors over the years have contributed greatly including Stephanie Lind, Kylie Weston-Scheuber, and Hannah Roberts. But the major contributor has undoubtedly been Margaret Jones, whose connection to law reform in the Territory goes back to the time that she co-authored the original SARP (sexual assault reform program) Report.

The first tranche of **special measures** following the SARP Report was introduced in 2009. However there have been many subsequent reforms introduced after the urging of my Office, and in particular the guidance of Margaret Jones. Some of those have included:

- permitting the tender of evidence in chief (EIC) interviews for all child witnesses and all intellectually impaired witnesses in sexual and other violence offence matters. Originally this was limited to complainants only - now it applies to all witnesses in proceedings who are children or intellectually impaired;
- recording the evidence of complainants in sexual offence matters so that it may be used in any retrial;
- EIC interviews are now able to be tendered for all complainants in family violence matters;
- EIC interviews are now also available for all complainants whether children or not, in sexual and violent offence matters;
- the number of offences where complainants can give evidence via audio visual link has been greatly expanded to include such offences as burglary and stalking;
- the courts now have the discretion to allow vulnerable witnesses generally to give evidence via audio visual link;
- further, the provisions which allow courts to receive evidence from interstate and overseas via audio visual link, including using phones and computers, has been expanded and changed;
- victims are now permitted to read victim impact statements via audio visual link.

The Office has also contributed to substantive **reform of the criminal law**. Some of the major achievements have been:

- the removal of statutory limitations for historical sexual offences;
- an expanded definition of sexual intercourse to include penetration to any extent of the genitalia and also to include fellatio;
- the introduction of offences prohibiting sexual acts between a person in a position of authority such as a teacher, coach, health professional or step parent and a young person who is 16 or 17;
- the criminalisation of sexual relations between a step parent and step child until they are 18;
- the introduction of a general grooming offence prohibiting encouraging a young person to take part in sexual activities;
- the creation of voyeurism offences prohibiting intimate observations or capturing of visual data;
- the new offence of food or drink spiking;
- the creation of an offence of strangulation or choking, which is of great significance in the FV area;
- reform of the law relating to double jeopardy, specifically:
 - by allowing retrials where a person has been acquitted, and after the acquittal fresh and compelling evidence comes to light that indicates the person has in fact committed the offence;
 - allowing a retrial where the trial at which the person was acquitted was “tainted”; and
 - allowing a person who was acquitted of an original offence to be prosecuted for an administration of justice offence allegedly committed during the trial of the original offence, overcoming the effect of *R v Carroll* (2002) 2013 CLR 635;
- an increase in penalties for culpable driving offences to 14 years for culpable driving causing death and ten years for culpable driving causing grievous bodily harm, bringing in the ACT into line with other jurisdictions.

The Office has also contributed to improvements in **procedural processes** in the courts. Some of the provisions which have been introduced at the recommendation of the office include:

- changes to the jurisdiction of the Magistrates Court allowing the prosecution to elect for summary disposal of matters. These provisions have had a significant impact in limiting the number of comparatively minor matters which are committed for trial in the Supreme Court;
- other changes to the committal legislation including the introduction of a committal by consent;
- introduction of changes to judge alone processes in the Supreme Court. This has had the effect of decreasing the number of judge alone trials conducted in the Supreme Court, and ensuring that the important matters such as homicides and sexual offences are tried by juries;
- the intensive listing of matters in the Supreme Court which has greatly increased the efficiency and reduced listing delays in that court;

- the introduction of block listing in the Magistrates Court which has greatly improved the efficiency of hearing processes in the court and reduced waiting lists for hearings;
- giving jurisdiction to the Associate Judge to preside over pre-trial hearings, which frees up judges of the Supreme Court for other duties;
- a scheme for service of expert reports in criminal matters which has greatly increased the fairness and efficiency of trials.

Modernisation of the Prosecution Policy

Under the DPP Act, the Director may give directions or furnish guidelines in relation to prosecutions. The key policy is the Prosecution Policy of the ACT, which sets out the principles which apply in deciding whether a prosecution proceeds, and how other key prosecutorial decisions are made. In 2015, I issued a new Prosecution Policy, replacing the policy promulgated by the first Director Ken Crispin QC in 1991. The policy has been extensively revised and modernised to reflect the developments in the law, particularly in relation to the treatment of victims of crime, and disclosure.

EXTERNAL RELATIONSHIPS

Perhaps the most important relationship the Office has is with the Australian Federal Police. This has been greatly strengthened and matured during the last 10 years. The AFP now provide a liaison officer who works in the Office ensuring that any issues that arise between the two organisations are speedily resolved. Further I and my senior executives have always had excellent relationships with the Chief Police Officer for the ACT, and the head of the Judicial Operations section of the force. The relationship of an independent prosecutor and police can sometimes be testy on individual matters, but the excellent relationship frameworks have ensured that no matter is allowed to fester too long.

Another key relationship is with the Legal Aid Office. Again the relationship is now extremely strong. For some years, the two organisations have swapped staff, to the great benefit of the professional development of prosecutors and legal aid lawyers. Those prosecutors who have returned to us after having been employed at Legal Aid have a new appreciation of the difficulties of dealing with those accused of crimes. And legal aid lawyers who have worked in this Office have seen the professionalism, dedication and commitment to public interest that our prosecutors exhibit.

But perhaps the greatest achievement throughout the past 10 years has been a considerable strengthening of the independence of the DPP. When I commenced the relationship with the relevant government directorate JACS was somewhat subservient. Now there is a more robust and appropriate relationship with that Directorate, although as I mention elsewhere, there is still one final achievement to be had: that of fiscal independence.

CHALLENGES AHEAD

There are three matters in particular which are unfinished business and with which my successor will undoubtedly have to grapple. First and most important is the issue of the fiscal independence of the Office, recommended by Dr Hawke in his review of the ACT Public Service some years ago. This is fundamentally about the independence of the Office. It is time that for the DPP to take full accountability on itself, rather than the divided accountability which currently exists. In the context of the one department model, the government needs to consider the appropriate relationship of the Office to the public service as a whole and the government. The JACS Directorate continues to take as corporate overheads a significant amount of the appropriation to this Office in circumstances where there are simply no synergies between the Office and JACS and no reason for the Office to contribute to those overheads. Happily, it seems that the government is at last favourably disposed to granting this fiscal independence.

Another matter which I have long advocated and which will require action by the government is permitting paralegals and prosecutor associates, none of whom are admitted practitioners, to appear for the prosecution in list work in the Magistrates Court. This change, which again I believe the government is favourably disposed towards, will have two major effects. First of all it will allow for a proper prioritisation of work within this Office, freeing up prosecutors from routine list work, while still providing stimulating and challenging work for trainee lawyers or paralegals. Secondly, it may stimulate the Magistrates Court to recognise that the major business of that Court should be the determination of matters at hearing, rather than the shuffling of matters in lists.

Lastly, it is inevitable that the Office will move fully to electronic briefs of evidence. This will mean the Office will become paperless. Briefs will be received in electronic form from police, served in electronic form on defence, and tendered in electronic form in our courts.

FAREWELL

It has been a great privilege to serve as the Director of Public Prosecutions. Above all, I want to record my gratitude to the magnificent staff of the Office, whose dedication, professionalism and enthusiasm for their important task has been a continuing inspiration to me.

Jon White SC
Director of Public Prosecutions

A. Transmittal certificate



5 October 2018

Mr Gordon Ramsay MLA
Attorney General
Legislative Assembly
CANBERRA ACT 2601

Dear Attorney,

ANNUAL REPORT

I present my Annual Report for the year ended 30 June 2018.

This Report has been prepared under section 6(1) of the *Annual Reports (Government Agencies) Act 2004* and in accordance with the requirements under the Annual Report Directions. It has also been prepared in conformity with the *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 2017 to 30 June 2018 has been included.

I certify that fraud prevention has been managed in accordance with the *Public Sector Management Standards 2006*, Part 2.

Section 13 of the *Annual Reports (Government Agencies) Act 2004* requires you to present the report to the Legislative Assembly within 15 weeks of the end of the reporting year and on the day declared under subsection (2) of the section.

Yours faithfully

Jon White SC
Director of Public Prosecutions

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B. Organisational Overview and Performance

The Executive. Margaret Jones, Jon White SC, Shane Drumgold and Emma Flukes



B.1 Organisational Overview

The role and functions of the Office

The Office of the Director of Public Prosecutions was established by the *Director of Public Prosecutions Act 1990* ("the Act") to institute, conduct and supervise prosecutions and related proceedings. The Act provides that the Office be controlled by the Director, an independent statutory officer appointed by the Executive. The Director makes prosecutorial decisions independent of political influence or control. Although the Director reports to and through the Attorney-General, the Director has complete independence in relation to the operations of his Office.

The current Director, Jon White SC, was appointed in September 2008. His current appointment will end in December 2018. He is assisted by two Deputy Directors, Margaret Jones and Shane Drumgold, and Emma Flukes, General Manager.

The Director has the powers mentioned in the *Public Sector Management Act 1994*, section 25(3) in relation to the staff assisting the Director, that is to say:

- a. the powers of the head of service relating to the appointment, engagement and employment of people; and
- b. the powers of a director-general.

The Act requires the Director and Attorney-General to consult with each other, if required, concerning the functions and powers of the Director. The Attorney-General may give directions to the Director, but any such directions must not be given without prior consultation; must be in writing and be presented to the Legislative Assembly; and be of a general nature only and not refer to a specific case. Any such direction or guideline is a notifiable instrument. In the reporting period there were no such directions given.

The Act ensures that 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 are:

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

The Director has some important statutory functions, including:

- 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 Attorney-General);
- 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.

In prosecuting matters, the Director acts on behalf of the community. Prosecutors are "ministers of justice", a phrase which sums up the unique position of the prosecutor in the criminal justice system. Prosecutors must always act with fairness and detachment with the objectives of establishing the whole truth and ensuring a fair trial.

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. The Policy is available on the website of the Office and is appended to this report. The Director may also issue guidelines to prosecutors from time to time in relation to a particular area.

Although the Office does not have clients as such, in performing its functions the Office works closely with the courts, the legal profession, police and other investigators, victims' representatives and other government agencies.

EMPLOYEE PROFILE

Catherine Zaal



Catherine joined what was then the Canberra office of the Commonwealth DPP in 1987. She started working as a steno-secretary for the then Assistant Director Grant Lalor, utilising her then recently acquired shorthand skills.

Since that time Catherine has performed just about every non legal role in the Office. When the ACT DPP was formed as a separate entity in 1991, staff were initially told that they could either choose to stay with the Commonwealth Public Service or change over to the ACT Public Service of which the ACT DPP would become part. Catherine expressed a preference

to stay with the Commonwealth, but at the last minute staff were told that only lawyers could stay with the Commonwealth, and other staff must transfer over to the ACT. As her long subsequent service with the Office shows, she has not regretted this.

An early memory Catherine has was of staff smoking in their offices and conference rooms in the old AMP building. The public service has changed a lot since those days.

Catherine has had stints away from the Office for maternity leave, and when she accompanied her husband on an overseas posting to the Hague where she ended up working for the United Nations.

Catherine worked on developing an electronic link between the police and the Office which in the early days functioned as a rudimentary file tracking system, although manual spreadsheets were still employed. From 2008 Catherine worked on the new case management system. Because of her extensive knowledge of the various roles in the Office – a knowledge obtained from performing almost all of those roles herself at one time or another – Catherine has been the key problem solver for issues to do with Office systems. She has been particularly vital in the production of statistics and ensuring the entry of accurate information.

When asked why she has stayed with the one organisation for so long, Catherine replies that she is really interested in the work, and she enjoys working with such dedicated people.



The organisation

During the reporting period, there were three senior executives employed in the Office, being the Deputy Directors and the General Manager. Each has the responsibility of assisting the Director with the management of the Office, with particular emphasis on providing a high degree of leadership of the Office's staff and ensuring the effective deployment of resources; achieving effective and productive relationships with the courts, investigators, criminal justice agencies and the legal profession; and representing the Director in forums and meetings. The Deputy Directors are also charged with conducting more complex litigation, and providing high quality legal advice to the Director.

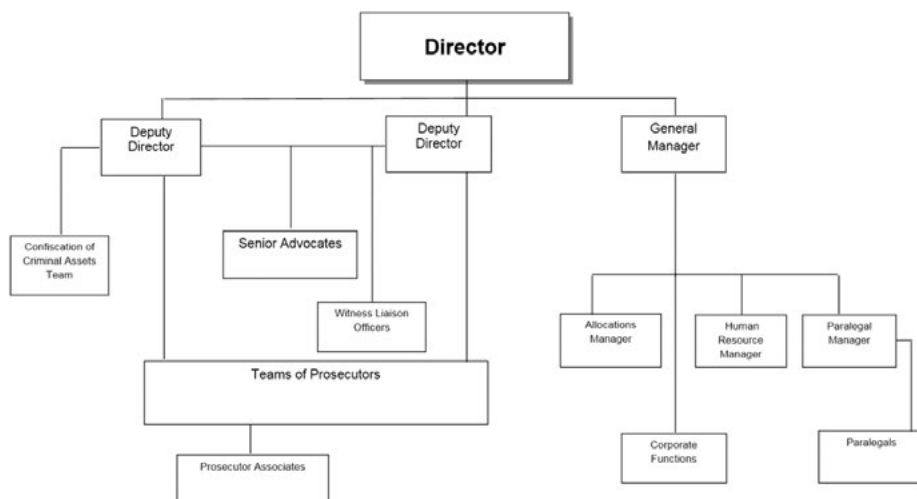
The ACT Remuneration Tribunal determines the remuneration of the Director and senior executive staff from time to time. The Director or executives may make submissions to the Tribunal on those matters.

The operations of the Office are overseen by the executive comprising the Director, and the senior executives. The executive meets weekly. A management committee comprising the human resources manager, the allocations manager, the practice manager and the paralegal manager also meets weekly. Legal staff meet weekly to discuss matters of current concern, including legal and procedural issues, and administrative matters. Continuing legal education sessions are conducted often. Regular meetings of paralegal staff are held. There are also regular all staff meetings.

The Office has a Working Environment Group which meets monthly to discuss issues affecting staff and their working environment. Each section of the Office has a representative. The objectives of the group are to:

- foster co-operation in relation to 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.

The Office structure during the reporting period was as follows:



EMPLOYEE PROFILE

Patty Ng



Patty started with the Office in 2001. She originally worked as a paralegal preparing matters for the various Magistrates Court lists as well as coronial matters. As such, she has spent a great deal of time in court assisting prosecutors with files, recording results and then doing the necessary follow up tasks. She also managed advice files from 2002-2008. In addition, she has worked in the Supreme Court area, including on appeals.

With her wealth of experience, Patty has also provided training and guidance to many paralegals over the years.

Patty has gone on to perform a large variety of roles in the Office including acting paralegal manager, allocations manager in the times when allocations were done on a manual spreadsheet, and, since the introduction of the electronic case management system, working with rostering and allocations and attending the major matters meeting, where significant cases are allocated. She has also worked in the regulatory area which deals with prosecutions for food safety, animal welfare and work safety. Patty has also been involved in other aspects of the Office, in WEGies meetings (Working Environment Group), being a fire warden, and on the Social Club committee.

The biggest change Patty has seen has been the push for paralegals to do more legally orientated roles. She has also seen the technological advancement in the office such as CASES, and using IPADs for court. A notable advance has been making available a psychologist for the health and wellbeing of staff.

Patty is presently a witness liaison officer in the WAS. Working with vulnerable witnesses and complainants can be challenging as each individual reacts differently and can be unpredictable. The WAS officers need to be sensitive to the complex emotions experienced. Patty can use her extensive knowledge to guide those witnesses and complainants through the court processes and to reassure them.



Summary of performance

There is great satisfaction in reflecting that so many of the matters listed as future priorities in the last annual report have been realised this year.

During the reporting period the Office's achievements have included:

- delivering upon the strategic review into the Office, with long-term government funding commitments for the next four years including a commitment to fund Crown Prosecutor positions;
- establishing a discrete Confiscations of Criminal Assets Unit in the Office. The unit has been very active in restraining and having forfeited proceeds of criminal activity;
- introducing prosecutor associates, who instruct counsel in trials thus freeing up prosecutors to prepare for and appear in hearings;
- appearing in a record number of Court of Appeal appeals, including some significant Crown appeals;
- prosecuting a considerable number of difficult and high profile trials in the Supreme Court;
- improved listing procedures in the Magistrates Court, in particular the evolution of family violence case management hearings and the establishment of block listing in family violence matters;
- bedding in evidence in chief interviews for sexual and violent offences;
- implementing recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse;
- making significant advances towards the aim of 100% electronic brief handling and case preparation;
- consolidating the health and wellbeing programme involving a specialist psychologist with particular skills in the law enforcement environment to provide counselling support to all staff.

Outlook

The outlook for the Office is bright. While resourcing issues will continue to be a challenge, particularly when the new Supreme Court facilities come online, long-term funding commitments have been won from government, particularly in relation to the appointment of more senior prosecutors.

The priorities for the coming year include:

- working with government to achieve fiscal independence of the Office, including direct appropriation of funding for the provision of prosecution services;
- working to achieve right of appearance for paralegals from the Office in plea and mention lists in the summary courts;
- bringing into effect unimplemented recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse;
- continuing to work towards the aim of 100% electronic brief handling and case preparation
- working with the courts and the profession to enhance the number of early pleas of guilty;
- working with the Magistrates Court to improve listing procedures and hearing processes, in particular to ensure that block listing of Magistrates Court matters takes place outside intensive listing periods in the Supreme Court;
- working with the Magistrates Court to decrease the number of plea and mention lists, so that the core business of the court, the hearing of matters, can be given priority;
- refurbishment and updating of accommodation including opportunities to enhance workspaces;
- providing appropriate training and professional development to lawyers, paralegals and staff;
- updating the external website of the Office to ensure enhanced access for victims of crime and witnesses;
- improving the information technology of the Office, including useability of the internal intranet, and implementing TRIM for records management.

EMPLOYEE PROFILE

Cam Tang



Cam has been with the Office for 17 years having started as a paralegal in 2001. He worked in a number of different paralegal areas and particularly remembers his time in the Family Violence area with Louise Taylor and John Lundy.

Cam always had an interest in IT and in 2008 started working on the introduction of an electronic case management system for the Office. The CASES system was put into operation in 2009. Cam has seen how much this system has changed the work of the Office. Rostering in particular was

a shambles before the introduction of CASES, being run through an excel spreadsheet that was updated manually. Now, allocations and rostering are all done electronically and emails can be stored against a particular matter without having to be put on a physical file. Accurate statistics can now be produced.

Cam is working on making the Office completely paperless, with briefs of evidence to be received, served, and filed electronically, with the Office being connected electronically to police and the courts.

As to why he has stayed in the job for so long, Cam says the Office had been a very friendly environment and an interesting place to work. It is the people who work here who make it so enjoyable.



B.2 Performance Analysis

Superior Courts

46 trials, including many significant and complex matters, were prosecuted in the Supreme Court during the year, occupying some 249 days of court time. The number of trials conducted in the last year was broadly in line with the average for the last five years which is 53.8 trials per year. As remarked in earlier annual reports, in 2011 amendments to the jurisdiction of the Magistrates Court meant that more matters are now kept in the Magistrates Court thereby reducing the number of straightforward matters being committed for trial. But this has been counterbalanced by an increase in the number of complex or otherwise serious matters being tried.

A significant portion of the trials were for sexual offences (19 trials involving 117 trial days in court).

As in previous years however, the number of trials actually conducted is only part of the picture. As set out in the following table, in many matters an accused person pleads not guilty and is committed for trial, and has their matter listed for trial, only to change their plea to guilty prior to the trial commencing. The largest percentage of change of plea takes place within one week of the trial date. Of course by that stage most of the work on the trial has been done not only by prosecutors, but by the prosecutor associates and other instructors, the paralegals who prepare the matter for trial and the corporate area which arrange for travel and accommodation and the like.

The following table sets out those matters where there has been a change of plea after committal for trial. There was a fairly significant increase in the number of matters that fell into this category (76 up from 64 last year) although the other figures are broadly aligned to the trend of the last year.

Plea of Guilty after Committal for Trial - 1 July 2017 to 30 June 2018

Plea of guilty after committal for trial	Trials listed	Total Matters Subpoenas issued	Plea of guilty on day of trial	Plea of guilty within 1 week of trial	Plea of guilty within 2-4 weeks of trial	Plea of guilty more than 4 weeks before trial
76	47	45	8	18	12	9

Note: Plea of guilty after committal for trial shows all matters that were committed for trial following a plea of not guilty, where the plea was changed to guilty after committal. Where subpoenas have been issued in these matters it is a general indicator that most of the preparatory work has been completed.

Of course pleas of guilty are always welcomed. Even a late plea of guilty has some utilitarian value, which is inevitably represented by a discount in the sentence imposed by the court. Nevertheless, the Office works continually to encourage defence lawyers to engage in early consultation with the Office to ensure that if a plea of guilty is to be entered, it is entered at the earliest opportunity. This is a better outcome for all concerned –for victims and witnesses, and for the court in terms of saving of resources, but also for the accused person who will access a greater discount on their sentence and expiate their guilt.

The prosecution is ready to engage with defence counsel on a meaningful basis at any time, but particularly once committal documents have been lodged. However experience shows that often defence solicitors do not brief matters to counsel until late in the proceedings. Solicitors are naturally weary of pleading their clients guilty without the advice of counsel. Accordingly, the key ingredient to obtaining earlier pleas of guilty is to ensure engagement with matters by defence counsel at an earlier time. Defence counsel can then advise their clients as to their options at trial and the benefits that flow to them of an early plea.

The number of accused sentenced after committal for sentence in the Supreme Court or after a change of plea increased markedly this year, up some 37%. This further emphasises the upswing in the number of serious matters being dealt with by the Supreme Court.

The upward trend for superior courts looks set to continue into the next reporting period. The number of matters committed to the Supreme Court from the Magistrates Court and Childrens Court again increased this year, up over 9%, following a 33% increase in the previous reporting period.

The commissioning of the new Supreme Court building, which is behind schedule but will take place during the next reporting period, will have a significant effect on the Office. The increase in available court rooms for jury trials, which are limited under the current accommodation arrangements, will mean an increase in the intensity of listing periods. This will challenge the Office. Of course, the new court rooms, and particularly the new improved witness facilities, will greatly increase the quality of justice in the Supreme Court.

EMPLOYEE PROFILE

Joanne Smith



Joanne joined the office in 1997 as an ASO 1. She was employed as a paralegal doing A list preparation working to Catherine Zaal as the Paralegal Manager. Joanne remembers Geoff Howard as being the key member of the legal support team - he was the guru who usually went to court to assist prosecutors.

Jo eventually moved to the Supreme Court team. She remembers some long days in that team, including 2am finishes working with Margaret Jones and Adrian Robertson on a big fraud case. In 2006 Jo became the Paralegal Manager managing about 18 paralegals. It was somewhat chaotic as there were few processes in place and information was not readily available. At that time, on top of their other duties, paralegals had responsibility for conduct money and arranging travel and accommodation for witnesses. There was also some tension between paralegal uppers and paralegal lowers.

In 2009 Jo went on extended maternity leave, returning in 2014. On return Jo worked in a number of roles including familiarising herself with CASES. Eventually she became the Paralegal Manager. She is responsible for 14 paralegals. Some of the responsibilities of the paralegals have been devolved to either prosecutor associates, who look after subpoenas, or Corporate who now look after conduct money and witness travel. However, the paralegal cohort is now much more professional than in previous times, with paralegals either studying law or attaining a Certificate IV qualification.

The greatest change that Jo noted on coming back into the Paralegal Manager role is that the crossover of duties is now much greater across the paralegal cohort. Paralegals are expected to have skills across the broad range of functions. This has led to paralegals taking more ownership and responsibility of matters. CASES has made a big change getting rid of the old days of manually updated spreadsheets, and missing files.

Recently all of the paralegals have been gathered in one work area. This is a better work environment with paralegals gelling together and enjoying each other's company.



Appeals

There were a record 50 appeals to the Court of Appeal this year. This reflects the greater number of matters being dealt with in the Supreme Court in the last few years which flows through to more appeals. Court of Appeal matters are complex. Typically the Director or one of the Deputy Directors appears on behalf of the Crown.

Statistics over the last few years reveals how much the Court of Appeal practice has grown. The number of Court of Appeal matters over the last 11 years is set out in the following table:

Appeals to Court of Appeal 2007-2009 to 2017-2018

Year	2007-2008	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018
Total	11	19	12	23	18	41	45	40	33	41	50

Clearly over that time there has been a significant change. For the five years from 2007-2008 to 2011-2012 the average number of appeals to the Court of Appeal was 16.6 per year. However from 2012-2013 to 2016-2017, there was a marked upswing with the average number of appeals being 40 per year.

The total number of appeals in the present reporting period is by far the highest ever in the ACT and represents a 21% increase on the previous year, and a 25% increase on the average for the previous five years.

New appeal procedures for the Court of Appeal mentioned in the last report, are still being bedded in. The procedures include new timeframes for the lodgement for documents and submissions, which must be now filed well in advance of the hearing of the appeal. Generally, compliance with the new procedures has been solid. Latitude is extended by the court to those (few in number) appellants who are not legally represented.

EMPLOYEE PROFILE

Phoebe Burgoyne-Scutts



Phoebe started on 1 July 2009 as a paralegal. She was then studying law, having previously completed a sports management degree and working in the sports industry. As a paralegal her duties included part heard lists and assisting in A lists. This involved a lot of time in court which was a great help in her subsequent career development. Phoebe had stints in the Family Violence and Sexual Offences units as a paralegal and ended up as the second-in-charge of paralegals. While she was a paralegal, she instructed on a big murder trial with the Director, Chris Todd and Stephanie Lind.

Phoebe was admitted to practice in the ACT in December 2011 and immediately employed as a prosecutor. She has since worked in most areas of the Office including a spell as the prosecutor in charge of regulatory prosecutions.

Phoebe has worked on numerous interesting and significant cases. One that comes to mind was a man who fraudulently tricked a sex worker into having sex with him. He was charged and found guilty on the basis that the "consent" of the sex worker was vitiated by fraud. More recently Phoebe took the opportunity of a secondment to Legal Aid. She found that to be a great learning experience where she was constantly in court, including conducting a number of Supreme Court trials. It gave her a great appreciation of the difficulties Legal Aid lawyers face in dealing with often very disadvantaged clients. It also really assisted her confidence in appearing in court. Phoebe is now back at the DPP, having recently been promoted to the position of Supervising Lawyer.

The major change that Phoebe has seen in her time at the DPP is the increase in the sheer number and complexity of cases that prosecutors have to deal with. On the other hand, processes within the Office have become much more efficient with paralegals and prosecutor associates assisting prosecutors greatly. This enables prosecutors to concentrate more on their in-court work.



Summary courts

As foreshadowed in previous annual reports, the increase in the population of the Territory has led to an increase in the number of prosecutions in the summary courts of the ACT.

In the 2017/2018 financial year, the Childrens Court finalised 255 matters, up 36% from the previous year. The Magistrates Court finalised 4401 matters, and increase of 5% from the previous period. Needless to say, a 5% increase on such high volumes, coming on top of a 9% increase in the previous reporting period, has significant resourcing implications for the Office.

In the last financial year, 767 hearings were completed in the Magistrates Court (47 were Childrens Court matters and 179 were family violence matters).

In a positive development, the “block listing” of hearing matters in the Magistrates Court has now extended to family violence matters. Block listing in the Magistrates Court involves the “over listing” of matters in the expectation that a number of cases will resolve without proceeding to a contested hearing. Not only is this a more efficient way of listing matters, it is also a more efficient use of resources for the DPP. The matters in the block lists are usually conducted by more junior prosecutors, which are overseen by a senior prosecutor who determines which matters ought to be treated with priority. Prosecutors are often required to conduct prosecutions prepared by a colleague at short notice.

Block listing practices have had a dramatic effect on delays in matters coming on for hearing. In the last quarter of the reporting period (when block listing was fully operational), of 120 matters listed for hearing, none received a listing more than six month after the date of plea. In contrast, for the preceding quarter, of 105 matters listed for hearing, 63 (being 60%) received a listing more than six months after the date of plea. These figures represent a vindication for this Office’s advocacy of the block listing system over many years. It is satisfying to see the Magistrates Court enthusiastically, if belatedly, embrace the practice.

It is anticipated that the block listings will continue in 2018/2019. Worryingly, there will be some overlap with the Supreme Court Central Criminal Listing periods, which stretches the resources of the DPP in attempting to cater for both courts. The DPP has been advised that the Chief Justice and the Chief Magistrate have consulted about the periods in which there is an overlap in listings. There is no need for any overlap, and it is to be hoped that a sensible and efficient resolution to this problem can be found.

The Office continues to conduct a number of lists in the Magistrates and Childrens Court, including a daily A1 (mention and sentence) list, A2 (bail and sentence) list, B (Childrens Court) list and a weekly FV (Family Violence) list. This is in addition to assisting the Galambany Court in circle sentencing, appearing in “part heard” lists before particular magistrates, and conducting more complex contested hearings which fall outside of the block listing periods. Indeed, as has previously been remarked, the number and complexity of plea or mention lists, which should take a subsidiary role in the business of the Court, continues to increase. This is in marked contrast to the way such matters are dealt with in other jurisdictions, where in summary courts plea and mention lists are subordinate to the main business of the Court. The central business of the Court should be the determination of hearings.

At times, the increase of matters in the Magistrates Court has not been met with increased efficiency in dealing with them. The Office has struggled with matters being listed and heard outside of normal court operating hours. The decision of some magistrates to sit through morning tea breaks, lunch breaks and finish after 5pm is particularly challenging for prosecutors. The DPP will continue to work to improve the efficiency of the Magistrates Court, not only for the benefit of defendants and the community, but also for the health and wellbeing of the staff of the Office.

EMPLOYEE PROFILE

Eugenia Canevski



Eugenia was employed in 2008 as a part time receptionist, and she has continued in that role since. When she started, she job shared with Maggie Kirkwood who had been the long term receptionist. A receptionist's job can sometimes be demanding, dealing with some very unhappy and stressed people. However Eugenia manages to settle them down and enjoys the aspect of the job where people are helped to find solutions to their problems. Being receptionist also means she interacts with everybody in the Office and chats to just about everyone on a day to day basis.

When Eugenia started, the duties were straight reception duties, but since with the assistance of more modern technology, the role has diversified greatly. Eugenia assists in entering details in the case management system, and also with closing files, amongst other duties.

Of course there are some incidents that stick in the mind. One person was so angry in leaving the Office that they walked into a glass window thinking it was the door. The main injury they suffered was one of embarrassment. Generally though, Eugenia is able to calm things down and make sure people get what they want.



Paralegals

During the reporting year the paralegal section has continued to undergo changes which have ensured a much more efficient use of resources and enabled the paralegals to provide a more detailed service to the legal staff.

There is a broader range of knowledge across the whole paralegal stream which enables the team to maintain a good level of support to the prosecutors when resources are stretched as they are able to cross over to other duties seamlessly. This has been made easier by the fact that all paralegals including the paralegal manager are now located on the one level, previously having been split between two floors. The flow of work and the morale of the group as a whole has improved significantly with this change.

The paralegals have continued to prepare all matters at first mention stage, however now they are preparing matters as soon as they arrive in the Office. This has allowed the team to identify any problems and resolve issues much earlier on.

The use of casuals is still in play. That has been very beneficial, not only when resources are low but by having a consistent flow of work being completed in the pressure areas of the paralegal duties.

The continuation and progression of the above processes has improved the efficiency of the paralegal staff and given them valuable knowledge and training.

Sexual Offences Unit

Prosecutors of the specialist Sexual Offences Unit review and oversee every new sexual offence file, thereby providing a central point of expertise. The Unit manages each sexual offence file until a trial date is set, and the matter is then allocated to a senior advocate and instructing solicitor. The Unit retains supervision of all matters until completion. This ensures consistency in the Office's approach as well as continuity of prosecutor and promotes early contact with the victim.

Relevant statistics for the reporting period for all matters are:

Sexual offences all matters – 1 July 2017 to 30 June 2018

Description	Magistrates Court	Childrens Court	Supreme Court	Total
Sexual Offence matters commenced	58	3	32	93
Sexual Offence matters completed	63	11	48	122
Sexual Offence matters proved	31	5	34	70
Sexual Offence matters discontinued	1	0	2	3

New offences relating to the distribution of, and threat to distribute, intimate images were introduced in September 2017. During the reporting period a small number of people were charged with these offences with one defendant pleading guilty to the offence (he was sentenced in July 2018).

Just under half of all trials in the Supreme Court during the reporting period were for sexual offences. Supreme Court results for the year were as follows.

Sexual Offences: Trials and Sentences in the Supreme Court - 1 July 2017 to 30 June 2018

Description		Matters
Trials		
	Trials	19
	Trial Days in Court	117
Trial Outcomes		
	Guilty Verdicts	9
	Not Guilty Verdicts	8
	Other	2
	Awaiting verdict	
Sentencing Proceedings		25
	Accused sentenced after committal for sentence/after committal for trial-changed plea	20
	Accused re-sentenced after breach	5
Notices declining to proceed further		2

Although there has been an offence of maintaining a sexual relationship with a young person in the ACT since 1991, significant amendments were made to this provision in March 2018. The Royal Commission into Institutional Responses to Child Sexual Abuse recognised the difficulties for victims of child sexual abuse to provide adequate particulars of each sexual act, particularly where the sexual conduct was a regular occurrence. It recommended changes which were adopted in the March amendments to the *Crimes Act 1900*. An unlawful sexual relationship can now be established by two (rather than three) unlawful sexual acts. The amendments also extended the offence to include a sexual relationship with a young person under special care and to allow sexual conduct that occurred before the commencement of the amendments to be used as evidence of the sexual relationship. During the reporting period, a small number of ex officio charges have been included in indictments alleging a maintain sexual relationship with a young person or person under special care where the sexual conduct occurred before March 2018.

The Office continues to be involved in law reform and participates in the Sexual Assault Reform Program Reference Group in its consideration of legislative reforms recommended by the Royal Commission.

The Office is very conscious of the trauma associated with sexual offences and the additional anxiety that is caused by the criminal process. Special measures are extensively used in sexual offence proceedings in the ACT, such as allowing children in sexual matters to give their evidence before the trial, victims giving their evidence from remote rooms, a victim having a support person present, and a prohibition on cross examination of the victim by an unrepresented defendant. In May 2017 legislation allowing a child victim's recorded interview with police to be admitted as their evidence in chief was extended to apply to **all** victims of sexual or violent offences. Most briefs now contain an audio visual recording of the victim giving their account to police and this is then played at trial rather than the victim having to give their account for a second time.

It is particularly important that a victim of a sexual offence does not feel re-traumatised by criminal proceedings. To that end, the Office ensures early contact is made with victims, who are then kept informed about the progress of the matter and whose views are sought in relation to significant decisions regarding the prosecution. The Unit is greatly assisted by the Witness Assistance Service who play a critical role in communications with victims.

The Case Reports section of this report contains accounts of some of the many significant cases prosecuted during the reporting period.

EMPLOYEE PROFILE

Chamil Wanigaratne



Chamil's first involvement with the Office was in 1998 when, while completing his law degree at the ANU, he spent a few weeks doing work experience during the time of acting Director Terry Golding. He recalls about that time coming across the description of prosecutors as "ministers of justice" and that has always resonated with him. After being admitted as a legal practitioner, he worked with the Aboriginal Legal Service in NSW and then with the Commonwealth Director of Public Prosecutions in Sydney before joining the Federal Public Service in Canberra.

Chamil joined the Office in 2007 and, in addition to general prosecution work, he worked in the appeals area directly to the then Director Richard Refshauge SC. He later worked in the family violence area which was professionally challenging and great for his professional development. He found his undergraduate studies in psychology to be useful when dealing with challenging witnesses and victims. He has always received a great sense of satisfaction in being able to speak to reluctant witnesses and complainants and help them to understand why a prosecution was being pursued.

In his time in the Office he has conducted hundreds of hearings, and is renowned as being an indomitable workhorse.

The biggest change Chamil has seen in the Office is that it is now more streamlined and organised – in the early days things seemed more haphazard and the lines of authority were not always clear. Chamil has been involved in many significant cases. But it is sometimes the smaller cases that stay in the memory. One drink driving matter he dealt with raised the significance of the omission of an umlaut from the name of the breathalyser unit as registered in the regulations. The magistrate ultimately agreed with the prosecution's submissions. In another matter, a magistrate purported to stay the whole case before the first prosecution witness had even finished giving their evidence. The prosecution appealed to the Supreme Court which duly upheld the appeal and sent the matter back for hearing before another magistrate.

Chamil continues to be enthusiastic and dedicated in his work as a prosecutor.



Family Violence Team

The Family Violence Unit, which consists of seven prosecutors and two paralegals, prosecutes most of the family violence cases referred to the Office. The Unit strives to provide a consistent approach to the prosecution of charges arising out of FV situations through the early allocation of FV cases. This promotes the establishment of strong working relationships with investigating AFP members and the timely consideration of the prosecution case. The Witness Assistance Service, Victims Support ACT and the Domestic Violence Crisis Service (DVCS) play an important role in supporting complainants. And in cases involving children, FV prosecutors liaise closely with the AFP and the Office of Children, Youth and Family Support.

The community's growing awareness, and condemnation, of family violence demands the robust prosecution of cases arising out of offences committed in a domestic environment or in current, or former, family relationships. The continued success in the prosecution of these cases is assisted by the family violence evidence in chief interview (FVEIC) amendments introduced in to the *Evidence (Miscellaneous Provisions) Act* in May 2016, and the AFP's commitment to interviewing complainants in accordance with that regime. These interviews are conducted as soon as practicable following the report of a family offence, and often take place at or near the scene of the alleged incident. The FVEIC recordings provide a compelling audio visual record of a complainant's account by capturing the emotion, distress and chaos that is family violence. The recording is played in court and tendered as an exhibit in support of the prosecution case. It represents a lasting and valuable piece of evidence in the event the complainant later becomes a reluctant or unavailable witness.

The majority of FV matters are determined in the Magistrates Court, which has a weekly Family Violence mention list. From this list matters are either adjourned for sentencing or set down for a defended hearing. Most of the FV hearings are "bulk listed", meaning they are adjourned to week where two or three magistrates are specifically allocated to hear those cases. The cases are "over listed", on the expectation (confirmed by experience) that many defendants will change their plea to guilty at the last minute. It is a matter of great satisfaction that the Magistrates Court has adopted this listing practice. As I noted in my 2015-2016 Annual Report:

My Office and the profession generally are urging the court to take advantage of the reforms to streamline the hearing of family violence matters. Presently matters are often delayed with multiple adjournments, and a long wait for a hearing. The reforms allow for the early service of relevant material -the most relevant being the evidence in chief statement which will be served shortly after the incident. This will enable defence lawyers to seek instructions from their client as to whether a guilty plea will be entered. If the plea is not guilty, then matters can be listed for hearing at an early time on an "over listed" basis, as the Courts can be confident that many of the perpetrators will change their plea to guilty closer to the date of the hearing. Experience shows that the most effective way of obtaining early pleas of guilty is to list the matter for hearing as soon as possible. It is the hard hearing date fast approaching which most effectively leads to defendants reconsidering their position and entering pleas of guilty.

Bulk listing periods are particularly busy for the FV Unit. The preparation for, and prosecution of, family violence demands significant contact with complainants and witnesses. The sensitive nature of the subject material and vulnerability of the people involved requires the establishment of trust and rapport. Prosecutors often appear in multiple cases on multiple days during those bulk listing periods. Without their dedication and commitment the finalisation of FV cases would be significantly delayed.

The following cases illustrate the type of matters the FV Unit regularly deals with.

Tiger Zhu

The defendant and victim were first year international students living in a residential college at ANU. After dating for several months, the relationship had become rocky. Blaming her for their relationship problems, the defendant assaulted the victim one evening in his room by slapping her and pushing her onto the bed. She tried to leave but he stopped her. He then proceeded to slap her across the face 120 times, claiming that each slap represented one day of their relationship. He filmed part of the incident on his mobile phone and could be heard telling the victim *"it's what you deserve"*. After the ordeal the victim sought medical treatment for facial swelling, pain and dizziness. She reported the matter to police and the defendant was charged with assault occasioning actual bodily harm. He pleaded guilty and was sentenced to two months imprisonment, partly suspended on condition he comply with a 12 month good behaviour order.

Van Dartel

The complainant, a 54 year old grandmother, had been staying at the house of the defendant (her daughter) for several nights, helping to look after grandchildren. One morning the pair got into an argument near the landing at the top of the stairs. The defendant pushed the complainant onto the floor. The complainant got up and started to walk down the stairs. The defendant followed her and pushed the complainant in the back. The force of the push caused the victim to lose balance and fall, crashing into a child safety gate at the bottom of the stairs, and sustaining a fractured left wrist. The injury required surgery and the insertion of a plate and screws. The incident was reported to police by another relative, concerned for the victim's welfare. The defendant pleaded not guilty to charges of common assault and causing grievous bodily harm, but the charges were proved at hearing and the defendant was sentenced to three months imprisonment suspended on condition she comply with a 12 month good behaviour order.

Gillard

After a night of heavy drinking, the defendant woke up still affected by alcohol. The complainant, his partner, who was six months pregnant with their first child, advised him not to go into work in that state. This remark angered the defendant and he pushed his partner causing her to trip over a water bowl. The defendant then dragged her across the floor of their apartment and into the lounge room. He then kicked and punched several large holes through a set of internal bi-folding doors. The complainant fled to a neighbour's house and police were called. When police arrived they conducted a Family Violence evidence in chief interview with the complainant inside the apartment. Soon after the defendant was arrested. He ultimately entered pleas of not guilty to charges of common assault and property damage. The matter went to hearing nine months later, by which time the complainant was no longer cooperative with police. The prosecution played her FVEIC interview in court. She also gave evidence in which she attempted to recant her earlier statement. Separately, the court heard evidence that she and her infant child were financially reliant on the defendant and she was worried about the impact a criminal conviction could have on his employment. Notwithstanding the fact that she had attempted to deny her original version of events, on the strength of the FVEIC and other corroborating evidence, the court was satisfied of both offences and found the defendant guilty. The defendant was convicted and sentenced to an 18 month good behaviour order.

FV prosecutions are not confined to the Magistrates Court. There have been a number of family violence cases finalised in the Supreme Court over the course of the last 12 months, including the sentence of Dillon for the murder of his son, Woutersz for the manslaughter of her mother and Al Harazi for the murder of his wife.

The following statistics from the 2017-2018 period give an indication the resources that this Office, and the justice system in general, commits to deal with this significant social problem. The number of matters commenced has remained steady when compared to last year, but there has been a 5% increase in matters completed:

Description	Magistrates Court	Childrens Court	Supreme Court	Total
FV matters commenced	604	50	24	678
FV matters completed	630	45	40	715
FV matters proved	526	38	17	581
FV matters discontinued	15	1	1	17

In addition to its prosecutorial functions, the FV Unit has continued to play an active role in the training and professional development of AFP members in relation to family violence. Over the course of the past 12 months FV prosecutors have presented seminars on family violence offences, how to conduct a FVEIC interview, and the provisions related to the presentation of evidence of vulnerable witnesses.

Witness Assistance Service

The WAS continues to assist vulnerable witnesses throughout their dealings with the Office and the criminal justice system. The main role of the witness liaison officers who make up the WAS is to act as a liaison point between prosecutors and witnesses, provide information to witnesses on court processes, and give information on, and referrals to, available support services.

The WAS primarily focuses on assisting vulnerable witnesses in sexual offence and family violence matters, and those matters where a child is required to give evidence. Witness liaison officers also assist witnesses who are particularly vulnerable, and provide a varied degree of contact from answering general questions to providing referrals to support services.

WAS role in assisting witnesses

The role of the WAS is to assist vulnerable witnesses by providing them with information to ensure that they understand the court process, and to act as a liaison between the prosecutors and witnesses. The types of information provided include updates and information on the court process, information and assistance with referrals to various support services. The WAS also arranges meetings between prosecutors and witnesses at key stages within the court process.

For WAS matters, the witness liaison officers maintain contact with witnesses at key stages of the court process, including when the matter is first before the court, when a plea has been entered, when a matter is committed to the Supreme Court, when a hearing/trial and sentence date has been set, when there is a matter outcome and if there is a notice of appeal. The amount of contact the WAS will make with a witness is determined by the needs and wishes of the witness, as expressed during the initial introduction after the matter is first in court. If the witness is interested in a debriefing session with the prosecutor, the WAS may assist in organising a meeting after the matter is finalised.

During the reporting period the WAS began to provide information and assistance to witnesses in the new offences of “intimate observations or capturing visual data” and “threaten to capture or distribute intimate images” under the *Crimes Act 1900*.

Court support

Throughout the 2017-2018 financial year, WAS provided only limited court support in terms of sitting with witnesses whilst they give evidence. Instead, WAS has focused on referring witnesses to appropriate external support services, primarily the Volunteer Program administered by Victim Support ACT (VSACT). Trained volunteers of this program provides court support to witnesses that are required to give evidence, both in remote witness room locations and inside the courtroom.

WAS has actively promoted and referred victims of crime to VSACT for counselling, court support and other services. WAS has regular communication with the Volunteer Coordinator of the Volunteer Program, to ensure that support is available for witnesses who would like a volunteer court support person while giving evidence. WAS will continue to maintain regular communication with VSACT and the Volunteer Coordinator to ensure that witnesses have court support available.

During the reporting period, the WAS still provided court support in those matters where witnesses did not consent to be referred to the Volunteer Program or where a volunteer was not able to be organised due to availability, or if a witness required support at short notice.

Supporting multiple complainants of one defendant

There were several cases which involved multiple complainants for one matter. This requires a high degree of organisation by the WAS to ensure that all the complainants are informed of the court process and updated as required. WAS coordinated with VSACT to arrange available volunteers to take witnesses to the remote witness room and provided court support.

In one case, the matter was set down for trial eight times, which is highly unusual. WAS maintained contact with the three vulnerable witnesses from the beginning of the court process in 2016 until now, where the matter is awaiting sentence. The WAS has been a consistent source of contact between the victims and the prosecutors. This was important as a number of prosecutors have been allocated to this matter throughout the trial process. The WAS also liaised with VSACT to organise for the same volunteer for court support each time the matter was set for trial.

Another matter currently in the early stages of the court process has nine complainants requiring WAS to provide information, updates and referrals to support services. It is anticipated that the WAS will have ongoing involvement and contact into the 2018-2019 financial year.

Meeting with external agencies and service providers

During the 2017-2018 financial year, the WAS continued to attend weekly Family Violence case tracking meetings. This forum is important in ensuring that relevant agencies including the AFP, ACT Corrective Services (ACTCS), Child and Youth and Protection Services (CYPS), Victim Support ACT (VSACT) and the Domestic Violence Crisis Service (DVCS) are offered 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 in support.

The WAS continued to attend monthly Wraparound meetings with the AFP, CYPS, Child and Risk Health Unit (CARHU), Forensic and Medical Sexual Assault Care (FAMSAC), Canberra Rape Crisis Centre (CRCC) and VSACT. Wraparound continues to provide a confidential forum where information regarding client matters and support is discussed. The WAS continued to advise of involvement in sexual assault matters and provided updated information concerning client matters and support.

Victim Impact Statements

The WAS continued to provide information and support to witnesses during the preparation of a Victim Impact Statement (VIS). WAS may often assist a witness to prepare their VIS, understanding that it can be an extremely difficult and daunting task. Whilst WAS do provide assistance to the witness to capture the impact of the offence, they ensure that the witness understands that the VIS needs to be in their own words, ensuring credibility and transparency.

WAS assisted with the preparation of VISs for the Dillon Supreme Court sentence, liaising directly with the victims to provide support and guidance to ensure that the full impact was captured. This was a particularly lengthy process, given that the nature of the offences and the severe impact that the offences had on those involved. WAS also provided court support, and worked closely with members of the AFP and VSACT, during the Supreme Court sentence proceedings.

Assistance in non-WAS matters

The WAS continued to assist prosecutors in non-WAS matters, where WAS had no previous contact with a witness, providing court status of matters, information on the court process, referrals to support services and assistance in preparing a VIS.

The WAS also assisted in taking witnesses to remote witness rooms and explaining the layout of the room, in non-WAS matters where there is capacity to do so. There was a particularly noticeable increase during the Supreme Court Criminal listing period and the Magistrates Court family violence special fixtures list, with both WAS matters and non-WAS matters requiring support and assistance.

WAS Case load

A breakdown of all WAS matters within the 2017-2018 financial year is as follows:

Offence type Categories	Number of WAS matters	Percentage*
Adult Sexual Assault	90	46.2
Child Sexual Assault	45	23.1
Child Pornography	7	3.6
Death	3	1.5
Historical Sexual Assault	28	14.4
Less Serious Violence Off (adult)	4	2.1
Less Serious Violence Off (child)	1	0.5
Other	8	4.1
Serious Violence Offence (adult)	8	4.1
Serious Violence Offence (child)	1	0.5
Total	195	100

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

This represents an increase of some 9% in number of matters from the previous period.

The New Court Precinct

The WAS eagerly awaits the completion of the new ACT law courts, with new facilities to better assist vulnerable witnesses giving evidence. There will be easy but safe access to the new court building for witnesses utilising the remote witness rooms, as well as private waiting areas to make the experience as comfortable as possible.

Confiscation of Criminal Assets

An increase in the DPP budget for the last financial year allowed the establishment for the first time of a dedicated Confiscation of Criminal Assets (COCA) team within the Office. The budget increase followed increases in ACT Policing resources devoted to the confiscation of criminal assets. The funding, which continues for the next year, has allowed for the employment of three prosecutors and support staff who are able to focus on COCA proceedings. The amount of property restrained has increased significantly with the establishment of the dedicated COCA team.

The Office conducts proceedings under the Confiscations of Criminal Assets Act 2003 in the Magistrates and Supreme Courts. Proceeds of crime and instruments of crime are restrained and forfeited through these proceedings. This is an effective way to ensure offenders will not be enriched from the commission of offences.

The increase in resources in both the AFP and this Office, has allowed this Office to undertake more complex and larger scale confiscation proceedings. This is reflected in the very significant increase in the value of property restrained.

During the 2017/18 financial year the total value of property restrained was \$7,396,951.55. This includes \$194,273.47 cash, 26 cars with an estimated value of \$511,485 and 13 houses with a net estimated value of \$6,691,193.08. This is compared to last financial year where the total value of the property restrained was \$1,849,595. Restraint of this property will mean it is available in the future to satisfy forfeiture or penalty orders made pursuant to the Act. (The estimated value of the restrained property is based on the estimated value of the interest in the property restrained at the time it was restrained. The value of the property restrained does not include other people's known interests in the property—including the interests of mortgagees.)

During the 2017/18 financial year, tainted interests in property were forfeited to the Territory to the total value of \$1,101,301.53. This includes \$624,575 cash, nine cars with an estimated value \$177,042 and interests in two houses with an estimated value of \$228,642.53. (The estimated value of the forfeited property is based on the estimated value of the interest in the property at the time it was restrained.)

It is anticipated that there will be a significant increase in the value of the property forfeited in the next financial year as a result of the increase in restrained property when compared to last year.

Some matters of interest from the reporting period are as follows.

DPP v McLeod & Ors

The related criminal matter was reported on last year. McLeod was a mid-level public servant employed by the Public Trustee and Guardian (PTG). McLeod and another PTG employee stole money from the PTG, which is responsible for managing the financial affairs of people suffering from legal incapacity who cannot manage their own money. McLeod pleaded guilty to four counts of theft, the total amount stolen being \$1,087,227.55. He was sentenced to seven years and 10 months imprisonment with a four year non-parole period.

The DPP had obtained restraining orders against the property of McLeod and the other three offenders in relation the fraud against the PTG. After each of the four offenders was convicted for their part in the fraud, the DPP oversaw the forfeiture of their interests in a house, three cars, three motorbikes, a boat and a trailer with an estimated value of \$144,542. The DPP also obtained a penalty order against one of the defendants, which requires him to pay more than \$20,000 back to the ACT, which is the amount that he was found to have stolen.

DPP v Lou & Lou

As reported last year Lou was convicted of drug trafficking offences after presenting himself to police and confessing that he was a long time drug dealer. Lou told police he had given his father money to buy a house on his behalf and that he had been giving his father money to pay the mortgage. Lou handed over close to \$120,000 in cash to police and informed police that he had bought his black Subaru WRX using money he had made through selling drugs. Lou pleaded guilty to money laundering and drug trafficking offences in the Supreme Court. He was sentenced to three years and six months imprisonment with a two year non-parole period.

Following the finalisation of the criminal matters confiscation proceedings were commenced in the Supreme Court to restrain the cash and the defendant's interest in the house (including his father's interest). That property was subsequently forfeited to the Territory.

DPP v Song

Police executed a search warrant on the defendant's home after suspecting he was trafficking in heroin and seized a range of drugs, scales, drug paraphernalia and nearly \$398,370 in cash (including \$377,905 in cash hidden in a safe in the foundations of the building).

The defendant was charged with drug trafficking and money laundering offences. He elected to be tried by judge alone. In the course of the trial he pleaded guilty to the trafficking charge. In relation to the money laundering charge the defendant gave evidence that \$100,000 to \$150,000 of the cash found at his house was saved earnings, and the balance were gambling winnings which he won from interstate casinos.

The trial judge found the explanation of the defendant was implausible and the collective circumstances were strongly supportive of the Crown case, however was not satisfied beyond a reasonable doubt that the cash or any amount of it was the proceeds of crime within the meaning of s 114A of the *Crimes Act*. The defendant was acquitted on the charge of money laundering.

Following the finalisation of the criminal proceedings, and despite the findings of the learned trial judge, the Office obtained orders for the forfeiture of the cash pursuant to the COCA Act.

DPP v Hagan

In early 2014, police commenced an investigation into trafficking of illicit substances in the ACT which identified the offender as being a heavily involved participant. The offender pleaded guilty to three counts of trafficking. One count involved the trafficking over a period of months of substantial quantities of cocaine. At one point police intercepted Hagan while he was driving and executed a search warrant on the vehicle. Police found almost 29kgs of methylamphetamine in the car and a smaller quantity in his house. Evidence was led of the estimated value of the drugs being in the millions. The defendant was sentenced to 13 years and six months imprisonment with a nonparole period of eight years.

In COCA proceedings, the parties agreed to self-executing consent orders after a considerable period of negotiation. The orders provided the defendant forfeited \$2,000 and his motor vehicle valued at \$8,500. The agreement also meant that an amount of equity in the defendant's house, equal to the value of the narcotics he was found to possess would be forfeited in the event that he did not forfeit an equivalent amount of money by a stated deadline.

R v Eastman

Background

On 3 November 1995, following a jury trial, David Harold Eastman was convicted of the murder of Assistant Commissioner Colin Winchester on 10 January 1989. Mr Eastman was sentenced to life imprisonment. Following a comprehensive inquiry into his conviction, the Full Court of the ACT Supreme Court, after considering a report produced by Martin AJ, quashed the conviction and ordered a new trial.

In December 2016, Kellam AJ was appointed to preside over the re-trial. The re-trial was listed to commence in July 2017 but, as reported in the last report, was adjourned to 12 February 2018, in part to deal with a number of pre-trial applications.

Developments in this reporting period

Preparations for the re-trial

A large part of the second half of 2017 was spent dealing with pre-trial applications and preparations for the re-trial. Because of the number and complexity of matters that needed to be dealt with before the trial, as well as issues in obtaining some evidence from overseas, the commencement of the trial was adjourned to 4 June 2018. The final pre-trial application was heard the week before the trial commenced.

It is clear that the determination of issues in advance of the re-trial has helped ensure the trial has proceeded efficiently. In addition, when the judgments are published in due course, they will undoubtedly assist the development of the law in the ACT in a large range of areas.

Whilst pre-trial arguments were being dealt with, the Office was simultaneously making preparations for trial. The workload of the team prosecuting the case increased significantly during this reporting period, particularly over the last six months. The size of the brief has required substantial resources. The team consists of two junior lawyers and a paralegal, who are managed by a Senior Advocate, as well as two external counsel and a number of casual paralegals who assist on an "as needs" basis.

One development which has assisted in saving time and costs has been the amendment to the *Evidence (Miscellaneous Provisions) Act 1991*, which clarified issues identified by Penfold J in *R v Woutersz* [2017] ACTSC 212. The timing of this amendment was fortuitous as it simplified the process for ACT courts to take evidence remotely using audio-visual links (including in places outside Australia). Due to many witnesses residing interstate or internationally, the ability to take evidence remotely, rather than flying witnesses to Canberra, has yielded savings as well as reduced the burden on witnesses, many of whom have had health issues making travel difficult. This matter was the first in the jurisdiction to make an application under the new provisions.

Commencement of the re-trial

The re-trial commenced on 4 June 2018, with the empanelment of 16 jurors. The empanelment process was unique and unprecedented. Owing to the large number of potential witnesses, the notoriety of the matter and the likely length of the retrial, some 1500 jury summonses were issued by the Sheriff's Office to ensure that 16 jurors could be found. (In a typical matter, the Sheriff's office issues around 100 jury summonses.) Due to the anticipated size of the jury panel, the existing ACT Supreme Court was deemed to be an unsuitable location for the empanelment. Instead, the Chief Justice directed that the heritage listed Albert Hall be utilised and for that purpose it was deemed to be part of the ACT Supreme Court.

Following the empanelment of 16 jurors, the Crown opened its case on 18 June 2018. The first witnesses were called that week.

It is expected that the retrial will continue for a number of months and the result will be reported upon in the next Annual Report.

Work Health and Safety prosecutions

Most Australian jurisdictions aim to positively motivate compliance with work health and safety laws and regulations, and strongly deter breaches in order to achieve safer work environments. The application is fourfold:

- The provision of information, education and guidance creating safe work environments; thereby encouraging and enabling compliance;
- Issuing improvement notices and prohibition notices, thereby directing compliance;
- Regulatory sanctions (such as fines, cancellations, suspensions and enforceable undertakings); and
- Criminal prosecutions.

A criminal prosecution results from serious breaches whereby other avenues of compliance are inappropriate. Since implementation of the model laws in the *Work Health and Safety Act* in 2011, prosecutions under the Act have been critically scrutinised. As reported in last year's annual report, from early 2017 WorkSafe and the Office met to develop strategies to improve investigations and prosecutions. The success of those strategies is evident in the focused prosecutions of this year including commencing the largest industrial prosecution in the Territory's history. Nine charges including manslaughter have been laid after the death of a worker in a 2016 incident involving a mobile crane on the University of Canberra Hospital construction site in Bruce. Two companies and seven individuals including company executives have been charged over the death. It is anticipated that the prosecution will continue into next year.

The Office completed two prosecutions this financial year; both resulting in convictions.

Azize v Samarkos Earthmoving Pty Ltd

Samarkos Earthmoving Pty Ltd pleaded guilty to a charge of having failed to comply with a work health and safety duty. In the course of demolishing a “Mr Fluffy” house, an excavator operator commenced demolition resulting in an uncontrolled release of dust into the area. The offender’s failures included: failure to ensure all relevant workers were aware of their roles and responsibilities; failure to implement effective methods of communication between the excavator operator and ground workers; failure to maintain adequate water suppression devices before the demolition began; and failure to implement a safe method of work statement. The offender was convicted and fined \$60,000.

Cummins v Paul Papas

This prosecution also involved the unsafe handling of asbestos. Mr Papas was prosecuted as a business owner who in the course of cleaning a building, directed or allowed a worker to carry out work involving asbestos; allowed a worker to use a high pressure water spray on asbestos, and failed to ensure that an asbestos register was readily accessible. Ms Papas pleaded guilty at the earliest opportunity and demonstrated remorse and contrition for the offending. The court afforded him leniency for his prior good character, early plea, remorse and contrition. He was convicted and fined \$1,980.

Parking matters

The Office prosecutes parking offences which end up in court. There were 371 parking matters completed in the reporting period. This continues the trend, seen last reporting period, of a significant increase on the long term historical trend.

EMPLOYEE PROFILE

Carla Brown



Carla started in the Office in 2009 as a paralegal, having worked as a receptionist and as an administrative officer before that. She recalls being in the FV section with fellow paralegal Phoebe Burgoyne-Scutts. It was at this time that the Office formed a sexual offences unit for the first time and she performed paralegal tasks for that unit as well as the FV section. She was involved in a lot of interaction with witnesses such as proofing and arranging for witnesses to attend court.

While Carla was in FV, the new electronic case management system CASES was introduced into the section first before being rolled out to the whole Office, so that the section were the guinea pigs for the new system.

One of the biggest changes Carla has seen is a change in the atmosphere between prosecutors and paralegals. Some prosecutors treated paralegals in an off-hand manner but that has now changed and prosecutors respect the work of paralegals, just as paralegals have become more professional. Although many paralegals are studying law, not all paralegals want to become lawyers. There is now a stream for professional paralegals. Carla like the other paralegals has attained her Certificate IV in Legal and Business Administration.

Carla fondly remembers the original Commander system in the Office which enabled broadcasts to be made to all staff through the phone system. Occasionally pranks would be made much to everyone's amusement. That system has long since been superseded by advancing technology.

Carla loves to travel and has taken a number of adventurous holidays, her favourite being a trip through South America and Cuba.



Regulatory matters

In addition to criminal matters that brought via charges or summonses laid by the AFP, this Office also deals with a wide range of regulatory offences that are referred from a number of agencies. For example, regulatory offences that relate to the handling or preparation of food sold to commercially are referred to this Office by the ACT Health Department; or regulatory offences with respect to the mistreatment of animals are referred to this Office by the relevant agency.

The different regulatory agencies continue to provide this Office with good quality briefs of evidence with respect to potential regulatory offences, which are then assessed by the regulatory prosecutors and paralegals. In consultation with the agency, this Office is able to give careful consideration as to what charges (if any) should be laid in relation to each regulatory matter.

The following table sets out the number of regulatory matters referred to this Office, and which proceeded to prosecution, during the last financial year:

Act	Matters (No.)
<i>Animal Welfare Act 1992</i>	24
Election Act 1992 (failing to give an election return)	1
<i>Election Act 1992</i> (failing to vote)	1849
Environment Protection Regulation 2005	3
<i>Food Act 2001</i>	3
Total	1880

The high number of prosecutions for failing to vote relates to those summonsed for failing to vote at the last Legislative Assembly elections. Mostly these matters are uncontested and result in a modest fine. The logistics of so many prosecutions however are challenging for this Office and the Court.

By way of example, one of the above regulatory matters that was successfully prosecuted related to an instance of noise pollution. The Environment Protection Authority ('the EPA') received a complaint concerning noise from an air conditioning unit at a residence in Narrabundah that was affecting the occupants of a neighbouring property. On three occasions over the next year, the EPA took noise readings of the air conditioning unit - and on each occasion it was over the noise zone standards for the area. The highest reading recorded was after 9:50pm at night - which was 17.5 dB(A) over the applicable noise zone standard. The defendant was charged with contravening s39(2) of the *Environment Protection Regulation 2005*, by making noise louder than the noise standard and the noise caused environmental harm in an affected place. At the time of sentence, the EPA was still receiving complainants regarding the noise of the air conditioner. The defendant ultimately did not attend the Magistrates Court and was dealt with in his absence - he was convicted and fined \$500.

Case Reports

The following cases are included in the report to illustrate the breadth of work of the Office or because they involved significant issues.

Homicides

Murder is one of the most serious crimes in the criminal calendar, attracting a maximum penalty of life imprisonment. Most often, murder takes place in a family violence context.

R v Graham Dillon

The murder of Bradyn Dillon, and the further crimes perpetrated by Graham Dillon against Bradyn's sister and a former partner, were some of the most horrific offences the Territory has seen.

Between December 2015 and 15 February 2016, Graham Dillon assaulted his nine year old son Bradyn on numerous occasions, including multiple strikes to Bradyn's head. At around midday on 15 February 2016 Dillon again assaulted Bradyn, striking him to his head and face with force. The combination of fresh injuries to Bradyn's brain on this day and the older injuries inflicted by Dillon resulted in Bradyn losing consciousness, and ultimately caused his death a number of hours later. Between Bradyn losing consciousness at approximately midday and an ambulance being called after 7:00pm, Dillon made no attempt to obtain medical assistance for Bradyn, instead leaving him largely in the care of his ten year old sister JL. JL called an ambulance at 7:47pm and Bradyn was taken to hospital, where he was later pronounced deceased after unsuccessful attempts to resuscitate him.

Following police arrival at Dillon's residence, it was apparent that both Bradyn and JL had sustained extensive injuries at the hands of their father. It was later determined that in the months prior to Bradyn's death the children had suffered fractured bones, fractured teeth, widespread internal and external bruising and numerous lacerations. These injuries were the result of Dillon assaulting Bradyn and JL, throwing them against walls of the house, kicking them, burning them with cigarettes, choking them and striking them with belts. During the period he was violently assaulting the children, Dillon kept the children home from school and inside the house to avoid any detection of his offending.

Dillon initially pleaded not guilty to murder and a number of other serious charges, and the matter was committed to the Supreme Court. In August 2017, Dillon pleaded guilty to the murder of Bradyn and ten other offences against both children. These included offences of intentionally inflicting grievous bodily harm, assault occasioning actual bodily harm, threats to kill and acts endangering life. An additional thirteen offences of assault occasioning actual bodily harm and two offences of an act endangering life were taken into account on sentence.

Prior to being sentenced for the offences against the children, Dillon pleaded guilty to a further seven counts of violence against his former partner, UN. These were committed between 2011 and 2013, and involved offences of recklessly inflicting grievous bodily harm, threats to kill and assault occasioning actual bodily harm. An additional seven offences of common assault against UN were taken into account on sentence.

On the count of murder, Dillon was sentenced to 36 years imprisonment. Taking into account all matters, Dillon was sentenced to a total sentence of 41 years and one month imprisonment, with a nonparole period of 32 years. In sentencing, the judge noted that Dillon's conduct towards his children was "brutal, cowardly and callous", adding "your conduct towards your children could aptly be described as torture".

In relation to Bradyn, the judge noted that the murder offence was aggravated by the fact that Dillon had effectively isolated him from the world during his abuse, and the acts which caused his death were part of a process of physical, mental and emotional torture of the victim extending over months. The sentencing judge found that the murder of Bradyn fell into the worst case category and it was only due to his plea of guilty that Dillon avoided a life sentence, although the judge noted that he was not convinced that Dillon's guilty plea was evidence of any significant remorse for his conduct.

R v Scott Cole

Scott Cole and Jason Hollingshed resided next to each other at the Stuart Flats in Griffith. The relationship between the two had originally been friendly, but over the years had deteriorated and had been acrimonious for some time.

On the day of the murder, Mr Cole had taken his methadone dose at a clinic, and consumed several Valium tablets. He had been drinking for most of the day starting at 9am. In the afternoon Mr Cole argued with Mr Hollingshed in the hallway outside Mr Hollingshed's unit about damage to Mr Hollingshed's screen door which he believed Mr Cole had caused. Mr Cole went back to his unit, grabbed a large knife, and followed Mr Hollingshed into his unit. Mr Cole repeatedly stabbed Mr Hollingshed with the knife, killing him.

Following the murder, Mr Cole returned to his unit and washed the knife, placing it in a kitchen drawer. He went to the bathroom and washed his face and removed his blood stained clothing and shoes. He then cut his arms and face to make it appear as if he had been attacked by Mr Hollingshed. Police had been notified of an incident and when they arrived Mr Cole frankly admitted to stabbing Mr Hollingshed, asking police if the victim was dead yet, saying "I hope he's dead".

Mr Cole was charged with murder. He initially pleaded not guilty and was committed for trial to the Supreme Court. He pleaded guilty after a trial date had been set but prior to the Court hearing a pre-trial application. The sentencing judge took into account Mr Cole's prior convictions which involved the use of knives and violence when under the influence of alcohol and drugs, including the attempted stabbing of a close relative in 2010. The judge took into account that Mr Cole demonstrated no remorse immediately after the offence, attempting to clean up and make it appear that he was attacked by Mr Hollingshed. His Honour noted that Mr Cole's admissions to police attempted to justify his actions and denigrate the deceased. Mr Cole had a history of drug and alcohol abuse and did not engage with services while awaiting sentence. The sentencing judge found Mr Cole's prospects for rehabilitation to be poor.

Mr Cole was sentenced to 21 years imprisonment with a non-parole period of 17 years and nine months. Mr Cole has been granted leave to appeal the sentence out of time on the ground that the non-parole period is manifestly excessive. The appeal is yet to be heard.

R v Milan Ulrich and Marc Ulrich

Milan Ulrich was alleged to have murdered 52 year old Andrew Carville at his home in Evatt on 4 November 2015. Milan Ulrich had gone to the house to help a distressed friend who had just found

the body of her deceased dog in the back yard. While the friend sat in the accused's vehicle, the accused Milan Urlich went into the house. A short time later, the accused Milan Urlich placed a heavy object on the back of his Toyota Landcruiser and they drove away.

A fortnight later, the body of Andrew Carville was found in a gully area beside Sutton Road, Majura. The body was wrapped in a floor rug and buried under rocks and sticks.

An extensive police investigation determined that on the night Andrew Carville disappeared the accused Milan Urlich had dumped his vehicle on a farming property at Sutton Road, leaving the vehicle and the body of Andrew Carville at the property. He then stole a vehicle from the Australian War Memorial and travelled to his brother Marc Urlich's house on Phillip Island in Victoria.

On 13 November, Milan Urlich and Marc Urlich drove back to Canberra and the Crown alleged that they moved the vehicle, buried the body and then dumped the vehicle at nearby Kowen Road in the Molonglo Gorge Recreation Reserve. An attempt was made to ignite the vehicle using diesel fuel. The evidence showed that Marc Urlich had stayed at a hotel in close proximity to Sutton Road on the night when the body was buried. Marc Urlich maintained that he knew nothing of the murder and had no involvement in the disposal of the body.

Milan Urlich was charged with the murder of Andrew Carville, and Marc Urlich was charged with being an accessory after the fact of murder.

On the second day of the trial, after the conclusion of the Crown opening, the accused Milan Urlich made factual admissions that he had caused the death of Andrew Carville and had disposed of his body as alleged by the Crown. The trial continued with the essential issues for the jury to determine being the circumstances and intent of the killing and the role of Marc Urlich in the disposal of the body.

Over 100 Crown witnesses were involved in the trial, including expert evidence from Victoria in relation to the cause of death and DNA analysis. The jury were assisted with their understanding of the evidence by a view of key locations including the location where Andrew Carville's body was buried and the location where the attempt was made to burn the vehicle.

Milan Urlich gave evidence and described the deceased Andrew Carville having come towards him holding a knife and that he reacted by taking him into a headlock to protect himself. His version was that he acted in self-defence. He then panicked and disposed of the body and the vehicle as alleged by the Crown. Milan Urlich maintained that his brother did not assist him with disposing of the body and that he had acted alone.

The jury returned a verdict of manslaughter in respect to Milan Urlich and acquitted his brother, Marc Urlich, of the charge of being an accessory after the fact to murder. Milan Urlich is yet to be sentenced.

R v Gabrielle Woutersz

On 17 October 2014, Gabrielle Woutersz killed her mother, Norma Cheryl Woutersz. The offender had returned to her parents' residence in Dunlop following a long hiatus away from home. During the time away from home she had developed a significant drug habit, particularly with the drug "Ice" (methamphetamine). On the day in question, following an argument with her mother, the offender brought in a hammer and some rope from the garage. She slapped and punched her mother, knocking her out. She placed her mother on a chair and began cutting her hair. After her mother regained consciousness, the offender hit her with a terracotta pot and with a hammer, struck her repeatedly on the left side of her head, face and jaw. The offender struck further blows after her mother fell to the floor. She then brought in a ladder and tied her mother's body to it by her feet. Thereafter, she used the ladder to drag the body through the house and into the backyard. She attempted to lift the body into a planter box but subsequently gave up. After the incident, Woutersz thoroughly cleaned the inside of the house. She placed bloodied items into the rubbish bin, cleaned the hammer and returned it to the garage rack. She washed herself in the main bathroom. The offender's father, Keith Woutersz returned home that evening to find the offender in the kitchen cooking eggs wearing only a G-string. Mr Woutersz discovered his wife's body and called police, who arrested the offender.

Woutersz was indicted for the murder of her mother and the matter proceeded to trial by jury. Whilst the offender accepted her conduct, she pleaded not guilty by reason of mental impairment based on a diagnosis of schizophrenia. The question for the jury was whether her mental state at the time of the killing reflected the legal definition of a mental impairment or whether it was a function of her illicit substance abuse of 'ice' that was taken in the years and days leading up to the killing. The jury was also required to consider the causal connection between her schizophrenia and her conduct. After lengthy deliberations, the jury was unable to reach a verdict.

The matter was set down for a re-trial. However, before that trial, the offender pleaded guilty to manslaughter by way of 'diminished responsibility', and the Crown accepted that plea in satisfaction of the indictment. In assessing the offender's moral culpability, the sentencing judge had to determine whether the psychotic episode arose from a drug-induced psychosis or by an underlying illness such as schizophrenia which was aggravated by drug use. The sentencing judge resolved this by directing the inquiry to the offender's 'degree of impairment', not the origins of the impairment. The sentencing judge found the offender was suffering from schizophrenia that impaired her responsibility for the killing and was 'very unwell' at the time of the killing. The sentencing judge further found that the offender had not consumed 'ice' shortly before her return to Canberra. The offender was sentenced to nine years and nine months imprisonment, with a non-parole period of five years.

Sexual offences

Sexual offences account for almost half of the Supreme Court trials conducted.

R v Lars Daniel Burman

The last decade has seen numerous significant legislative reforms in recognition of the unique experience of the victim of sexual offending. In response to a greater understanding of the re-traumatisation many sexual offence victims experience in participating in the criminal justice process, legislative reforms address some of those contributing factors.

The case of *R v Burman* involved allegations that the accused had committed various sexual acts upon his nieces when they were under 10 years of age between the years 1979 and 1987. The trial was first listed in April 2017. The matter finished in June 2018. It was listed not less than six times, and commenced five times. The first four times, the trial was aborted, and the fifth trial ran to completion; the jury returning verdicts of guilty for six out of nine counts on the indictment.

Under the *Evidence (Miscellaneous Provisions) Act* the evidence of a complainant in a sexual offence proceeding must be recorded, and that recording is admissible as their evidence in any future trial. Without that provision in this case, the victim(s) may have had to tell their story and be cross-examination repeatedly over a 12 month period. As it was, each victim only gave their evidence once, although one victim completed her evidence across two trials.

Further reforms now mean that the audio visual recording of the police interview of a complainant of a sexual offence proceeding can be used as their evidence in chief, which means that sexual offence proceeding complainants only need to 're-live' the trauma once in the initial report and be subject to cross-examination, once.

In *R v Burman* the Crown, utilising s108C of the *Evidence Act*, led evidence of an expert with specialised knowledge of child sex offence victims and disclosure. The credibility of the complainants was said by the defence to be in issue on the basis of their delayed complaint and reporting to police. Although the offending occurred when they were under 10 years of age, the first complaint was raised when the victims were in their teenage years, and the matter not reported to police until some 20 years later. Forensic medical officer, Dr Catherine Sansum gave evidence based on her extensive experience that the average age for reporting of childhood sex offending is middle age; and the reasons why that reporting is often delayed.

R v John Aitchison

Cases of child sexual abuse by priests and sustained failures by church leaders to adequately respond to this abuse was an all too regular theme in the recent child abuse royal commission. Priest John Aitchison was an example of that failure. Despite being convicted of child sex offences in Victoria and the United Kingdom in the 1970s, Aitchison became a Deacon at the All Saints Church in Ainslie. It was there that he befriended the victim, then 13 years old. She was a talented musician and it was that interest which brought her to the attention of Aitchison. He also befriended the child's mother which later enabled him to take advantage of the victim. On one occasion, after the victim recited a musical piece in the church, he sat her on his lap in the church pew, under the pretence of encouraging her to pray, before having penile-anal sexual intercourse with her. On other occasions he sexually molested the victim in her own home and bedroom while her mother was out.

Later Aitchison would be ordained as a priest in Bombala NSW where he continued to molest children – sexually abusing two separate boys. Some years later the victim, barely an adult at the time, recalled during the trial how she tentatively tried to tell the then Catholic Bishop about what the accused had done to her. But she recounted how the Bishop's demeanour changed and he became prickly and uncomfortable when she raised it. The Bishop told her that she had put him in a difficult position and that Aitchison was confused and she should feel sorry for him and show mercy. However, during the trial the Bishop gave evidence completely at odds with the victim's recollection. Instead he stated that the victim spoke to him about her difficult relationship with her mother. In line with the prosecution's obligation to assist the court arrive at the truth, the prosecutor cross-examined the Bishop about the different account. However, he maintained his statement. Whatever was said in that conversation it was apparent that the victim felt discouraged by the Bishop's reaction and didn't complain to anyone else in authority. It wasn't until her own child turned 13 years old, many years later, that the victim felt that she needed to be brave and finally reported it to police.

The jury found Aitchison guilty. He was sentenced to nine years imprisonment with a non-parole period of five years. He has appealed against his conviction.

R v Adam Cranfield

Anxious to reinstate his relationship with the victim, in the early hours of one morning Adam Cranfield went to the victim's house. He had taken Ice and had been behaving bizarrely in the hours leading up to going to her house. He asked her for sex. She refused. He told her that he would do it anyway and grabbed her and took her into the lounge room where he ripped her clothes as she tried to fight him off. Over the next two to three hours Cranfield viciously and sexually assaulted the victim multiple times including threatening to shoot her. The sentencing judge described what happened during those hours as *"quite confronting. They represent what, in layman's terms could be described as a woman's worst nightmare – a methyamphetamine-affected former partner attending her house in breach of a protection order, confining her and raping and assaulting her over a number of hours in circumstances where she justifiably feared for her life"*. At one point during the incident the victim managed to secretly call a friend and left the phone line open. The friend could hear some of what was happening in the background and called police. A short time later police arrived at the house and saw the victim in great distress. Police arrested the offender and charged him with several serious offences. He initially pleaded not guilty, but five days before his scheduled trial he changed his plea. The sentencing judge sentenced him to 15 years and one month imprisonment with a non-parole period of nine years and six months. This included a 5% discount for the late plea of guilty.

Cranfield appealed the sentence essentially on the ground that it was manifestly excessive. The Court of Appeal disagreed. However, the Court did consider the 5% discount applied should be increased to 10% to reflect the utilitarian value of the pleas (which is largely concerned with the timing of the plea and related benefit to the justice system). As a result the court re-sentenced Cranfield to 14 years imprisonment with a non-parole period of nine years.

R v David Adams

The use of social media dating applications brings with it different ways that offenders exploit and groom children. David Adams was aged 51. He was a user on 'Grindr' which is an app geared towards gay and bisexual men. The victim was a school boy aged 14. Adams met the child on Grindr and despite obvious red flags about the child's age over a four month period exchanged nearly 600 sexually explicit text messages. In the messages the offender flattered the child and encouraged him to engage in sexual activity. This included sending the child numerous photos of his penis and some photos graphically showing males engaged in penetrative anal sex. Later Adams and the child met up on three occasions, in Adams' car and at a neighbour's house, where the child performed oral sex on him. On the last occasion the child's father walked in on the child performing oral sex on Adams and physically confronted Adams. Police were called. During the police investigation police seized Adams' mobile phone and retrieved the text messages between him and the child. Adams was due to face trial in March 2018. However, before the trial prosecutors requested police to re-examine Adams phone to try to recover the Grindr messages. Police were able to retrieve some Grindr messages between Adams and other users where he admitted to having sex with a 15 year old boy and boasted about his exploits with, and sexual interest in, underage boys. This material was provided to Adams' lawyers. Confronted with this material Adams pleaded guilty. Adams was sentenced to 21 months imprisonment in respect of each count of sexual intercourse with a child under 16 years, and 18 months for the offence of using a carriage service to procure. The total sentence was three years one month imprisonment with a nonparole period of 21 months.

R v Syed Qasim Naqvi

This case was summarised in the last annual report. At that time the offender was in the process of appealing the sentence. The appeal judgment has since been handed down. This case involved the exploitation of a vulnerable woman who had recently breached the terms of her student visa. She had also separated from her husband and the offender took advantage of this isolation, and her perilous immigration status, to forcibly confine her in his home for eight days. During this time, the offender took her money and forced her to cook and clean for him until she escaped about a week later. He forced the victim to carve his name into her arm and sexually assaulted her numerous times. The offender told the victim she had to do what he said, otherwise he would chop her legs off.

The offender pleaded guilty to one count of unlawful confinement, one count of recklessly inflicting actual bodily harm, and four "rolled up" counts of sexual intercourse without consent. Each "rolled up" count of sexual intercourse represented a number of sexual assaults occurring within the same course of conduct. The offender received an aggregate sentence of 13 years and eight months imprisonment with a non-parole period of eight years and two months. Mr Naqvi contended on appeal that the overall sentence was manifestly excessive because the sentence imposed for the count of unlawful confinement was too long. He argued that the seriousness of the unlawful confinement came from the other offences committed in the course of it. Therefore these offences, as the subjects of separate counts, should not be considered in sentencing for this one as well. And if they had not been considered, he argued, then the sentence was manifestly excessive as the unlawful confinement was not otherwise serious enough to warrant the sentence imposed.

The appellant also contended that the degree of concurrency between that first count of unlawful confinement, and the next count to be served, was too low. This resulted in the unlawful confinement sentence having a greater influence upon the overall length of his imprisonment than was warranted.

The Court of Appeal dismissed the appeal and confirmed the sentences both individually, for the count of unlawful confinement, and as a whole. In doing so the Court made clear that there were a number of features of the unlawful confinement that were not the subject of other offences with which the appellant had been charged. These features could be, and were, taken into account when the objective seriousness of the unlawful confinement, for sentencing purposes, was determined. The Court of Appeal was of the view that the sentencing judge was correct in his determination of the relationship between the sentence for unlawful confinement and the sentences imposed for the offences committed during that time.

BI v The Queen

BI was accused of committing historic child sexual offences against four young people, including the brother of his then wife, a neighbour, and his two daughters. He pleaded not guilty to twenty charges representing different types of sexual offending, and went to trial before a jury in the Supreme Court. The jury found BI guilty of six of the 21 counts, being one count of an act of indecency in the presence of a young person (under 16), four counts of act of indecency on a young person, and one count of attempting to commit incest on a young person. BI appealed to the Court of Appeal, with one of the grounds of the appeal being that the jury's verdicts were inconsistent.

The Court of Appeal was required to scrutinise all the evidence that was put before the jury at trial, in order to determine whether the jury's verdicts of guilty on some counts, but not others, were supported by the evidence. In some cases, mixed verdicts of guilty and not guilty were returned for different acts that were alleged to have taken place in the course of the same incident on the same complainant. The Court of Appeal held that the jury was able to differentiate between the evidence for some counts and others, even when the acts allegedly took place very close in time against the same person. It is a well-accepted principle of criminal law that a jury may accept some parts of a witness' evidence and reject other parts. On some counts, the evidence given by a witness could be clear, detailed and unequivocal, leading the jury to accept that the act took place. On other counts, the evidence could be vague or uncertain enough to create reasonable doubt in the mind of a juror.

Another basis on which juries can distinguish between evidence, and return different verdicts on different counts, is the presence (or absence) of 'corroborative' evidence. In child sexual abuse cases, the most obvious example of this is when the complainant reports the abuse to another person. The level of detail reported can vary depending on a number of factors – the complainant may be embarrassed, and initially only disclose some acts that occurred, or may simply be questioned in greater depth at a later police interview. Evidence of complaint is still led at trial, and if it corroborates the complainant's evidence on some counts but not others, it may be a reasonable basis for the jury to return different verdicts on different counts.

The Court of Appeal dismissed the appeal and reaffirmed the convictions. The case highlights important principles for historic child sexual abuse trials, where complainants are required to recall traumatic events which occurred many years earlier. The fact that a jury returns different verdicts for acts relating to the same complainant does not necessarily mean the verdicts are inconsistent – it can be reflective of a careful jury which takes its role in the criminal justice system very seriously.

R v Luke Summerfield

The Crown may appeal against sentences which it considers inadequate, but does so rarely. Essentially, the purpose of a Crown appeal is to lay down principles for the governance and guidance of sentencing courts. This case was a notable example.

From January to May 2016, Luke Summerfield, then aged 18, engaged in ongoing sexual offending against two girls, aged 13 and 15. He was charged with five offences of sexual intercourse with the young people during that time. As a result of sexual intercourse with the offender, which was the subject of one of the charges, the 13 year old girl became pregnant and had an abortion. Mr Summerfield pleaded guilty to and was sentenced for the five counts. The total sentence was two years' imprisonment, with eligibility for parole after one year.

In the course of the sentencing proceedings, Mr Summerfield's lawyer submitted that *"...when these offences occurred, the defendant was a young man of 18 and he was in two relationships that he viewed as being, and for all intents and purposes were, boyfriend, girlfriend relationships with girls who were at a similar level of development and maturity to him"*. In sentencing the offender, the sentencing judge repeatedly referred to the "relationship" between the offender and each of the girls, and noted, apparently by way of mitigation: *"I sentence him on the basis, consistent with the evidence, including the evidence in the victim impact statement, that he was engaged in a genuine, if immature, relationship with each of the victims"*.

The Crown appealed to the Court of Appeal against the inadequacy of the sentence. The Crown argued, inter alia, that the characterisation of each of the "relationships" as being "genuine" was not open on the evidence but, more importantly, that the circumstances were not mitigatory. By law, a person under 16 cannot provide consent to a sexual relationship. Parliament passed this law to protect young people under 16 from sexual exploitation.

The Court stated that the use of the word 'relationship' to describe sexual involvement between a young person and an adult was *"inherently problematic"* and should be avoided. *"the use of that word [relationship], has the capacity to blur the vitally important distinction between the activities between an adult and a child that are permissible and the activities that are impermissible under any circumstances"*. The fact that the Judge considered the 'relationships' with the victims involved 'genuine affection' was a factor which contributed to an inadequate sentence.

The Court also considered the issue of overlap between sentences for separate offences. In child sexual abuse cases, it is important that offences occurring on different dates not be treated as a single course of conduct which results in a reduced overall sentence. This was especially important in Mr Summerfield's case, because he had persisted in engaging in sexual acts with the victims despite being expressly warned not to do so, and later escalated his conduct by deliberately planning and causing the pregnancy of a 13 year old.

In the result, the court re-sentenced Mr Summerfield to a total term of three years' imprisonment, with 18 months nonparole period. The Court stressed that the new sentences were at the very bottom of the appropriate range, and *"a considerably higher sentence would have been entirely open to the primary judge than should now be imposed"*. The Court added in relation to the offence which had left the 13 year old victim pregnant:

That offence requires clear, express and substantial recognition and disapproval, to punish and deter the respondent and to deter others. There must be a clarion call to young men as to how serious such offending is, and the dire consequences of doing so. The final outcome for this offending will remain, after resentencing, very lenient in all the circumstances.

Fraud: not a “victimless” crime

R v Trisha Lee Mooney

Trisha Lee Mooney worked as the finance manager in a small not-for-profit organisation where she bore the primary responsibility for financial management. She was appointed as an executive officer of the organisation and formed part of a three person management team reporting directly to the chief executive officer.

Using various fraudulent schemes, the defendant defrauded the organisation of more than \$157,000. The schemes included using her control of the payment system to overpay herself wages, paying herself at a higher casual rate, paying herself unauthorised overtime, and using a corporate credit card for unauthorised personal purchases. She also forged a loan agreement purporting to be between herself and the organisation in relation to the purchase of a car.

The offending only came to light when a new CEO of the organisation noticed that the organisation was struggling financially, and brought in outside auditors.

The offender originally pleaded not guilty and was committed for trial. However two months before the scheduled trial she entered pleas of guilty.

A feature of the sentencing proceedings were victim impact statements from members of the organisation. The former CEO who had recruited Mooney expressed his distress at the manner in which the offender had betrayed the respect, confidence and friendship that both he and the staff had extended to her. The general manager referred to the loss of staff morale associated with the revelation of her misconduct. Staff had become anxious and mistrustful of each other. The general manager also expressed concern about reputational damage arising from the offender's misconduct, noting that as a not-for-profit organisation the organisation's good reputation was vital.

In the light of the victim impact statements, the sentencing judge remarked, *“there is no doubt that the offender's misconduct caused substantial financial and nonfinancial loss to the organisation and had a significant psychological effect on numerous personnel within the organisation.”*

The offender was sentenced to a total sentence of three years imprisonment with a nonparole period of 18 months. The offender appealed against the sentence claiming that it was manifestly excessive, however her appeal was dismissed by the Court of Appeal.

This case is a stark reminder that fraud offences are far from “victimless” crimes. They often have a devastating psychological effect on those who work with the fraudster, as well as causing economic detriment.

R v Stephen Stubbs

This reporting period saw the conclusion to the prosecution of Stephen Stubbs, a prominent Canberra criminal lawyer, for fraud offences, when the High Court dismissed his application for special leave to appeal verdicts of guilty on 14 counts.

In 2008 Mr Stubbs acted for a client (AD) who was charged with a serious criminal offence. AD was a young man and his mother (Mrs D) supported him through his legal proceedings. Both Mrs D and AD had no prior experience with the criminal justice system and relied heavily on Mr Stubbs to guide them.

At the time Mr Stubbs was a legal practitioner on a restricted practising certificate, and was employed by two firms – Diana Burns Solicitors and Paul Edmonds Solicitors. He had registered with Legal Aid ACT in 2007 meaning he could take on clients funded by Legal Aid. Practitioners are prohibited pursuant to s32A of the *Legal Aid Act 1977* from demanding, accepting or taking payment for services where the client is legally aided and receiving legal assistance.

Mrs D had limited capacity to pay her son's legal fees privately so she asked Mr Stubbs whether her son could obtain legal aid. Mr Stubbs assisted AD with his application for legal aid. Legal aid was granted with Mr Stubbs appointed as AD's lawyer under the grant. However, Mr Stubbs told Mrs D that her son was not in receipt of legal aid and she would need to fund his legal expenses. Believing this to be true, Mrs D borrowed money against her mortgage so that Mr Stubbs would represent her son. Over the course of a year Mrs D paid Mr Stubbs \$25,620 in legal fees, transferring them from her bank account to his business account.

In March 2009 Legal Aid contacted Mr Stubbs and queried AD's ongoing eligibility for legal assistance. They noted that Mrs D was willing to provide a cash surety for a bail application and, for that reason, appeared to be someone who could privately fund her son's legal expenses. Mr Stubbs responded to Legal Aid by stating that Mrs D had no means to pay her son's legal fees on a private basis and that he was not receiving any payments from Mrs D. Following these misrepresentations, Legal Aid continued AD's grant of legal assistance and made a number of payments totalling \$4013 to Mr Stubbs pursuant to the grant of aid.

Mr Stubbs was charged with 14 counts of dishonestly obtaining property by deception contrary to s326 of the Criminal Code. He was tried by a jury. Initially he was legally represented.

At trial, a number of issues arose which significantly extended the length of the trial. On the fourth day of the trial, a Thursday, Mr Stubb's counsel withdrew from acting because, in the words of the trial judge, counsel could not continue to represent the accused "ethically, based on the instructions that [she was] being given." The instructing solicitor then informed the trial judge that his instructions had been withdrawn by Mr Stubbs. Mr Stubbs then requested the trial judge to discharge the jury, stating he could not arrange alternative counsel and he was not able to represent himself due to health issues. The trial judge did not discharge the jury but indicated he was prepared to adjourn the trial until the following Monday to allow Mr Stubbs to arrange new legal representation. When the trial resumed Mr Stubbs indicated that he would not be in a position to arrange new legal representation and the trial continued.

Over the next few days of the trial the Crown closed its case and Mr Stubbs gave evidence and was cross examined. On day seven of the trial, at 8.05am, Mr Stubbs emailed the court indicating he had gone to the local hospital and he would contact the court as soon as he was able to. Later that morning the police informant gave evidence indicating that staff at the hospital had found Mr Stubbs outside the front of the hospital at 8.40am that morning claiming he had no idea where he was, what time it was or what day it was. The Crown submitted to the trial judge that this presentation was at odds with the email sent to the court by Mr Stubbs 35 minutes earlier.

Medical staff at the hospital looked into the symptoms complained of by Mr Stubbs, however after six days of investigations could find no organic cause for the symptoms and discharged Mr Stubbs. By this stage the court had required Mr Stubbs to report back to the Supreme Court and when he did not, a warrant was issued for his arrest. Mr Stubbs was arrested in NSW and extradited to the ACT to continue with the remainder of his trial.

The trial resumed after a hiatus of some days. The Crown called evidence in reply, and closing addresses were made. The jury returned verdicts of guilty to fourteen of the fifteen counts in the Indictment.

At sentence, the sentencing judge noted that Mr Stubbs, having committed each of the offences in his capacity as a lawyer, abused the system of trust afforded to lawyers who are referred work from Legal Aid, and took advantage of the vulnerability of AD and Mrs D. The judge also found Mr Stubbs showed no remorse for his offending.

Mr Stubbs was sentenced to a total term of three years and one month imprisonment for the offences. He was ordered to serve one year by way of full time imprisonment with the balance suspended upon him entering into a good behaviour order for two years. He was ordered to pay reparation to Mrs D and the ACT Legal Aid Commission.

Mr Stubbs appealed his convictions on the grounds the conduct was not capable of making out the offence, and he did not receive a fair trial.

The Court of Appeal dismissed the appeal. As to the ground that the conduct was not capable of making out the offence, the Court of Appeal held that the common law complications associated with bank transfers, and determining ownership of such transfers which had previously bedevilled the criminal law, were resolved by the Criminal Code, in particular the provision deeming amounts transferred from a bank account to have belonged to the person who held the account, in this case Mrs D. In relation to the fair trial ground, Mr Stubbs had raised the *Human Rights Act 2004* in argument. The Court in dismissing this ground stated:

In this case, the available evidence is that the appellant gave certain instructions to his counsel, who was obliged to withdraw upon the basis that she could not continue with the case for ethical reasons. Thereafter, the appellant withdrew instructions from his solicitor. There is nothing in s 22(2)(d) of the *Human Rights Act 2004* (ACT) which adds to the law to be applied in the above circumstances once a trial has commenced. The matter is one of practice and procedure for the trial judge.

.....

As noted at [51] above, the trial judge, appreciative of the desirability of the appellant having legal representation, offered an adjournment of the trial for a short period for the appellant to obtain representation. The appellant did not take up that offer and elected to represent himself.

We cannot see any error in the exercise of the trial judge's discretion to continue the trial in the circumstances and in the manner in which his Honour did.

We also cannot see any error in the trial judge's decision to continue the trial after the appellant had been hospitalised mid-trial. The trial judge considered the then available medical evidence before continuing the trial. At that time the appellant made no objection to the trial resuming. Again, this was a matter for the discretion of the trial judge.

Mr Stubbs applied to the High Court for special leave to appeal, but special leave was refused.

This case is a reminder that the criminal law is there to protect all citizens and further that those that practice in the law are entrusted to carry out their duties honestly and truthfully.

Appeals

Appeals often raise difficult issues of statutory construction.

The Queen v Aaron Holliday

Aaron Holliday was on remand awaiting trial for serious sex offences against a number of young people. He offered another inmate a reward for organising people outside the prison to kidnap two witnesses and force them to adopt exculpatory statements prepared by Holliday. The other inmate reported the plan to prison authorities without carrying it out. As previously reported, Holliday was tried and convicted on one count of attempting intentionally to pervert the course of justice and two counts of inciting the other inmate to kidnap the witnesses, contrary to section 47 of the Criminal Code and section 38 of the Crimes Act.

On appeal to the Court of Appeal, Holliday's incitement convictions were set aside and his conviction for attempting to pervert the course of justice was confirmed. The Crown appealed to the High Court against the setting aside of the incitement convictions. The High Court granted special leave to appeal to the Crown, but dismissed the appeal. The issue was a technical one involving the correct construction of sections 45 and section 47 of the Criminal Code. The Crown argued that there was no bar to charging an offence of inciting another person to perform conduct which if completed would attract liability under section 45, which deals with the offence of procuring another person to commit an offence. In other words it was possible under the Criminal Code to be guilty of incitement to procure an offence.

The High Court held however that there was no offence of incitement to procure an offence under the Criminal Code. The plurality of the High Court noted *"if that is a gap or omission in the Criminal Code, that gap or omission cannot be filled or resolved by resort to the text or structure of the Criminal Code or its legislative history."* Following this decision the Legislative Assembly passed an amendment to the Criminal Code to make it clear that a person can commit the offence of incitement if they urge another person to aid, abet, counsel or procure someone to commit the offence.

Director of Public Prosecutions v Booth

This case concerned whether a “claim of right” was available to an accused charged with aggravated burglary and aggravated robbery. Section 38 of the Criminal Code states that:

1. A person is not criminally responsible for an offence that has a physical element relating to property if—
 - (a) when carrying out the conduct required for the offence, the person is under a mistaken belief about a proprietary or possessory right; and
 - (b) the existence of the right would negate a fault element for any physical element of the offence.
2. A person is not criminally responsible for any other offence arising necessarily out of the exercise of a proprietary or possessory right that the person mistakenly believes to exist.
3. This section does not negate criminal responsibility for an offence relating to the use of force against a person.

The Crown case was that Mr Booth and a co-accused had entered the complainant’s house through a window without her permission, threatened her with a knife, and demanded money. Mr Booth’s case was essentially that he had been seeking a refund after being ripped off in a drug deal. At trial Mr Booth’s trial counsel told the jury flamboyantly that his client was legally entitled to the refund – a so-called “claim of right” – and that so long as his client acted to fulfil that right it did not matter whether his client was “armed or not, with a cannon, with a shotgun, with a brass band, with a barking dog, it does not matter”. Mr Booth’s counsel asked the trial judge to direct the jury that claim of right was available in relation to both aggravated robbery and aggravated burglary. The trial judge (we now know, wrongly) acceded to this request. The jury acquitted Mr Booth.

There is no provision that allows the Director to appeal against an acquittal. After Mr Booth was acquitted, the Director instead took a reference appeal to the Court of Appeal asking for guidance about when the claim of right ‘defence’ was available. A reference appeal does not affect the conviction or acquittal of an accused. It allows the Court of Appeal to provide guidance on the correct application of a law in future trials.

The Director asked the Court of Appeal to consider a number of questions about how to correctly interpret different aspects of this provision: is claim of right available to defend an allegation of aggravated burglary? Is claim of right available to defend an allegation of aggravated robbery? Is either aggravated burglary or aggravated robbery an offence “relating to the use of force against a person”? There was a dearth of authority on interpreting the model Criminal Code, which is excessively technical, and replaces the common law.

Accepting various arguments put forward by the Director, the Court of Appeal held that:

- Claim of right is not available to defend an aggravated burglary allegation. This is because aggravated burglary does not have a physical element relating to property; the only element relating to property is a fault element of intention to commit theft.
- A physical element of an offence will only relate to property if the element itself does; it is not sufficient that the general factual circumstances in which the offence occurred relate to property.

- A mistaken belief about a proprietary or possessory right does not require a mistaken belief about the existence of a right that exists in the civil law (rejecting an argument put by the Director to the contrary). However, a person will only have a mistaken belief when they positively consider the right at issue; a failure to advert to the right is insufficient.
- Claim of right is not available to defend an aggravated robbery allegation. This is because an ingredient of the offence of aggravated robbery is that an accused intended to use or threatened to use force against another person and so it is an offence relating to the use of force against a person.

This case provides helpful guidance to trial judges and practitioners on how to interpret a complicated, and little considered, provision of the model Criminal Code. It is also a stark demonstration of how difficult and time consuming it is for practitioners and courts to apply the Criminal Code. The Criminal Code was introduced with the noble intention of simplifying the criminal law of the ACT: few if any would claim that it had achieved that aim.

Director of Public Prosecutions v Spong

On the opening day of the 2017 Summernats festival, Spong drove his restored 1940's flatbed utility truck around the "cruise route". There were five passengers on the utility tray including the deceased who was situated near the rear of the tray. There were no sides to the tray and nothing onto which the passengers could hold. Spong revved the engine and attempted a "chirpy" (to spin the wheels by engaging and then disengaging the clutch, intending that the vehicle would remain stationary during the manoeuvre). However the vehicle lurched forward and the deceased and another passenger fell from the tray. The deceased's head struck the road surface causing an injury from which he later died.

Spong was indicted on a charge of culpable driving causing death on the basis of negligence. Over the objection of the Crown, and contrary to previous authority in the ACT, the trial judge directed the jury that to find the accused guilty, they must find that the driving involved "a high risk that death or serious injury would follow from the relevant conduct".

Spong was acquitted. The Crown lodged a reference appeal, arguing that the trial judge had been wrong to direct the jury that the driving must involve a high risk that death or serious injury would follow from the relevant conduct. The Court of Appeal agreed and upheld the Crown's contention. The Court noted that to make out the offence of culpable driving by negligence, the requisite negligence was substantially greater than bare negligence: "it is negligence that involves a "gross degree" of departure from the appropriate standard of care". However, the Court added, the level of negligence required was less than that required to establish the offences of manslaughter or recklessly causing grievous bodily harm. The Court held that negligent culpable driving was to be determined by reference to the degree of departure from the required standard of care, rather than by reference to advertence to the possible consequences of deviating from the required standard of care, which the judge's erroneous direction had suggested.

The case is an important one in establishing the appropriate direction to be given to jurors in cases of culpable driving.

Boxx v Peden

This case considered the question of whether the Supreme Court could order the prosecution to pay costs on an appeal from the Magistrates Court to the Supreme Court. This was once standard practice. However, an amendment to the Court Procedures Act meant the court no longer had a statutory power to award the costs of the appeal. The amendment was particularly significant because both appeals and costs are “creatures of statute” and so there is no common law to fall back on in the absence of a statutory power.

Mr Peden was convicted in the Magistrates Court of failing to vote. He successfully appealed his conviction in the Supreme Court and sought costs of the proceedings in the Magistrates Court and of the appeal. The prosecution opposed the costs of the appeal being awarded, but the judge on appeal awarded costs to Mr Peden.

The Director appealed against the order awarding the costs of the appeal. The Court of Appeal found in favour of the Director and upheld the appeal. The Court considered a number of possible sources of a statutory power to award the costs of the appeal – the Court Procedures Rules and the Magistrates Court Act, both of which contain various rules governing appeals from a magistrate to a single Judge of the Supreme Court – and held that none provided the necessary power.

The Court made a number of important points about statutory interpretation and the jurisdiction and powers of courts. Justice Collier delivered the leading judgment. Her Honour noted the Court Procedure Rules contained two possible powers to award costs of the appeal: one applicable to civil proceedings (where the Supreme Court does have an express power to award the costs of an appeal) and one general power to “make any other order that [the Judge] considers appropriate”. Her Honour noted that the Magistrates Court Act also contained a similar power to “give the judgment, or make the order, that, in all the circumstances, [the Court] considers appropriate”. Her Honour held there were a number of reasons why none of the relevant sections provided the necessary power including:

- they were powers that applied specifically to an appellate proceeding that was also a civil proceeding (which Mr Peden’s appeal was not);
- the existence of specific powers to award the costs of other types of criminal appeals from the Magistrates Court gave rise to an inference that no such power could be inferred for the type of appeal Mr Peden had brought; and
- the grant of a power to make “any other order” is not an unlimited grant of power, it is a power limited by other specific powers touching the same subject matter and by the court’s jurisdiction.

Justice Refshauge J agreed with Collier J. His Honour emphasised the importance of the distinction between the *“jurisdiction of a court to make orders or give judgments and the power of a court to make orders or give judgments”*. In other words, can a court hear this case (jurisdiction)? And, if it can, can it make particular orders or give particular judgments to resolve this case (power)? Justice Penfold also agreed and emphasised an approach to statutory interpretation that relies on the “ordinary sense” of the words used by the legislature and does not put a “counterintuitive judicial gloss” on the words used in legislation.

Nchouki v The Queen

Mohammed Nchouki was charged with a number of drug offences involving trafficking cocaine (136 grams), methylamphetamine (57 grams) and MDMA (19 grams). He was also charged with possessing two hand-held electric devices designed to administer an electric shock on contact, similar to 'taser' self-defence weapons. At the trial, Mr Nchouki argued that the drugs in his possession had been for personal use rather than trafficking, and that there was insufficient evidence for the trial judge to find that the electric devices had been designed to administer an electric shock on contact. The trial judge rejected both of these arguments, and he was convicted on all counts. Nchouki was sentenced to a term of imprisonment of three years, with a non-parole period of 20 months. Nchouki appealed the conviction in respect of the electric shock devices, and against the sentence imposed.

In relation to the electric devices, Nchouki argued that there was insufficient evidence for the trial judge to have concluded that the devices met the definition of a "prohibited weapon". In this particular case, the definition of a prohibited weapon was a hand-held electric shock device *"other than a piece of medical equipment or an electric prod designed exclusively for use with animals."* Mr Nchouki argued that the prosecution had not adduced any evidence establishing that the devices were *not* pieces of medical equipment or an electric prod for use with animals. As the respondent to the appeal, the Crown argued that these words in the legislation created an 'exception' which, under the Criminal Code, required the appellant to have adduced evidence capable of establishing that the devices were for one of those purposes. The Court of Appeal agreed and dismissed the appeal against conviction. The appeal against sentence was also dismissed.

Statistics

A note on statistics used in this report

Most of the statistics used in this report are generated from the case management system of the Office, known as CASES. These statistics comply with the Australian Bureau of Statistics (ABS) standards for the characteristics of defendants dealt with by criminal courts (see ABS 4513.0). A fundamental aspect that is different is that the ABS standard reports against defendants rather than charges. As ABS 4513.0 (Criminal Courts, Australia) at para 29 puts it: "The principal counting unit for the Criminal Courts collection is the finalised defendant. A defendant is a person or organisation against whom one or more criminal charges have been laid and which are heard together as one unit of work by a court at a particular level."

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 in ABS 4513 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 sixteen divisions within the ANZSOC are set out in ABS 1234.0. Where tables refer to matters being “disaggregated by matter type”, this is a reference to the ANZSOC divisions.

The National Offence Index (NOI) is a ranking of all ANZSOC Groups and supplementary ANZSOC codes. 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.

Table 1: Total matters finalised by jurisdiction

Description	Matters
Children’s Court	255
Magistrates Court	4401
Industrial Court	2
Supreme Court	296
Court of Appeal	46
High Court	4
Total	5004

Note: Children’s 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.

Table 2: Matters finalised disaggregated by matter type

Description	Matters
Homicide and related offences	
Children's Court	
Magistrates Court	9
Industrial Court	
Supreme Court	7
Court of Appeal	3
High Court	2
Sub Total	21
Acts intended to cause injury	
Children's Court	76
Magistrates Court	608
Industrial Court	
Supreme Court	47
Court of Appeal	3
High Court	
Sub Total	734
Sexual assault and related offences	
Children's Court	11
Magistrates Court	63
Industrial Court	
Supreme Court	48
Court of Appeal	18
High Court	1
Sub Total	141

Description	Matters
Dangerous or negligent acts endangering persons	
Children's Court	4
Magistrates Court	77
Industrial Court	
Supreme Court	10
Court of Appeal	2
High Court	
Sub Total	93
Abduction and related offences	
Children's Court	2
Magistrates Court	35
Industrial Court	
Supreme Court	13
Court of Appeal	
High Court	
Sub Total	50
Robbery, extortion and related offences	
Children's Court	21
Magistrates Court	50
Industrial Court	
Supreme Court	45
Court of Appeal	5
High Court	
Sub Total	121

Description	Matters
Unlawful entry with intent/burglary, break and enter	
Children's Court	21
Magistrates Court	115
Industrial Court	
Supreme Court	43
Court of Appeal	1
High Court	
Sub Total	180
Theft and related offences	
Children's Court	26
Magistrates Court	237
Industrial Court	
Supreme Court	8
Court of Appeal	1
High Court	
Sub Total	272
Deception and related offences	
Children's Court	
Magistrates Court	23
Industrial Court	
Supreme Court	4
Court of Appeal	2
High Court	1
Sub Total	30

Description	Matters
Illicit drug offences	
Children's Court	11
Magistrates Court	225
Industrial Court	
Supreme Court	29
Court of Appeal	5
High Court	
Sub Total	270
Weapons and explosives offences	
Children's Court	18
Magistrates Court	127
Industrial Court	
Supreme Court	7
Court of Appeal	2
High Court	
Sub Total	154
Property damage and environmental pollution	
Children's Court	20
Magistrates Court	129
Industrial Court	
Supreme Court	13
Court of Appeal	1
High Court	
Sub Total	163

Description	Matters
Public order offences	
Children's Court	8
Magistrates Court	86
Industrial Court	
Supreme Court	
Court of Appeal	
High Court	
Sub Total	94
Road traffic and motor vehicle regulatory offences	
Children's Court	24
Magistrates Court	1861
Industrial Court	
Supreme Court	12
Court of Appeal	1
High Court	
Sub Total	1898
Offences against justice procedures, government security and government operations	
Children's Court	13
Magistrates Court	239
Industrial Court	
Supreme Court	6
Court of Appeal	1
High Court	
Sub Total	259

Description	Matters
Miscellaneous offences	
Children's Court	
Magistrates Court	517
Industrial Court	2
Supreme Court	4
Court of Appeal	1
High Court	
Sub Total	524
Coronial	
Children's Court	
Magistrates Court	
Industrial Court	
Supreme Court	
Court of Appeal	
High Court	
Sub Total	0
Total	5004

Table 3: Committals to the Supreme Court

Description	Matters
Children's Court	10
Magistrates Court	222
Industrial Court	
Total	232

Table 4: Committals to the Supreme Court disaggregated by matter type

Description	Children's Court		Magistrates Court		Industrial Court		Total
	Trial	Sentence	Trial	Sentence	Trial	Sentence	
Homicide and related offences			9				9
Acts intended to cause injury	1		15	11			27
Sexual assault and related offences	1	2	24	5			32
Dangerous or negligent acts endangering persons		1	7				8
Abduction and related offences			8	5			13
Robbery, extortion and related offences	1	2	21	15			39
Unlawful entry with intent/ burglary, break and enter		1	19	22			42
Theft and related offences			9	8			17
Deception and related offences			1	1			2
Illicit drug offences			14	8			22
Weapons and explosives offences			8	1			9
Property damage and environmental pollution		1	3	4			8
Public order offences			2	1			3
Road traffic and motor vehicle regulatory offences							0
Offences against justice procedures, government security and government operations			1				1
Miscellaneous offences							0
Total	3	7	141	81	0	0	232

Table 5: Supreme Court Matters

Description	Matters
Trials	
Trials	46
Trial Days in Court	249
Trial Outcomes	
Guilty Verdicts	20
Not Guilty Verdicts	18
Other ¹	8
Awaiting verdict	
Sentencing Proceedings	
Accused sentenced after committal for sentence, after committal for trial/ changed plea	151
Accused re-sentenced after breach	26
Total sentencing proceedings	177
Notices declining to proceed further	11

Note¹: This includes trials which resulted in a hung jury or were aborted. Such matters are not “finalised” for the purposes of Tables 1 and 2.

Table 6: Appeals

Description	Defence Appeals	Crown Appeals	Total
Supreme Court	48	5	53
Court of Appeal	40	10	50
High Court	1	3	4
Total	89	18	107

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 Office is subject to scrutiny from the Auditor General and the Ombudsman. There were no relevant reports during the reporting period.

The Director also appears from time to time before committees of the Legislative Assembly. There were no inquiries by any Legislative Assembly Committee that related to the operations of the Office during the reporting period.

B.4 Risk Management

The DPP risk management arrangements are part of the risk management framework partnership within JACS. This approach emphasises that the management of risk is the responsibility of all employees within the Office.

B.5 Internal Audit

The Office's internal audit arrangements are primarily managed under the broader enterprise risk management framework of JACS. Details of the Audit Committee arrangements can be found in the JACS Annual Report. Areas of significant operational and financial risk are identified and managed under the Risk Management and Fraud Prevention Plans detailed in this report.

B.6 Fraud Prevention

The Office has a Fraud and Corruption Prevention Plan, prepared in accordance with the requirements of the ACT Integrity Policy. The Plan has been circulated to all staff.

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

B.7 Work Health and Safety

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

The Office works proactively to prevent injuries by utilising the Office Working Environment Group (the role and functions of which are discussed elsewhere in this report) as a forum to assess injury data and develop injury prevention programs for implementation and monitoring within the Office.

The Office Health and Wellbeing Policy outlines our commitment to the provision of a healthy and safe workplace. The Office has Health and Wellbeing support arrangements in place to proactively support the wellbeing of staff which recognises the challenging nature of much of the work we do in delivering prosecution services to the community. The Office had one elected Health and Safety Representative for the entire year.

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

- annual health and wellbeing checks;
- Respect, Equity and Diversity (RED) training;
- the opportunity to participate in flu vaccinations;
- Fire Warden training;
- work life balance.

Notifiable incidents

Figures shown in the following table are based on data provided by the Workplace Injury Performance Unit in the Chief Minister’s Directorate.

Section 38 notifiable incidents	Incidents without injury	Minor injuries	Total all incidents
nil	2	3	5

Note: Dates of incidents is in the range 1/07/2017 to 30/06/2018.

B8. Human Resources Management

The Office has continued to support staff wellbeing in a variety of ways including health and wellbeing initiatives and other professional training opportunities. In particular we have maintained our focus on supporting staff in dealing with the complexity and sometimes challenging and/or confronting nature of the work we do.

The Health and Wellbeing initiative has continued from last year after very positive feedback from staff. This program provides a one-hour session for each staff member with a specialist physiologist and provides the opportunity for staff to debrief and have a confidential discussion around any work related or personal issues.

The Office continues to collaborate and promote opportunities in support of staff leading a healthy lifestyle. These are co-ordinated through the Working Environment Group, information on which is contained in the organisational overview of this report.

Legal staff also had the opportunity to participate in continuing legal education and training sessions. Finding time to program such sessions in the busy court schedule and with workloads so high is a constant challenge.

Four employees worked part-time for the entire reporting period. A further three had part-time arrangements during the reporting period. The office continues to look for opportunities to improve flexible working arrangements for staff which presents a challenge in the face of inflexible court schedules.

ARins Reporting

Two members of staff were remunerated pursuant to the terms of Attraction and Retention Initiative (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.

Agency profile

Branch/Division	FTE	Headcount
Corporate	9.9	11
Executive	3.0	3
Legal Support	28.0	29
Prosecutor	43.6	44
Total	84.5	87

FTE and headcount

	Female	Male	Total
FTE by Gender	55.3	29.2	84.5
Headcount by Gender	57	30	87
% of Workforce	65.5%	34.5%	100.0%

Classifications

Classification Group	Female	Male	Total
Administrative Officers	9	2	11
Executive Officers	2	1	3
Legal Support	19	7	26
Prosecutors	25	18	43
Senior Officers	3	0	3
Statutory Office Holders	0	1	1
TOTAL	58	29	87

Employment category by gender

Employment Category	Female	Male	Total
Casual	0	1	1
Permanent Full-time	40	19	59
Permanent Part-time	4	0	4
Temporary Full-time	12	10	22
Temporary Part-time	1	0	1
TOTAL	57	30	87

Equity and workplace diversity

	Headcount	% of Total Staff
Aboriginal and/or Torres Strait Islander	2	2.3%
Culturally & Linguistically Diverse	9	10.3%
People with a disability	0	0.0%

Age profile

Age Group	Female	Male	Total
Under 25	4	3	7
25-34	32	13	45
35-44	12	9	21
45-54	5	1	6
55 and over	4	4	8

Average years of service by gender

Gender	Female	Male	Total
Average years of service	6.0	6.1	6.0

Recruitment and Separation Rates by Classification Group

Classification Group	Recruitment Rate	Separation Rate
Administrative Officers	11.5%	0.0%
Legal Support	55.9%	37.3%
Prosecutors	21.5%	10.8%
Senior Officers	0.0%	27.1%
Total	24.9%	14.9%

Recruitment and Separation Rates - Executive

Classification Group	Recruitment Rate	Separation Rate
Executive Officers	40.0%	0.0%

B.9 Ecologically Sustainable Development

Sustainable development performance - current and previous financial year

	Unit	Current FY	Previous FY	Percentage change
DPP staff and area				
DPP staff	FTE	84.5	71.3	18.02%
Workplace floor area	Area (m2)	1591	1600.1	-0.56%

	Unit	Current FY	Previous FY	Percentage change
Stationary energy usage				
Electricity use	Kilowatt hours	131078	143741	-8.80%
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
Other vehicles (that are not electric or hybrid)	Number	N/A	N/A	N/A
Total number of vehicles	Number	Nil	Nil	N/A
Total kilometres travelled	Kilometres	N/A	N/A	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)	Cubic Metres (Cm3)	unavailable	unavailable	
Water usage				
Water use	Kilolitres	unavailable	Unavailable	
Resource efficiency and waste				
Reams of paper purchased	Reams	3109	3306	-5.95%
Recycled content of paper purchased	Percentage	100%	100%	0
Waste to landfill	Litres	22560	18000	25.33%
Co-mingled material recycled	Litres	24000	19750	21.51%
Paper & Cardboard recycled (incl. secure paper)	Litres	61920	53000	16.83%
Organic material recycled	Litres	0	0	0

	Unit	Current FY	Previous FY	Percentage change
Greenhouse gas emissions				
Emissions from stationary energy use	Tonnes CO2-e	60	82	-26.82%
Emissions from transport	Tonnes CO2-e	N/A	N/A	N/A
Total emissions	Tonnes CO2-e	60	82	-26.82%

Notes:

1. The ACT Government purchased an estimated 7,600 MWh (Mega Watt hours) of GreenPower, representing an indicative 5% of the ACT Government's energy consumption for 2017-18.
2. No water consumption data is captured in the ESP for DPP'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 (May 2018) ACT Electricity Emissions Factor Report: A factor of 0.667 kilogram (kg) CO2-e / kilowatt hour (kWh) or 0.667 tonne (t) CO2-e / megawatt hour (MWh) has been used to calculate electricity emissions (Scope 2) for the 2016-17 period. It is based on actual historical data and is a retrospective adjustment of the original 0.525 factor (Scope 2) used for 2016-17 annual reporting. A factor of 0.455 kilogram (kg) CO2-e / kilowatt hour (kWh) or 0.455 tonne (t) CO2-e / megawatt hour (MWh) has been used to calculate electricity emissions (Scope 2) for the 2017-18 period.

C. Financial Management Reporting

C.1 Financial Management Analysis

The Office 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. However, that said ongoing cost pressures will continue to create challenges for the organisation.

C.2 Financial Statements

The financial transactions of the Office for the year ending 30 June 2018 are subsumed within the audited financial statements of JACS. For information related to the budget outcomes please refer to the audited JACS financial statements for 2017/2018 (Output 1.4). It should be noted that total expense in Output 1.4 include allocated JACS overheads.

C.3 Capital Works

The Office had no Capital Works during the reporting period.

Contact details capital works officer:

Emma Flukes

Director Corporate Services

Phone: 02 6207 5399

C.4 Asset Management

The Office is located in the Reserve Bank Building, adjacent to the Supreme Court and Magistrates Court buildings.

87 staff occupied a total floor space of 1,591m². The current utilisation rate is 18m² per employee which is a decrease from 21m² in the last period. This is largely as a result of an increase in staff numbers during the reporting 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 2018, 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 2017-18	Date services commenced	Procurement Type
1.4	Mr Thangaraj	External Counsel	\$566,435.00	01 July 2017	Single Select
	Ms Campbell	External Counsel	\$326,324.00	01 July 2017	Single Select
	Dr Weston-Scheuber	External Counsel	\$53,727.00	05 July 2017	Single Select
	Itec Pty Ltd	Case Management System	\$50,000.00	01 July 2017	Single Select

C.6 Statement of Performance

The following is extracted from the audited JACS financial statements for 2017/2018:

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.

	2017-18 Original Target	2017-18 Amended Target	2017-18 Actual	YTD Variance
Total Cost (\$'000)	14,056		14,925	6%
Controlled Recurrent Payments (\$,000)	13,240		13,674	3%
Accountability Indicators				
Percentage of cases where court timetable is met in accordance with Courts' rules	80%		80%	0%
Average cost per matter finalised	\$2,800		\$2,983	7%

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

N Community Engagement and Support

The following sponsorship was provided by the Director during the year ending 30 June 2018.

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

Q. Territory Records

The Office 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.

The Director of Territory Records has approved a Records Disposal Schedule for the Office, *Territory Records (Records Disposal Schedule - ACT Director of Public Prosecutions Records) Approval 2008 (No 1)*, being Notifiable Instrument NI2008-60, effective 4 March 2008.

A revised Records Disposal Schedule for the Office is currently being developed with the assistance of the Director of Territory Records.

No records containing information that may allow people to establish links with their Aboriginal or Torres Strait Islander heritage are created within the Office.

The Director of Territory Records has not made any declaration under section 28 of the Act.

Freedom of Information

The *Freedom of Information Act 2016* commenced on 1 January 2018, replacing the *Freedom of Information Act 1989*. This report contains information about freedom of information access applications made under both the Acts. To ensure accurate reporting under the requirements of relevant Acts, this section is split into two time periods: 1 July 2017 to 31 December 2017, and 1 January 2018 to 30 July 2018.

1 July 2017 to 31 December 2017: *Freedom of Information Act 1989*

Section 7 and 8 statement

Section 7 and 8 requirements were abolished by the *Freedom of Information Act 2016*. The Office has updated its website and published documents since 1 January 2018 to reflect the new requirements.

Section 79 Statement

During the reporting period, there were:

- two application(s) to access documents. Of these applications:
 - full access to the documents was granted in 0 case(s)
 - partial access to the documents was granted in one case(s)
 - access was refused to all documents in one case(s)
- 0 application(s) made for the internal review of decisions under section 59;
- 0 application(s) made to the Tribunal for the review of decisions;
- 0 charge(s) or application fees collected in relation to FOI requests and other applications made under the FOI Act; and
- 0 request(s) received to amend records under section 48.

A summary of the number of FOI decisions notified based on the time taken for notification after the request was received, was as follows:

30 days or less	31 – 45 days	46 – 60 days	61 – 90 days	91 days or more	Decision pending	Withdrawn
2	0	0	0	0	0	0

1 January 2018 to 30 July 2018: *Freedom of Information Act 2016*

Section 96 Statement

Number of open access information published under Section 24 of the *Freedom of Information Act 2016* and status of decisions

Decisions to publish Open Access Information	Decision to withhold Open Access Information	Decision to not publish a description of Open Access Information withheld
1	1	

Number of FOI access application requests received under of the *Freedom of Information Act 2016* and access type determination

Access application received	Full access	Partial access	Refused access
2		1	1

Time to decide under Section 40 of the *Freedom of Information Act 2016*

Access application decided within time to decide.	Access application not decided within time to decide	Addition Number of day taken to decide over the time to decide
2	0	0

During the reporting period there were:

- 0 requests for amendment of personal records under section 59;
- 0 applications made to the Ombudsman under Section 74;
- 0 applications made to the ACAT under Section 84;
- no fees or charges applied in relation to the processing of FOI requests.

APPENDIX

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. There are no further guidelines at present.

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 commonsense. 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?
 - (h) 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?
 - (i) 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?
 - (j) If identity is likely to be an issue, is the evidence that it was the accused who committed the offence sufficiently cogent and reliable?

- (k) 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 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 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.

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