



DIRECTOR  
OF PUBLIC  
PROSECUTIONS  
**ANNUAL REPORT**  
**2013–2014**



### **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 appropriate symbol for the DPP, which acts for, and represents, the community.

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# Glossary

## Acronyms

<b>ACTPS</b>	Australian Capital Territory Public Service
<b>AFP</b>	Australian Federal Police
<b>CASES</b>	name of the case management system of the Office
<b>DPP</b>	Director of Public Prosecutions
<b>DVCS</b>	Domestic Violence Crisis Service
<b>FOI</b>	freedom of information
<b>FV</b>	family violence
<b>FPVP</b>	Family Violence Intervention Program
<b>JACS</b>	Justice and Community Safety Directorate
<b>RJ</b>	restorative justice
<b>VSACT</b>	Victim Support ACT
<b>WAS</b>	Witness Assistance Service

## Technical Terms

<b>accused</b>	person charged with an offence, usually an indictable offence
<b>complainant</b>	person against whom it is alleged a crime has been committed, usually used in the context of sexual assault
<b>Crown</b>	the prosecutor in the Supreme Court or Court of Appeal
<b>defendant</b>	a person charged with an offence
<b>Director</b>	the Director of Public Prosecutions
<b>director</b>	administrative unit of the ACT Public Service
<b>director-general</b>	person appointed to head an administrative unit of the ACT Public Service under Division 3.4 of the Public Sector Management Act 1994
<b>head of service</b>	person appointed to head the ACT Public Service under Division 3.2A of the Public Sector Management Act 1994
<b>indictable offence</b>	an offence required or able to be dealt with in the Supreme Court
<b>Office</b>	the Director and staff assisting the Director
<b>summary offence</b>	an offence required or able to be dealt with in the Magistrates Court
<b>victim</b>	a person who suffers harm arising from an offence

## Director's Overview

Again this year the outstanding feature was the successful conduct of business in the superior courts, with record or near record numbers of appeals, trials and sentences. The new intensive listing system for trials in the Supreme Court has been a great success. Trials are listed in blocks with a running list and all available judicial resources devoted to them. As one trial ends there is another to take its place. If, as is not infrequently the case, a plea of guilty is entered at the last moment, the court can move straight onto the next trial on the list.

Notably, sexual offence trials are included. This is most welcome. Delays in bringing matters to trial hit victims of sexual offences particularly hard.

The new system does place demands on my Office in readying matters for trial. Most of the work takes place before the first day of the trial. However, the reduction in delays makes it well worthwhile. The rate of late pleas of guilty continues to be of concern and details are given in this report. We continue to explore ways of negotiating early pleas of guilty. But experience has shown that the best way of bringing about a change of plea is to have a matter listed for trial and ready to proceed.

The Magistrates Court appears to be feeling the pressure from an increase in business and from listing practices in urgent need of reform. For some years we have been awaiting initiatives to assist in more efficient listing such as a separate bail court, the abolition of case management hearings and the streamlining of listings of hearings. Unfortunately those reforms are yet to be implemented. Other worthwhile reforms suggested by my Office, such as the creation of a separate traffic list, have not found favour. The consequence of all of this has been that delays are increasing in the Magistrates Court, just as they are decreasing in the Supreme Court.

A major focus for the next year within the Office will be handling Magistrates Court matters more efficiently, giving greater attention to significant matters. For example the preparation of straightforward traffic matters will be handled by paralegals. Ultimately, they could even be dealt with in court by experienced paralegals appearing by leave.

In line with the whole of government move towards electronic service delivery, the Office is moving to the electronic service of briefs of evidence, and the presentation of evidence in court by electronic means. Much has already been achieved within the Office by way of electronic dissemination and storage of material.

In the budget additional resources (a senior lawyer and a paralegal) specifically for work safety matters were allocated, a welcome development. This will allow work safety matters, which as predicted are increasing in number, to be coordinated more effectively.

I must record my appreciation for the contribution of John Lundy, my Deputy Director, who is to retire. John has earned a reputation as a formidable advocate, but his work behind the scenes in the Office, particularly guiding young lawyers, has been just as significant. I will miss his wise counsel. With my new senior team of Margaret Jones as Deputy, and Shane Drumgold as Assistant Director, the Office continues to be in good hands.

It is a great privilege to lead this Office. The community can be well satisfied of the professionalism, dedication and sensitivity of my officers across the board. It is a continuing source of inspiration to me as we go about our challenging but rewarding work.

**Jon White SC**  
**Director of Public Prosecutions**



## A. Transmittal certificate



18 September 2014

Mr Simon Corbell MLA  
Attorney General  
Legislative Assembly  
CANBERRA ACT 2601

Dear Attorney,

### ANNUAL REPORT

I present my Annual Report for the year ended 30 June 2014.

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 is and is an honest and accurate account and that all material information on the operations of the Office during the period 1 July 2013 to 30 June 2014 has been included.

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

Section 13 of the *Annual Reports (Government Agencies) Act 2004* requires that you cause a copy of the Report to be laid before the Legislative Assembly within 3 months of the end of the financial year.

Yours faithfully



Jon White SC  
Director of Public Prosecutions

ACT DIRECTOR OF PUBLIC PROSECUTIONS

Reserve Bank Building 20-22 London Circuit CANBERRA CITY ACT 2601  
Phone +61 2 6207 5399 | Fax +61 2 6207 5428 | GPO Box 595 CANBERRA CITY ACT 2601 | DX: 5725

## B. Performance Reporting

### 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, was appointed for a seven year term commencing on 15 September 2008.

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. There were no such notifiable instruments during the period covered by this report.

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 have strikingly been called “ministers of justice”, a phrase which sums up the unique position of the prosecutor in the criminal justice system. It has been said that prosecutors must always act with fairness and detachment with the objectives of establishing the whole truth and ensuring a fair trial.

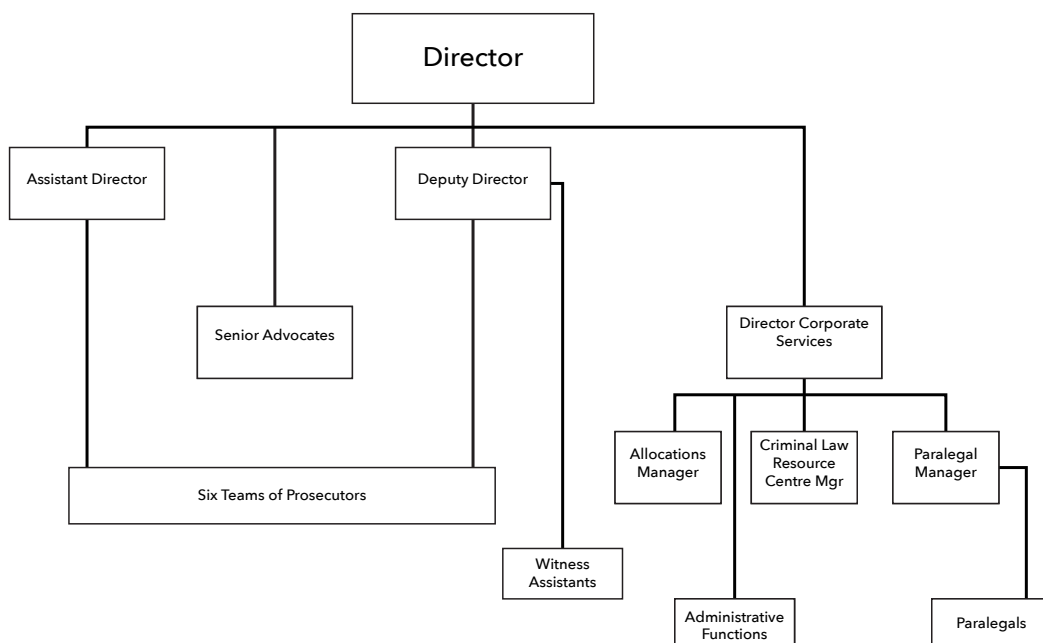
In making decisions in the prosecution process, prosecutors are guided by the procedures and standards which the law requires to be observed, and in particular by the Prosecution Policy promulgated by the Director. The Prosecution Policy is available on the website of the Office and is appended to this report. The Director also issues 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.

## **The organisation**

A senior management meeting involving the Director, senior executives, director corporate services, allocations manager, practice manager, paralegal manager and senior lawyers takes place each week. There are also frequent meetings of prosecutors and paralegal staff and these meetings are used to communicate proposals and requests, and invite feedback.

The Office structure during the reporting period was as follows:



## Summary of performance

- Continuing record numbers of Supreme Court trials, sentences and appeals conducted by the Office.
- Participation in a pilot intensive listing program of Supreme Court trials.
- Prosecution of a number of complex and significant matters.
- Prosecution of a number of significant Crown appeals.
- Responding to appeals, including in the High Court.
- An increase in “front end” preparation of Supreme Court matters, including attention to filing indictments and case statements immediately after matters are committed for trial, internal case management and consultation in respect of Supreme Court trials, and attempts to negotiate early pleas of guilty consistent with prosecution policy.
- A continued progress to electronic service delivery including a move to the service of briefs electronically.
- A program of continuing legal education for prosecutors, incorporating aspects of advocacy, evidence, criminal law and procedure.
- Continuing emphasis on training opportunities for paralegals.

## Outlook

Priorities for the coming year include:

- Putting in place a team dedicated to work safety, and other regulatory prosecutions, and enhancing expertise in the area.
- Reviewing internal processes to maintain pressure for efficiency in dealing with Magistrates Court matters.
- Consolidation of the move to electronic service delivery particularly in relation to the receipt and service of police briefs in electronic form.
- Shifting criminal law resources within the Office to a new platform to enable better access to existing resources and precedents, and greater functionality in discussions between lawyers about current developments.
- Recruitment and training across the organisation, particularly in relation to junior prosecutors.

The major challenge facing the Office is undoubtedly maintaining prosecutorial services in the face of increasing workloads and tightening resources. Other major challenges are:

- Working with the Magistrates Court to improve listing procedures.
- Working with government and the courts to ensure that pleas of guilty are made at the earliest possible time.
- Maintaining staff development in the face of work load and budgetary pressures.
- Retaining junior prosecutors.
- Continuing pressures on wage rates and workloads of paralegals.
- Dealing with issues of security of staff outside the Office, particularly in court and on the way to court.
- Engaging with legislative reform within existing staffing levels and workloads.

# B.2. Performance Analysis

## SUPREME COURT AND APPELLATE ACTIVITIES

### Supreme Court

The trend of very high numbers of trials conducted in recent years continued with some 65 trials conducted during the year. This was in line with the significant increase in trial numbers since the 2010/11 year. The figures for the last five years are:

Year	2009/2010	2010/2011	2011/2012	2012/2013	2013/2014
Trials	30	66	62	72	65

To put this into perspective, prior to 2010/11, the highest number of trials conducted in a year was 42. Clearly a seismic shift has taken place.

A great variety of cases were conducted, some of which are detailed elsewhere in this report. Of particular significance, 35 of the 65 trials conducted, or 54% of trials, were for sexual offences.

The year saw a new listing procedure trialled in the Supreme Court, whereby matters are listed in blocks in a rolling list with all available judges sitting. A successful pilot of this listing system having been completed, it will now become the norm. One of the notable features is that sexual offence matters are included and indeed given priority. This is a welcome development. While all victims of crime benefit from having their matters brought on as soon as possible, complainants in sexual offence cases often tell us that their lives are “on hold” pending the completion of trials.

As always, figures for completed trials tell only part of the story. In no fewer than 63 cases a plea of not guilty was originally entered and the matter committed for trial, only for the accused to change their plea to guilty nearer the trial date. Of those 63 cases where the plea was changed, some 39 of those changes came within two weeks of the trial date when considerable preparation and expense had already taken place – witnesses subpoenaed and proofed, travel and accommodation booked, cases prepared and court time set aside etc. Obtaining earlier pleas of guilty is clearly one of the biggest challenges to our system of criminal justice. Experience has shown that the best remedy is to list matters for trial as soon as possible after committal. It is the impending trial date which most concentrates the mind of accused persons, and indeed defence and prosecution counsel. The Office actively pursues prospects of early resolution of matters, but this is always contingent upon the accused person and their legal representative engaging with the case. Ways have to be found to ensure that that engagement takes place at a much earlier time than at present.

The number of sentencing proceedings in the Supreme Court was also close to historically high levels – 201 accused persons were sentenced, a number second only to last year.

An interesting statistic is that whereas overall there were 65 trials conducted and 201 pleas of guilty, in the sexual offences field, there were 35 trials conducted and only 26 pleas of guilty. This indicates that those charged with sexual offences are much less likely to plead guilty than those charged with other offences.

## Appeals

Appeals too continued at record high levels. In particular, 45 Court of Appeal matters were conducted, which was the highest on record, eclipsing last year. To a large degree, the increased number of appeals mirrors the greatly increased numbers of trials and sentences of the last few years.

## The Eastman Inquiry

As reported last year, on 3 September 2012, Acting Justice Marshall ordered an inquiry into the conviction of David Harold Eastman for the murder of Assistant Commissioner Colin Winchester. The inquiry was purportedly ordered pursuant to Part 20 of the *Crimes Act 1900* on wide ranging grounds drafted by counsel for Mr Eastman and adopted in their entirety by Marshall AJ despite opposition from the Director. Following that order, a Board of Inquiry was established, headed first by Duggan AJ and then by Martin AJ. The Board was assisted by senior counsel assisting, junior counsel and a number of solicitors.

In order for the Director to appropriately respond to the Inquiry, a team was set up within the Office, consisting of a senior lawyer, a junior lawyer and a paralegal. The Director instructed junior counsel, Dr Peggy Dwyer of the Sydney Bar, to appear for the Director at the Inquiry.

When he took over, Acting Justice Martin held a number of directions hearings during which the Director sought clarification as to the scope of the Inquiry. The parties made submissions on how the Board should interpret the order made by Marshall AJ. In early November 2013, Martin AJ ruled on the scope of the Inquiry and the matter was set down for hearing.

### *Hearing before the Board*

On 11 November 2013, the Board began hearing evidence through public hearings. The Director, the AFP and Mr Eastman were given leave to appear at the hearing, which they did through counsel. Later, Mr Robert Barnes sought and was also granted leave to appear through counsel.

The Board heard from 54 witnesses, including from three former prosecutors and Counsel who appeared for the Director, who had all worked on Mr Eastman's trial in 1995. The Board received thousands of pages of documents and other evidentiary items, 263 of which were marked for identification or exhibited. The Board also heard evidence at two private hearings from which the

parties given leave to appear were excluded. The evidence given at those private hearings has not been disclosed to the parties or to the public, but was later relied on by the Board.

The Inquiry concluded taking evidence on 12 April 2014 and the matter was adjourned for final submissions. As required by the legislation, the Board served Notices of Proposed Adverse Comment on various parties and witnesses, including the Director. The Director responded to the Notice by way of written submissions and filed further submissions on the doubts or question said to have been raised by the application for the Inquiry and on the circumstantial case against Mr Eastman. Oral submissions were made by each of the parties and the Inquiry concluded on 15 May 2014, with Martin AJ reserving his decision.

### *Director challenge to rulings on scope*

Whilst the Inquiry was underway, the Director applied to the Full Court to challenge, by way of judicial review, Marshall AJ's order for the Inquiry and Martins AJ's ruling on the scope of the Inquiry. Because of the length of time between the making of the order and the challenge to it, the Director was required to seek an extension of time in which to file the application for judicial review. During the course of the hearing, a question was raised concerning a constitutional matter which required notice to be given to the Attorneys-General under s 78B of the Judiciary Act. The Court decided to sever that matter and continued hearing submissions about the other matters raised in the application.

On 22 May 2014, the Full Court handed down its decision. The Full Court granted the Director an extension of time in which to file the application for judicial review and went on to consider the substantive grounds of the application. It found, amongst other things, that Marshall AJ's decision to order the Inquiry was affected by jurisdictional error and, if set aside, would invalidate Martin AJ's appointment. The Full Court, in its discretion, however, refused to grant the Director relief – that is, despite the finding of error, it refused to quash the order for the Inquiry.

### *The Board reports*

On 29 May 2014, the Board delivered its Report of the Inquiry to the Registrar of the Supreme Court. In its Report, the Board made findings with respect to each paragraph of the application for the inquiry which were said by Mr Eastman to raise a doubt or question about his conviction. In most respects, the Board found that doubts or questions raised by Mr Eastman had been dispelled, or convincingly dispelled.

The first four paragraphs related to the issue of Mr Eastman's fitness to plead during the trial, but particularly on 29 June 1995. Mr Eastman had suggested that the question of his fitness to plead had been raised on that day that the trial should have been adjourned and, because it was not, the trial was a "nullity". He also complained the prosecution was in possession of psychiatric reports from Dr Milton which alerted the DPP to the question of his fitness to plead. The Board upon consideration of all of the evidence, including the medical evidence, found that Mr Eastman was highly intelligent, had an excellent grasp of the issues at trial and was fit to plead on and before 29 June 1995. The Board found that the reports of Dr Milton did not raise the issue of Mr Eastman's fitness to plead, were not relevant to any issue at trial and no occasion arose for their disclosure. The Board considered if the

issue of Mr Eastman's fitness to plead "had been raised by counsel or the trial judge, on the material available to the trial judge, and on the material now available to me, there is no doubt that his Honour would have found that no 'question' existed as to fitness." The Board concluded that each of the doubts or questions in paragraphs 1-4 had been convincingly dispelled.

Paragraphs 5-11 of the application for the inquiry were interrelated as the doubts or questions said to be raised by each paragraph concerned forensic evidence relating to gunshot residue. The Board considered that, to some extent, the paragraphs could also be read together as relating to a doubt or question that arose because of the unreliability of evidence given by forensic expert, Mr Robert Barnes – who gave forensic evidence that was used to link Mr Eastman to the crime scene – and a failure by the prosecution to disclose material which reflected adversely on the credibility and reliability of Mr Barnes. The Board found that there was some material that was not disclosed by the prosecution team, including, some conference notes with other experts and deficiencies in a database used by Mr Barnes, but noted that the Crown prosecutors had "made every effort to comply with their duty of disclosure. They were acutely conscious of their ethical duties and endeavoured to fulfil them". The Board also found that matters known by the AFP, but which had not been passed on to the prosecution team, that cast doubt on Mr Barnes' reliability should have been disclosed to the DPP and defence.

The Board ultimately concluded that there were serious problems with the forensic work undertaken by Mr Barnes, including his finding that gunshot residue found in the boot of Mr Eastman's car was indistinguishable from gunshot residue located at the crime scene. The Board found, amongst other things, that the evidence Mr Barnes gave at the Inquest lacked a proper scientific basis, that he was not an independent or objective witness, that he failed to comply with accepted forensic practice with respect to his case files and the provenance of crucial exhibits was either non-existent or highly doubtful. The Board found that neither the AFP nor the DPP was aware of the "inadequacies and conflicts" within Mr Barnes' case file and nor were they known by the defence. So although the Board considered that the doubts or questions said to arise in paragraphs 6-11 had been dispelled, the problems identified by the Board with Mr Barnes' evidence uncovered during the investigation of paragraph 5 were found to amount to a miscarriage of justice.

It should be noted that the criticisms about Mr Barnes' evidence did not derogate from the fact that gunshot residue was found both in the boot and front seat of Mr Eastman's car as well as at the crime scene. That circumstance connected Mr Eastman's car to the crime scene. The flaws identified in Barnes' evidence related to his conclusion that the gunshot residue in the car and the crime scene was of the *same ammunition type*. Even without that evidence there remained circumstantial evidence which linked Mr Eastman's car to the crime scene, although not to the same extent as was presented at trial.

The Board found it "unnecessary to rely" upon the opinions of one Dr Wallace, an expert retained by Mr Eastman, the Board noting that Dr Wallace's "conduct over the years strongly suggests that there is a serious danger that his views are less than objective". Paragraph 10 asserted that Dr Wallace had conducted tests and concluded that it was more probable that the murder weapon was a shortened rifle than one to which a silencer had been attached. The Board found that Dr Wallace had arranged for test to be conducted, but the resulting test were "useless", the Board commenting "one might have expected primary school students to have performed a more scientifically reliable test".

Paragraph 11 related to an "innocent explanation" for the presence of gunshot residue in Mr Eastman's car, being an assertion by a Mr Smith that he had borrowed the car to go rabbit shooting

and had placed the weapon in the boot. The Board found two problems with this. First, Smith asserted that he had borrowed the car in late 1985 or early 1986, but even if he had done so and placed his rifle in the boot, this “could not possibly account for all of the gunshot residue found in the boot in January 1989”. Secondly in any event the Board described the evidence of Smith on the issue as “utterly without credit”. The Board found that any suggestion of a doubt or question as to guilt arising from Smith’s version has been convincingly dispelled.

Paragraphs 12 and 13 of the application for the inquiry both concerned an hypothesis consistent with Mr Eastman’s innocence that Assistant Commissioner Winchester had been killed by members of Italian organised crime. Paragraph 12 related to information that the gun dealer who sold the murder weapon had delivered a rifle to a man involved in organised crime. It posited that the gun that was delivered to the man was the murder weapon. The Board found that the hypothesis put forward by Mr Eastman was mere speculation and that the doubt or question said to arise in paragraph 12 had been dispelled. Similarly, the Board found that although the matters in paragraph 13 created suspicion they did not support the existence of a doubt or question as to Mr Eastman’s guilt. This finding, however, was later qualified by the Board as it considered that fresh evidence, given at private hearing (which has not been disclosed publically or to the parties), “adds a new dimension” and “potentially lifts suspicion to the level of a reasonable hypothesis consistent with the applicant’s innocence”.

Paragraph 14 related to evidence given by Dr Roantree that Mr Eastman said “I should shoot the bastard”. The Board found that competent cross-examination could have put a different complexion on the evidence given by Dr Roantree, but that the paragraph of itself did not give rise to a doubt or question.

Paragraph 15 related to the reliability of a key Crown witness, Mr Webb. Mr Webb had given evidence that he saw Mr Eastman at the house of the gun dealer, who had sold the murder weapon, a week before the murder. The Board found that the doubt or question had been convincingly dispelled.

Paragraph 16 concerned an allegation that reports of Dr Milton, which had not been disclosed until well into the trial, together with evidence of police harassment, cast doubt on the reliability of confessional utterances made by Mr Eastman in his flat which had been covertly recorded. The Board found that some of the police conduct in investigating Mr Eastman did amount to harassment, but that there was “no evidence to suggest that the police conduct resulted in the involuntary making of the recorded admissions or the making of false admissions”. The Board concluded that the doubt or question underpinning paragraph 16 had been dispelled.

Paragraph 17 related to evidence at trial that Mr Eastman submitted was factually incorrect or misleading. The Board found that the doubt or question said to arise in paragraph 17 had been convincingly dispelled.

The Board found it difficult to discern any particular doubt or question from paragraph 18 and noted that “No evidence independent of evidence relating to other paragraphs has been led in respect of Paragraph 18”. It found, however, that to the extent paragraph 18 implied that there was a doubt or question arising out of consideration of the evidence and issues raised in all of the paragraphs, the doubt or question had been confirmed.

The Board considered that paragraph 19 related to a doubt or question arising out of “(i) The failure of the applicant to receive a ‘satisfactory trial’; and (ii) The fact that the conviction is ‘unlawful’; and (iii) The fact that the finding of guilt is ‘unsafe’”. The Board found that in certain respects, but in particular in relation to the evidence given by Mr Barnes, the trial was “far from satisfactory”. With respect to the submission that the conviction was “unlawful”, his Honour found that the only basis upon which this



submission was made was “that the trial was nullity because there was a question as to the applicant’s fitness to plead which should have been determined by the Mental Health Tribunal”. As his Honour had earlier found that there was no issue as to Mr Eastman’s fitness to plead, he rejected the assertion that the conviction was “unlawful”. Finally, in assessing whether the finding of guilt was “unsafe”, his Honour took the same approach as he had with paragraph 18 and considered, in their totality, all of the matters raised under each of the paragraphs.

Ultimately, the Board concluded that:

- A substantial miscarriage of justice had occurred in Mr Eastman’s trial, he did not receive a fair trial and was denied a fair chance of acquittal;
- “The issue of guilt was determined on deeply flawed forensic evidence [given by Mr Barnes] in circumstances where the applicant was denied procedural fairness in respect of a fundamental feature of the trial process concerned with disclosure by the prosecution of all relevant material”;
- The miscarriage of justice was such that in an appeal against conviction it would have resulted in a re-trial;
- A re-trial was not feasible or fair;
- He was “fairly certain” Mr Eastman was guilty but “a nagging doubt remains”; and
- Regardless of his view of the case, the substantial miscarriage of justice suffered by Mr Eastman should not be allowed to stand uncorrected.

Based on these conclusions, the Board recommended that Mr Eastman’s conviction be quashed, without an order for a re-trial.

### *The Full Court*

The report having been delivered, it became a matter for the Full Court of the Supreme Court to consider the report and come to its own conclusions about what order to make under s 430(2) of the *Crimes Act*, including, whether to confirm the conviction; quash the conviction and order a re-trial; or quash the conviction without ordering a re-trial.

The Full Court invited the parties to make further submissions about what jurisdiction it was exercising and about whether it could hear from the parties as to the appropriate order to make. It was necessary for the Full Court to hear submissions on this issue as s 431 of the *Crimes Act*, contrary to recognised principles, seemed to suggest that the Full Court in exercising its power under s 430(2) could not hear submissions from anyone and was exercising administrative power. The question of the interpretation of this provision raised another constitutional matter which required the Director to issue further s 78B Notices, and the matter was set down for hearing.

On 23 June 2014, the Full Court, after hearing submissions from the Director, Mr Eastman and the Attorneys-General of the ACT and the Commonwealth, accepted the Director’s submissions and declared that s 430(2) involved an exercise of judicial power and that s 431 did not apply to the Full Court’s exercise of its jurisdiction under s 430(2). This allowed the Director and Mr Eastman to make further submissions to the Court about the Report and what order the Court should make under s

430(2). The Court adjourned the proceedings, directed the parties to file written submissions, and listed matter for oral argument on 14 and 15 July 2014.

On 14 and 15 July 2014, the Director made oral submissions about the Report and what order the Court should make under s 430(2). The Director submitted that the Board erred in a number of respects in coming to its ultimate conclusions in the report, including (amongst other things), by denying the Director procedural fairness in relying on secret evidence given at private hearings which was not tested by the Director, and misunderstanding the test to apply in determining what order to make. The Director submitted that this led the Board to err in its conclusion that the conviction should be quashed without an order for a re-trial. The Director submitted that, despite the significant flaws in the forensic evidence given by Mr Barnes at trial, the Full Court should confirm the conviction as the remaining circumstantial case against Mr Eastman was overwhelming. In the alternative, the Director submitted that if Court was to quash the conviction, it should also order a re-trial. Whilst this would not guarantee a re-trial, it was appropriate given the circumstantial case that still exists, the Board's finding that he was "fairly certain" of Mr Eastman's guilt, and the public interest in the matter to leave the decision about whether to prosecute the matter to the Director.

On 23 July 2014, the Court heard final submissions from Mr Eastman. He submitted that the Board's findings and recommendations should be adopted, and his conviction should be quashed, without an order for a re-trial.

The Court reserved its decision. The result will be reported upon in the next reporting period.

## **Magistrates Court**

The number of completed matters this year, 3,926, was an increase of some 11.6% on the previous year. More matters are now kept in the Magistrates Court because of legislation allowing for a prosecution election to have matters with a maximum penalty of up to five years imprisonment dealt with summarily, with a concomitant restriction on the penalty available to two years imprisonment. This legislation has achieved its aim of ensuring that less serious matters can be dealt with in the Magistrates Court and not take up the time of the Supreme Court.

However there has also been an increase in the number of matters that have been committed to the Supreme Court for trial or sentence. This figure was up sharply to 216 for the current year as against 166 last year.

The figures for matters completed in the Magistrates Court and matters committed from the Court seem to indicate an increase in criminal cases generally.

The Office has improved its performance significantly against a key performance indicator which is the rate of compliance for service of briefs within the timetable set out in the Magistrates Court Practice Direction. The increased rate of compliance was contributed to both by the AFP providing briefs to the Office in a timely manner, and matters being dealt with within the Office more efficiently. There continue to be however many occasions in which individual Magistrates shorten the period of compliance which does place additional demands on both this Office and the AFP.

The issue of Magistrates Court listing procedures continues to be of concern and is dealt with elsewhere in this report.

## Childrens Court

The court remains busy with numbers about the same as last year. During the reporting period there were 243 completed matters as against 256 for the previous period.

### *Restorative Justice*

Restorative Justice (RJ) is a process established by the *Crimes (Restorative Justice) Act 2004*. RJ is only available in the Childrens Court and only applies to those offences that can be dealt with summarily, and do not involve family or sexual violence. RJ aims to provide the victim with an opportunity to express how an offence has affected them, while offering a young offender an opportunity to accept responsibility for their actions and repair the harm that their actions have caused. While RJ is a proper sentencing consideration for the court, successful completion of the RJ process or agreement will not necessarily result in a discontinuation of the prosecution. The Office is very supportive of the RJ process. The DPP is one of six entities - including the court itself - that have the power to refer matters for RJ at various stages of the criminal process.

## Galambany Court

A Circle Sentencing Court (the Circle), available for certain Aboriginal or Torres Strait Islander offenders, commenced operation in 2004. Since 2011 it has been known as the Galambany Court. Galambany means 'we all, including you' and is intended to reflect the inclusive nature of the Court. The Circle aims to reduce barriers between courts and the Aboriginal and Torres Strait Island communities and provide culturally relevant and effective sentencing options for indigenous offenders.

An offender who identifies as an Aboriginal or Torres Strait Islander and who pleads guilty to an offence may be referred to the Circle for sentencing, if the offence and the offender fit the guidelines. The Circle is presided over by a Magistrate and includes a panel of elders or respected community members. The offender, their legal representative, and a prosecutor also participate. The victim is invited to participate in the Circle with a supporter. Having heard the facts of the offence, information about the offender, and the impact of the offence upon the victim, the panel makes recommendations to the Magistrate concerning sentencing. The Magistrate then sentences the offender, taking into account the recommendations of the panel.

Circle, by its very nature, takes a more expansive approach than conventional sentencing as a wider range of subjective factors are considered to arrive at a sentence that promotes the rehabilitation of the offender but also takes into account the expectations of the community. This process is significantly longer and more complicated than the conventional sentencing process and involves a significant amount of resources from the courts and by this Office.

## Coroners Court

The Director's functions include the function set out in Section 6(1)(d) of the *Director of Public Prosecutions Act 1990* of "assisting a coroner in inquests and inquiries". Although this is not a function that is exclusive to the Office, in practice, the coroner is usually assisted by a prosecutor from the Office.

Coronial proceedings are investigative rather than adversarial in nature. Many coronial matters do not require a hearing of evidence. The coroner can often make findings in relation to the cause of death from statements and documents tendered in a short hearing. Where the cause of death is not clear, or where issues of public interest arise, the coroner can hear evidence from witnesses. Interested parties can also ask questions or be represented by counsel.

Long term, the trend has been away from coroners hearing evidence, although numbers were up from last reporting period. During the reporting period there were:

Appearances in Coronial Hearings	22
Appearances in Coronial Directions	37
Inquest hearings concluded	9
Matters in which a Coronial Brief was received by the DPP	8

## Paralegals

The paralegal section has built on the achievements of previous years in the training and development of paralegal staff, as well as instigating a number of new initiatives to streamline practices.

All paralegals permanently employed within the Office have either obtained their Certificate III in Business and Legal Administration, are continuing with further qualifications to the Certificate IV level, or are enrolled in or hold a relevant tertiary degree. Four paralegal staff hold degrees in law. This balance between law students and professional paralegals has proved to be beneficial. The Office utilises those with legal skills in such things as drafting legal documents, providing support in instructing solicitor roles, and assisting in conferencing of witnesses, while the employees benefit from "on the job" training in a legal environment.

With current workload pressures, paralegal staff have had limited availability to participate in further formal training, although a number of the paralegal staff with supervisory elements to their duties have completed relevant courses.

In an attempt to increase efficiency for prosecutors and to allow for further development opportunities for the paralegal staff, the Office has initiated new procedures for the preparation of traffic matters. The expectation is that this will provide enrichment opportunities for the paralegal staff, especially those studying law, whilst allowing prosecutors to focus on higher level legal issues.

The reporting period also saw a significant and long awaited achievement - the finalisation of a formal manual for procedural and administrative tasks that the paralegals undertake on a daily basis. The manual will assist greatly with the induction and training of new staff and with the rotation and cross training of current staff.

The 2013-14 year has seen a further development of the move to electronic records, with a number of internal and external processes moving from paper based methods to electronic procedures. The on-going project to develop and disclose briefs of evidence electronically, has passed the pilot stage with the involvement of a number of paralegal staff. This project will be a major focus in the 2014-15 year.

## **Sexual Offences Unit**

The Sexual Offences Unit specialises in prosecuting rape and sexual assault cases. These cases are among the most challenging of all to prosecute. They are generally complicated, and typically involve pleas of not guilty. Often, there are no independent eyewitnesses. There is usually a broad ranging attack mounted on the complainant's credit. And even in straightforward cases, prosecutors need to combat biases or misconceptions about the nature of sexual violence and the way victims respond during these offences.

A number of cases prosecuted by the Unit are in the case reports section of this Report.

The Unit was created in acknowledgement of the particular issues in prosecuting these matters, to ensure greater consistency in the conduct of sexual assault prosecutions, to develop expertise within the Office, and improve the rate of convictions. The unit works closely with the Witness Assistance Service (WAS) to improve the experience for victims and ensure all victims are provided with support and information throughout the court process. This also assists in determining what special legislative measures can be applied in court. As has been previously reported these legislative reforms, in particular paper committals and permitting child complainants' interviews with police to be tendered as their evidence-in-chief, continue to be a significant contributing factor in improving this experience.

Over the last year there were 148 new sexual offence matters. This is a significant (66%) increase in the number of matters prosecuted against the previous year. It is too early to say whether this is a long term trend reflecting increasing number of complainants coming forward. Notably too there has been an increase in the number of prosecutions of registered child sex offenders for failing to comply with reporting obligations.

Keeping pace with this increase there were 149 matters completed during the reporting period. The second half of the period saw significant increases in the number of sexual offence matters finalised as they received priority listing in the pilot central criminal listing periods in the Supreme Court. This turnover has allowed sexual offence matters to progress more quickly through the courts - a thoroughly welcome outcome - although it must be recorded that it has also placed added strain on prosecutors operating within existing resources.

During the year legislative reforms closed a loophole that prevented the prosecution of certain historical sexual offences by retrospectively removing the statutory limitation period. Already this has resulted in at least one prosecution for sexual acts committed against a child in the 1970s. More current and historical prosecutions continue to emerge as victims become more comfortable about reporting these crimes and more of the public spotlight is shone on this area through the media.

The Unit has also continued to provide training sessions with the AFP around sexual offence prosecutions, in particular the legislative requirements for evidence-in-chief interviews of children.

Relevant statistics for the Unit for all matters for the reporting period are:

#### **Sexual Offences: Trials and Sentences in the Supreme Court - 1 July 2013 to 30 June 2014**

Description	Matters
Trials	<b>35</b>
Trial Outcomes	
Guilty verdicts	<b>18</b>
Not guilty verdicts	<b>14</b>
Other	<b>3</b>
Awaiting verdict	<b>0</b>
Sentencing proceedings	<b>26</b>
Notices declining to proceed further	<b>2</b>

#### **Sexual Offences All Matters - 1 July 2013 to 30 June 2014**

	Magistrates Court	Childrens Court	Supreme Court	Total
Sexual offence matters commenced	91	9	48	<b>148</b>
Sexual offence matters completed	81	6	62	<b>149</b>
Sexual offence matters proved	20	2	38	<b>60</b>
Sexual offence matters discontinued	9	0	2	<b>11</b>

Note: Sexual offence matters completed in the Childrens Court and Magistrates Court include matters completed by way of committal to the Supreme Court. Sexual offence matters completed in the Supreme Court include Supreme Court appeals and matters in which a Notice Declining to Proceed was filed.

## Family Violence Team

The Family Violence (FV) team consists of 5.5 specialist prosecutors, and two dedicated paralegals. The maintenance of a specialist team is part of the Office's contribution to the Territory's Family Violence Intervention Program (FVIP), which is a coordinated inter-agency response to address family violence in our community through the criminal justice system.

FV matters are identified at the charging stage by police and once before the Magistrates Court, are transferred to the Family Violence Court. As with all prosecutions, the FV team proceeds with charges where there are reasonable prospects of conviction bearing in mind the strong public interest in denouncing family violence.

Prosecutors from the FV team appear in most family violence matters. This provides consistency of approach and continuity for victims. Prosecutor case loads are allocated according to defendants' surnames, which enables prosecutors to be familiar with the background history of repeat offenders and ensure consistency. The specialist FV prosecutors undertake in-house training in evidence law and courtroom skills. They are greatly assisted and supported by the Witness Assistance Service and the dedicated paralegals.

FV matters are challenging. The offences take place in private and are often not reported to the police. In most cases the victims are women. Often the complainant is a reluctant participant in the proceedings. The difficulties associated with convincing a court that an offence has been committed in a person's home, often without any witnesses apart from the victim, and in circumstances where there are emotional financial and physical pressures placed on the victim, should not be underestimated. Further, victims often reconcile with their attackers before the prosecution is concluded, leading them to be uncooperative or 'unfavourable' witnesses. FV prosecutors are familiar with the operation of section 38 of the *Evidence Act 2011* which allows the prosecution to cross-examine witnesses it has called. Prosecutors also become well versed in the vulnerable witness provisions in the *Evidence (Miscellaneous Provisions) Act 1991*.

A number of FV cases are in the case reports section of this Report.

FV prosecutors work closely with all the FVIP participating agencies. The Office works closely with the AFP by advising of appropriate charges, identifying further evidence and providing specialist family violence training to new recruits. Victims Support ACT and the Domestic Violence Crisis Service (DVCS) also continue to 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.

Significant statistics during the reporting period include the following. The figures are similar to last reporting period:

	Magistrates Court	Childrens Court	Supreme Court	Total
Family Violence matters commenced	373	42	10	<b>425</b>
Family Violence matters completed	360	44	33	<b>437</b>
Family Violence matters proved	258	35	5	<b>298</b>
Family Violence matters discontinued	31	1	2	<b>34</b>

Note: Family violence matters completed in the Childrens Court and Magistrates Court include matters completed by way of committal to the Supreme Court. Family violence matters completed in the Supreme Court include Supreme Court appeals and matters in which a Notice declining to proceed was filed.

## Witness Assistance Service

The Witness Assistance Service (WAS) continues to support clients by using a priority model which identifies those witnesses who are most vulnerable. The WAS supports witnesses in sexual assault matters, witnesses where a death has occurred, child and elderly witnesses, witnesses with physical and developmental disabilities, witnesses with brain injuries and cognitive impairments, as well as witnesses with mental health issues and/or substance abuse issues. The WAS also offers support to family members of witnesses as required. The priority model provides realistic parameters (enabling effective use of resources) for WAS officers and prosecution staff to identify witnesses who may benefit from WAS support during their involvement in criminal proceedings. This ongoing contact and provision of updates keeps clients abreast of the proceedings and provides them with opportunities to have any questions or concerns addressed by prosecutors or the WAS Officers. The WAS also refers witnesses to a number of support agencies as deemed appropriate.

During the reporting period, the WAS continued to provide support to both witnesses and prosecutors involved in court proceedings. This included organising initial 'meet and greets' between witnesses, prosecutors and the WAS, scheduling further appointments and/or tele-conferences, sitting in on proofings, facilitating court familiarisation tours, as well as accompanying witnesses to court or sitting with witnesses in remote witness rooms when they were required to give evidence at hearings or trials.

After finalisation of matters before the court, WAS officers often attended debriefing sessions with witnesses and prosecutors. If the outcome was guilty (plea or verdict), WAS officers were also instrumental in assisting witnesses in the preparation of victim impact statements.



### *Training provided by WAS*

The WAS continues to provide training to AFP recruits encompassing an overview of the role of the WAS, and a focus on family violence. The WAS also presented the AFP recruits with newly developed training on the preparation of victim impact statements. This training was also provided to Victim Support ACT (VSACT) and will shortly be provided to staff of the Canberra Rape Crisis Centre and AFP Victim Liaison Officers. The WAS continued to provide in-house training to legal and administrative staff within the Office, placing particular emphasis on providing staff with the skills to identify appropriate WAS clients utilising the priority model. This included meeting with new prosecutors and explaining the role and functions of the WAS and providing relevant information to prosecutors at the Sexual Offences and FV team meetings.

### *Contact with external service providers*

During 2013-14, the WAS continued to attend weekly FV case tracking meetings with relevant parties including the AFP, ACT Corrective Services, Care and Protection Services (CPS), VSACT and the Domestic Violence Crisis Service (DVCS). This forum is important in ensuring victims of family violence are offered (and receive) support by relevant agencies during the court process.

The WAS continued to attend monthly Wraparound Sexual Assault Reform Program meetings with the AFP, CPS, Child at Risk Health Unit, Forensic and Medical Sexual Assault Care, Canberra Rape Crisis Centre and VSACT. Wraparound continues to provide a confidential forum where information regarding client matters and support is discussed. The WAS is responsible for providing updated information involving matters where court proceedings are afoot, as well as advising of support involvement in sexual assault matters.

In addition, the WAS continued to attend meetings with VSACT to discuss the progress of court proceedings involving mutual clients. These meetings ensure there is no duplication of services, and that vulnerable witnesses are effectively supported during court proceedings. VSACT also overlook a volunteer service called 'Side by Side' who provide volunteers to the DPP in court matters where low level support may be required. These volunteers have assisted in a number of matters.

The WAS continue to work closely with Supreme Court staff, particularly in major trials. Feedback indicates that witnesses have felt well supported in the court environment with a co-ordinated and collaborative approach to organising witness attendance and welfare.

### *WAS Caseload*

A breakdown of all WAS matters within the reporting period is as follows:

Offence type categories	Clients	Percentage
Adult sexual assault	68	25.3
Child sexual assault	82	30.5
Death	24	8.9
Historical sexual assault	44	16.4
Less serious violence offence (adult)	10	3.7
Less serious violence offence (child)	2	0.7
Other	10	3.7
Serious violence offence (adult)	26	9.7
Serious violence offence (child)	2	0.7
Significant trauma	1	0.4
<b>TOTAL</b>	<b>269</b>	<b>100</b>

The caseload statistics reflect a significant increase in the number of clients supported by the WAS during 2013-14 (up from 221 in the previous period). This is indicative of the development of more streamlined work practices and relatively new staff becoming more settled in their roles.

### *Supporting multiple complainants of one accused*

The WAS were involved in a three week trial involving eight complainants and one accused. All complainants gave evidence from remote witness rooms which involved a high degree of organisation by the WAS in escorting the complainants to the remote witness room as required, while ensuring none of the complainants came into contact with one another, so as to protect the integrity of their evidence. Further, the WAS supported a number of the complainants in the remote witness room whilst they gave their evidence. That support continues pending the sentencing of the offender.

### *Achievements for the WAS*

The WAS made some significant improvements to their service during 2013-14.

Following occasions when male Sherriff's Officers were found to be in attendance in remote witness rooms when female complainants were giving evidence (usually in sexual assault and FV matters), the Senior Witness Assistant approached the security manager of the ACT Magistrates and Supreme Court to express concerns regarding this issue. Following discussion, a 'manager's instruction' was developed for the ACT Sheriff's Office. The direction stipulates, that at all times, the ACT Sherriff's

Office will provide a female Sherriff's Officer when a female complainant is providing evidence in relation to a matter before any ACT Law court or Tribunal Hearing. Currently, all female complainants are allocated a female Sherriff's Officer when they are giving evidence. Where possible, the WAS Officer will introduce the complainant to their allocated Sherriff's Officer prior to their attendance in the remote witness room. This appears to have reduced levels of anxiety in complainants.

Another achievement for the WAS has been the cessation of creating hardcopy files. The WAS is now effectively paperless, with all file notes and correspondence being created or imported onto the DPP case management system. This has minimised administration tasks and significantly reduced printing costs and the like.

The WAS has continued to foster and develop positive working relationships with external stakeholders (government and non-government) and there has been a notable improvement in information sharing between a number of (legislated) information sharing entities and the WAS.

### *Plans for 2014-15*

The WAS will continue to provide a high level of support and service delivery to witnesses in accordance with the priority model. Shortly, the WAS will be rolling out an ACT DPP WAS feedback survey. The survey will be based on a number of qualitative and quantitative questions in order to reflect witnesses' experiences as a client of the WAS. The collated data will be used to determine how the WAS can be improved in the area of service delivery for witnesses.

## **Confiscation of Criminal Assets**

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

Typically, the restraint of real property occurs where there are allegations of drug cultivation or trafficking, or fraud. The Office also pursues the restraint and forfeiture of cars used in relation to robberies and burglaries, cash being the proceeds of drug trafficking, and electronic equipment used in relation to child pornography.

In the latest reporting period, there were four applications to restrain property.

Numbers of applications were down this period against the previous period. This largely reflects the fact that last period an existing backlog was cleared.

The reporting of COCA matters has been simplified this year, to enable reports to be generated from the CASES system.

During the reporting period the following activity took place:

Number of matters completed:	<b>12</b>
Value of forfeited property:	<b>\$606,480.50</b>
No. of applications to restrain property:	<b>4</b>

Notes: No. of matters completed includes matters where a forfeiture order was made during the reporting period or where a restraining order was made and the property was subsequently forfeited during the reporting period due to conviction on criminal charges or the expiration of the two week period in relation to unclaimed property.

Value of forfeited property is the total of value of property forfeited after forfeiture order or forfeited after restraining order where conviction subsequently occurred / the two week period expired.

No. of applications to restrain property are applications to restrain property made during the financial year where forfeiture has not yet occurred due to outstanding criminal charges / outstanding applications for exclusion.

## Regulatory Matters

The Office prosecutes regulatory matters referred to it by ACT Government agencies and the RSPCA. These matters can sometimes involve tricky or complex legal and factual issues. In addition, these matters are often investigated by staff who do not necessarily have training or experience as investigators.

The standard of briefs of evidence received by the Office continues to vary. As a result, in the reporting period a prosecutor was employed to write a manual on the preparation of prosecution briefs of evidence. This manual was provided to the investigating agencies and the Office also delivered training to some of the agencies. The delivery of this training, preparation of the manual and continued close relationships with the agencies has resulted in improved quality of briefs of evidence.

A major legislative development in the reporting year was the creation of the Industrial Court within the Magistrates Court. The Court's jurisdiction is, in general terms, to hear and decide industrial and work safety matters. This new court is presently presided over by Chief Magistrate Walker.

During the reporting period, the management of regulatory matters was handled by two assigned prosecutors. One is responsible for the management of matters referred by Worksafe ACT and the other for matters from other regulatory agencies. This arrangement reflects the importance of regulatory matters in the practice of the Office and the complexity of these prosecutions, particularly work safety matters. Due to resource restrictions however, each of the prosecutors had to balance these duties with their more general work. As dealt with elsewhere in this report, the Office has now been resourced to allow a dedicated team to be assigned to work safety matters.

The number of matters referred to the Office was significantly up on last reporting period. The variety of matters finalised during the reporting period is shown by the following table:

Act	Matters	Proved
Agents Act 2003	1	1
Animal Welfare Act 1992	3	2
Commonwealth Electoral Act 1918	2	-
Criminal Code ACT 2002	2	2
Electoral Act 1992	17	7
Environment Protection Regulation 2005	1	-
Food Act 1992	5	5
Food Act 2001	11	11
Liquor Act 2010	5	-
Occupational Health & Safety Act 1989	1	1
Tobacco Act 1927	1	-
Tree Protection Act 2005	1	1
Work Health and Safety Act 2011	1	-
Work Safety Regulation 2009	1	1
<b>TOTAL</b>	<b>52</b>	<b>31</b>

The following case reports demonstrate the diversity of matters prosecuted within the regulatory practice:

#### *Inspector Noakes v Jeremy Grobбен & Stephen Fitzsimmons*

The defendants were the proprietors of Delissio Brasserie in Braddon. The victim was employed as an apprentice chef. In early 2011 the victim was preparing and cooking pizzas using a gas fired pizza oven. Three cans of butane lighter gas had been stored (incorrectly and contrary to instructions given by the defendants) on an open shelf directly underneath the pizza oven. The three butane cans exploded and the victim was engulfed in flames. The victim sustained severe burns and was placed in an induced coma. His injuries required long term treatment and have resulted in long term injuries. The defendants were charged, and pleaded guilty to negligently failing to ensure work safety by managing risk. They were convicted and fined \$24,000.00.

### *RSPCA v Kimberly Faithfull*

Inspectors attended the defendant's address after receiving a report that a dog's collar had been embedded in the dog's neck. An examination of the dog revealed that he was underweight, had a fever, and had a full thickness skin wound extending around most of his neck. The defendant pleaded guilty to failing to take reasonable steps to alleviate pain suffered by the animal and neglecting the animal in a way that caused it pain. The defendant was convicted and sentenced to one month imprisonment, suspended on entering a good behaviour order for 12 months.

### *Inspector Carnall v Cetrtek*

The defendant felled a tree on his property without authorisation. Permission to cut down the tree had been refused on two prior occasions. The defendant was charged with damaging a protected tree and being reckless about whether his actions would cause damage to the tree. The defendant was convicted and fined \$2,800.00.

## **Parking matters**

The Office prosecutes those parking offences which end up in court. There were 50 parking matters completed in the reporting period.

## **Sentence Administration Board**

The Sentence Administration Board is established under the *Crimes (Sentence Administration) Act 2005*. The Board has functions in relation to parole, periodic detention and release of offenders on licence. One of the functions of the Director is to attend meetings of the Board to make submissions in relation to specific matters, especially in relation to the law on sentencing and the interpretation of applicable legislation. Senior prosecutors from the Office may appear before the Board when occasion demands, but in practice the Board rarely requires such assistance.

## **Criminal Law Resource Centre**

The Criminal Law Resource Centre (CLRC) provides the tools necessary for prosecutors to carry out their work in the Office as well as in court.

Having undertaken a steady transition towards providing these resources online, as well as assisting with the implementation of iPads and Tablet devices in the workplace, the CLRC is now working to make access to these materials quicker and more convenient. The adoption of new technologies

continues to improve delivery of information with a recent example being a system which allows staff to simply 'sync' their devices with data stored in the 'cloud' to update a portfolio of legislation for use in court.

Planning for the migration of the Intranet to a new platform, Sharepoint was undertaken during the year with the rollout expected to take place early in the next financial year. The move to Sharepoint is designed to make the Intranet more collaborative and interactive while providing better information management and workflow procedures. Improved search functionality, document and records management capability and social tools will all assist staff in their work and improve productivity.

## **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.

### **R v JJ; R v Schmidt**

In the early morning hours of 2 August 2011, two young men, JJ then 17 years old and Taylor Schmidt, then 19 years old, set out to rob someone. Each was armed, one with a machete and the other with a baseball bat. They had been drinking and smoking marijuana most of the evening.

At around the same time they set out, a young man who was to be their victim had arrived from Melbourne by bus and unable to find a taxi, set out walking along Northbourne Avenue to meet his mother who was driving in to pick him up.

JJ and Schmidt came across the deceased just north of Haig Park and demanded that he hand over his property. A struggle developed which resulted in the offenders striking the deceased about the head and body with the baseball bat and the machete. The deceased suffered significant injuries to his head and both hands had been almost severed. JJ and Schmidt stole a mobile phone and approximately \$20 in cash and returned to Schmidt's flat where they cleaned themselves and hid the weapons.

The deceased died as a result of the injuries. A post mortem examination revealed horrific injuries particularly to his head.

Police interviewed a significant number of witnesses. JJ and Schmidt were subsequently arrested and the weapons recovered. Both offenders initially entered pleas of not guilty, and the matter was listed for trial. However a few days before the trial was due to commence, each changed their plea to guilty.

JJ who was sentenced as a young person being under 18 at the time of the offence, was convicted of murder and sentenced to 17 years imprisonment, to be released after serving 10 years and six months and then to be subject to a supervision order for six years and six months. The Crown appealed to the Court of Appeal against the inadequacy of the sentence given to JJ, but the appeal was dismissed.

Schmidt was convicted and sentenced to imprisonment for 20 years and six months with a 14 year non-parole period.

### **R v Iacuone; R v Duffy; R v JR**

At 3.00am on Tuesday 18 November 2008, a Greenaway resident heard a knock on her front door. When she opened it, she found the 17 year old victim, CR (his identity is protected) standing there exhausted, injured and traumatised.

This was the end of a long ordeal for the victim, which started three hours earlier when he had been lured from his house on the pretence of a conversation with two friends including one of the offenders, JR. He was then set upon by the three offenders. He ran, was chased through the bush and caught, and told to kneel down and not move so his murder would be quick. He was then hit with a baseball bat leaving serious bruising, and choked. CR then escaped again. The three assailants chased him again, but he managed to spend the next few hours hiding from them.

Police were called and a short time later they stopped a black Holden Commodore containing the three offenders and two others who were still looking for CR. A later search revealed a high degree of preparation to kill CR. Preparation including removing a large sub-woofer speaker and an amplifier from the boot of the car, and laying a shower curtain to prevent blood from spilling. In the boot there was a mattock to dig a hole and bury the body.

The three offenders were charged with conspiracy to murder. The motive was a fall out over social arrangements. One of the accused was socially excluded from CR's group. He then recruited the other two accused to kill CR.

The trial date was significantly delayed because of late defence applications to have the three tried separately, the last application being successful at first instance before being overturned following the Director's appeal. Eventually the trial of the offenders proceeded as a joint trial.

Following a lengthy deliberation, the jury found all three accused guilty of conspiracy to murder.

Iacuone was sentenced to five years imprisonment, JR was sentenced to four years imprisonment, and due to his lesser role, Duffy was sentenced to two years nine months periodic detention.

The Crown has appealed to the Court of Appeal against what it asserts are inadequate sentences.

### **R v Tully**

Cameron Tully was charged with 20 counts of acts of indecency and sexual intercourse with young people between 10 and 16 years of age or under 10 years of age. The offences occurred between about 1989 and 2003 mostly at the Tully's farming property in Cook and a number of other places around Canberra. The Tully family ran home birthing, home schooling and church groups from their property and the victims were all children of people involved in these groups. He pleaded not guilty and a trial was listed.



Eight complainants, victims of the sexual abuse by Tully, gave evidence that Tully had sexually assaulted them. All are now adults. The trial ran for 3 weeks and after deliberating for a number of days, the jury returned verdicts of guilty in 18 of the 20 counts. Tully was found not guilty in relation to one count and the jury could not decide on the other count.

Tully has not been sentenced at the time of writing but was remanded in custody and is due to be sentenced later in 2014.

## **R. v. Walmsley**

The issue of suicide is a tragic one which touches many in our community. It is not a crime in the ACT to commit, or attempt to commit suicide. However it is a crime – punishable by up to 10 years imprisonment – to aid and abet suicide.

Walmsley met Lisa McDonald, the deceased, whilst he was undergoing drug rehabilitation for his long term heroin addiction. He was eight years older than her. At this time the deceased had a history of alcohol and cannabis abuse and had bipolar disorder. The deceased also had a young daughter who was she was caring for with assistance from her mother.

In late 2010 the deceased was, to Walmsley's knowledge, suicidal. She attempted to address her drug addiction by booking herself into a drug rehabilitation facility. On 31 December 2010 the deceased was distressed at a Narcotics Anonymous meeting. Walmsley and the deceased argued at the meeting and Walmsley left the meeting. That night, the deceased tried to obtain enough heroin to commit suicide but the person she sought to buy it from refused to sell it to her.

On 1 January 2011 the deceased told Walmsley that she had unsuccessfully attempted to purchase enough heroin to kill herself the night before. Walmsley drove her to her mother's house where she wrote a document purporting to give custody of her daughter to her mother. (In later sentencing Walmsley, the trial judge was satisfied that Walmsley knew the effect of that document and that it was clear to him that the deceased was serious about committing suicide at this point.)

Walmsley and the deceased then drove to the refuge where she had been staying and collected her personal belongings, \$500 in cash (which the deceased had saved towards her drug rehabilitation) and some medication. From there, Walmsley arranged and conducted the purchase of heroin using all the money provided by the deceased. At the address where the heroin was purchased, Walmsley and the deceased both used part of the heroin. As she was a relatively inexperienced heroin user, the deceased was significantly affected. The person who sold the drugs to Walmsley was concerned about this and as they left he told Walmsley not to give the deceased any more heroin.

Walmsley and the deceased then went to his home at Ainslie Village. At about 5.30pm Walmsley prepared some more heroin, which they both used, and then fell asleep. At about 6.30pm or 7.00pm Walmsley woke up and went into the lounge room to drink beer. He then returned to his bedroom where the deceased woke up. His Honour accepted that the deceased talked about killing herself, wrote a suicide note and asked for more heroin. The evidence was that Walmsley was aware of the contents of the note, which indicated in the mind of the deceased at least that there was a suicide pact between the deceased and Walmsley. After using more heroin, Walmsley and the deceased passed out. Walmsley woke up at about 12.20am and noticed that the deceased was still asleep and

snoring. Walmsley fell asleep and then woke again at about 3.00am or 3.30am. Walmsley noticed that the deceased's face was blue and that blood and foam was coming out of her mouth. Walmsley rang for an Ambulance and then performed CPR, although the deceased was already dead.

Walmsley pleaded not guilty to the offence of aiding or abetting the deceased's suicide. Following a trial by jury he was found guilty.

The sentencing judge noted that the jury must have been satisfied that at the time Walmsley purchased the heroin and assisted the deceased in its preparation and use he knew that the deceased intended to kill herself and he did those acts in order to assist her in that plan. His Honour was satisfied that Walmsley also intended to kill himself on 1 January 2011.

Following an appeal on sentence Walmsley was sentenced to imprisonment for two years and nine months with a non parole period of one year and eight months.

## **R. v. Trajkovski**

Juries are required to be given directions in appropriate cases that victims of sexual assault may not offer physical resistance, and this is not a sign of consent. That is, that there is no positive requirement that a victim of a sexual assault fight back (in fact it can be dangerous to do so). However, in appropriate cases it may be of assistance to juries to have an expert give evidence, based on their experience, of the reactions of victims of sexual assault.

Trajkovski was charged with sexual intercourse without consent. The offender and victim met each other at a 21<sup>st</sup> birthday party. During the night the victim was asked to look after Trajkovski because he was from out of town. Both were staying at the same friend's house. After several hours nightclubbing Trajkovski and the victim shared a taxi home. The victim passed out asleep on the couch. At some point she woke to find the accused having sexual intercourse with her. She froze and was unable to respond. Afterwards she immediately told a friend and police.

During the trial Trajkovski claimed the sexual intercourse was consensual. However, the Crown called expert evidence about the reaction of sexual assault victims that they are wide and varying including that a significant portion of victims find they are unable to call out or fight back. Trajkovski was found guilty and was sentenced to two years imprisonment, with nine months nonparole period.

## **R v McDonald and DeBlaquiere**

McDonald and DeBlaquiere were cadets in the officer training course at the Australian Defence Force Academy (ADFA). At the time of the offences they were young men, McDonald being aged just over 19 years and DeBlaquiere 18½ years old. The female victim was a fellow cadet. The victim agreed to a suggestion of McDonald that they be "friends with benefits", that is they would engage in sexual activity without particular emotional attachment. The victim set rules, one of which was that nobody else should find out about this. However notwithstanding his acceptance of the victim's rules, McDonald told DeBlaquiere and other cadets of an intended sexual encounter with the victim.

After being told by McDonald what he and the victim intended to do, DeBlaquiere sent a text message to McDonald saying "I just had a [expletive] sick idea pop into my head. [expletive] her and film it". McDonald agreed with DeBlaquiere's suggestion and they arranged a connection via Skype between McDonald's computer in his bedroom and DeBlaquiere's computer in his bedroom. This allowed McDonald's sexual encounter with the victim in his bedroom to be transmitted by his computer via the Skype connection to DeBlaquiere's computer, allowing DeBlaquiere and anyone else in DeBlaquiere's bedroom to watch McDonald and the victim having sex.

McDonald boasted to another cadet about what he was about to do. When asked whether the victim was aware of the webcam transmission McDonald replied "Nope".

The victim and McDonald went to McDonald's room late at night where they engaged in various acts of sexual intercourse. This was transmitted via the Skype connection as planned, without the victim's knowledge. A number of cadets were in DeBlaquiere's room with DeBlaquiere watching.

After the sexual encounter the victim learned by chance that the encounter may have been transmitted. She confronted McDonald about it and he denied that there had been a webcam set up. However soon the truth emerged. McDonald was charged with two offences, one of committing an act of indecency on the victim and the other of using a carriage service in a manner which was offensive. DeBlaquiere was also charged with using a carriage service in a manner which was offensive. McDonald and DeBlaquiere pleaded not guilty but were found guilty by a jury.

In sentencing McDonald and DeBlaquiere, the trial judge made particular reference to the effect their crimes had had on the victim in the closed environment of ADFA. The judge noted:

**There cannot be any doubt that the complainant has been greatly affected by the offences. This is revealed by her victim's impact statement, which she, bravely, read out aloud in court, in person, in the presence of the offenders. As she said, her whole world has been shattered, her dignity stolen, her self-worth and self-respect destroyed. She became known as "the Skype slut". She was ridiculed by other members of the armed forces. She became depressed and she was prescribed medication by psychiatrists and referred for counselling by psychologists.**

McDonald and DeBlaquiere were each convicted and released upon entering into a good behaviour order for 12 months.

## **R v David O'Brien**

On 19 August 2012 David O'Brien and his de facto partner attended a party. O'Brien consumed alcohol and cocaine at the party. They returned to O'Brien's house later that night at which point he commenced a protracted and vicious attack on his partner. Over the course of about six hours he punched her in the face until she lost consciousness. On a number of occasions she regained consciousness, only to be beaten about the face again until she again lost consciousness. At one point the victim attempted to escape through a bedroom window, but O'Brien caught her doing so, threatened to kill her and bury her in the bush, and then beat her further. At one point he choked her.

The victim begged O'Brien to get her medical attention, but he refused out of concern that medical staff would realise the victim had been assaulted and it would be reported to police. He instead forced her involuntarily to consume Xanax, a powerful benzodiazepine, in order to sedate her and prevent her from escaping.

The attack was so vicious that the victim's blood was splattered on the bedroom ceiling. She had extensive bruising about her face, throat, chest, breasts, arms and legs. When she was admitted to the emergency room nurses observed her to be crying tears of blood.

O'Brien was charged with two counts of assault occasioning actual bodily harm and one count of forcible confinement.

As part of their investigation into the family violence offences, police obtained information that O'Brien was trafficking in cocaine. Police subsequently located almost one kilogram of cocaine which had been hidden by O'Brien. It had an estimated street value of between \$279,300.00 and \$325,850.00. It was the single biggest seizure of cocaine in the Territory's history.

At trial O'Brien denied the attack on his victim. Ultimately the trial judge found O'Brien to be completely lacking in credibility and went so far as to say "I am satisfied that the accused is willing to lie whenever he thinks that he may profit by a lie." He was found guilty.

O'Brien was sentenced to a total of 12 years and 11 months imprisonment, with a nonparole period of eight years and four months.

## **R v Hamza Bilal**

Hamza Bilal, a Pakistani national, was working as a taxi driver. He had collected the victim from a Dickson pub. During the short trip, Bilal and the victim argued about the fare. After Bilal dropped the victim near the victim's house, he conducted a u-turn and drove back on the wrong side of William Webb Drive, striking the victim as he was crossing the road. The victim was wedged underneath the taxi and dragged for approximately 50 metres along the road, sustaining horrific injuries. Bilal ran over the victim and drove off. He was charged with recklessly inflicting grievous bodily harm on the victim.

The Director sought a criminal justice visa to ensure that the offender remained in the country to be prosecuted. Bilal originally pleaded not guilty and the matter was committed for trial. However, he pleaded guilty before the matter went to trial. Justice Burns sentenced the offender to six years imprisonment, with a non-parole period of three years. It is expected that he will be deported from Australia when his sentence is complete.

## **Director of Public Prosecutions v AW**

On occasions when the ruling of a trial judge raises a substantive legal issue of continuing significance, the Director may institute what is known as a reference appeal. The appeal is taken to clarify a legal issue, and does not affect the result of the trial.

This reference appeal was taken after the acquittal by a jury of AW on a charge of committing an act of indecency in the presence of a young person under the age of 10 years. AW had met L, the young person's mother, via the internet when the young person was four years of age. AW and L married and lived together. On the occasion in question AW had taken the young person to the bathroom ostensibly to give her a bath. L decided to surprise AW. However on looking into the bathroom, L observed AW sitting on the toilet with his pants and underwear pulled down. His penis, she said, was exposed and erect. The young person was naked and standing in front of him. L was alarmed at this but AW protested that the young person had pulled his pants down as she was "curious". The exposure of his penis, he claimed, was merely educational. He disputed that his penis was erect. (That description of the facts is taken from one of the judgments in the Court of Appeal.)

At the trial AW's defence counsel put to the jury that the issue was whether the Crown had proved that the act AW had conceded he had done was "indecent" within the meaning of the offence provision.

In directing the jury as to the elements of the offence, the trial judge told the jury that an act of indecency was an act that offended against contemporary standards of sexual morality accepted by ordinary decent minded but not unduly sensitive people.

However his Honour went on in his directions – and this was the issue challenged by the DPP on the reference appeal – to direct the jury that the Crown also had to prove that the accused "performed the act in circumstances where he was aware that his act was indecent according to contemporary standards of sexual morality accepted by ordinary decent minded people".

Following the jury's verdict of not guilty the DPP took a reference appeal challenging this aspect of the direction.

The Court of Appeal upheld the appeal and found that the trial judge had been in error. The Crown did not have to prove that the accused was aware that what he was doing was indecent according to contemporary standards. It was irrelevant that the accused might have been ignorant of those standards or might have had a particular view about them.

## **Canham v Jabs**

When a magistrate stays a criminal proceeding or refuses to deal with charges before the court, the prosecution has no right of appeal as such, and the only remedy is to make an application to the Supreme Court for a *judicial review* of the actions of the magistrate. Jabs was charged with assaulting the complainant his 14 year old daughter. He pleaded not guilty and the matter came on for hearing before a magistrate. The prosecution's case was that Jabs had a physical confrontation with his daughter at his estranged wife's premises. There was some pushing and shoving, and it was alleged that the assault charged took place.

The prosecution commenced its case and called the complainant as its first witness. In the course of her evidence the complainant said after the assault she tried to set off the internal alarm, and picked up a cheese knife, shortly afterwards dropping it. Despite the fact that the defendant had not been near the complainant at this point, the magistrate questioned why the complainant herself had not been charged with assault. After some further evidence, and part way through the complainant's

cross examination the magistrate peremptorily stayed the proceedings entirely, stating that the prosecution was oppressive, the prosecution were not acting reasonably, and the prosecution was foredoomed to fail. This was despite only part of the evidence in the prosecution case having been called, and the magistrate hearing no submissions from either party despite the prosecutor's valiant attempts to be heard.

The Director sought a review of the magistrate's decision in the Supreme Court. Justice Penfold quashed the stay and referred the matter back to the Magistrates Court for hearing. Her Honour held that the prosecution had been denied procedural fairness. Procedural fairness demands that any judicial decision affecting a party's rights be preceded by an opportunity for that party to be heard. Her Honour observed that the power to grant permanent stay should "be exercised sparingly and with utmost caution". Her Honour observed that none of the concerns the magistrate had took the case "out of the ordinary run of prosecution cases". The fundamental flaw was that the magistrate was prejudging the prosecution case before hearing all of the evidence.

This case is important for reinforcing the High Court's insistence that prosecutorial discretion is to be exercised independently and is not generally subject to judicial interference. As Gaudron and Gummow JJ stated in *Maxwell v The Queen* (1996) 184 CLR 501:

**It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, to enter a nolle prosequi, to proceed ex officio, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process – particularly, its independence and impartiality and the public perception thereof – would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.**

The end result was that the stay was overturned and the matter returned to the Magistrates Court to be determined according to law.

## **R v Ang**

Ang was a 21 year old Singaporean national who had been awarded a scholarship to study at the Australian Defence Force Academy (ADFA) in 2012. He came for trial before a jury on a charge of committing an act of indecency without consent on a fellow cadet. In the early hours of 6 May 2012, Ang went into the victim's room at ADFA, knowing that she was heavily intoxicated. Ang asked her if she was awake. She did not reply. Ang closed the door and lay down beside the victim on top of the doona. He massaged her shoulders and then took hold of her face and held it while attempting to kiss her. When she would not open her mouth Ang covered her nose forcing her to open her mouth to breathe at which time Ang forced his tongue into her mouth. She was able to force his tongue away and made it clear to Ang by her words and actions during the course of the events that she was not consenting and the actions were unwelcome. The jury found Ang guilty.

The maximum available sentence for the offence was seven years imprisonment. In the sentencing proceedings before the trial judge a number of favourable character testimonials were tendered. Ang had no criminal record.

The Crown submitted notwithstanding these favourable factors that a term of imprisonment was necessary in order to achieve the appropriate denunciation and deterrence both specific and general of Ang's conduct. Ang's defence counsel on the other hand submitted that the judge should not order a conviction in relation to the matter.

The trial judge accepted the defence submissions and determined not to record a conviction. The judge took into account Ang's good character, his young age, and the importance of rehabilitation as a sentencing consideration in relation to people of his age. The judge also found that it was an "extenuating circumstance" that Ang was away from home and in a very different environment, which the judge suggested might have had a "somewhat disinhibiting effect" on him.

The Crown appealed against the sentence handed to Ang on the basis that it was manifestly inadequate.

In developing that argument before the Court of Appeal, the Crown argued that the objective seriousness of the offending was high and there was an absence of remorse, emphasised by the fact that Ang had pleaded not guilty. The Crown also argued that there had in effect been a breach of trust involved in the offence and the victim was especially vulnerable. This was particularly the case because military institutions such as ADFA were closed institutions and allegations of sexual assault are particularly sensitive issues in those military institutions. The Crown pointed to a victim impact statement which had been tendered to the sentencing judge where the complainant had pointed out the difficulties she had experienced in the environment at ADFA following the incident.

It was also argued by the Crown that the "disinhibiting effect" of being away from home and in a very different environment was not an "extenuating circumstance" that should be taken into account to mitigate his sentence.

The Court of Appeal dismissed the Crown's appeal. While accepting that the sentence was "very lenient" the Court was not convinced that it was so lenient that it must be found to be manifestly inadequate.

The Court specifically rejected the Crown's argument that the offence had involved a breach of trust stating "a breach of trust is not established by a general reference to military institutions as closed institutions or by the claim that allegations of sexual assault are particularly sensitive issues in such institutions. Nor is it established by reference to the impact on the victim, or the fact that the environment in which the victim found herself made it generally difficult to come forward about the assault. Such a difficulty might be an incident of a particular relationship of trust, but does not seem to establish such a relationship".

The result of the appeal and especially the Court's comments about breach of trust were disappointing. Prosecutors are confronted on an increasing basis with accounts from complainants who allege sexual offences committed in closed institutions not the least being ADFA itself. A closed military environment makes it very difficult to make and sustain complaints of sexual offending within the environment, a fact which the Australian military now increasingly accepts.



The Office will continue to prosecute similar matters where there are reasonable prospects of success, and will continue to press for appropriately severe punishments where offences are found proved.

## **R v Paton**

On the morning of Sunday 5 July 2009, after spending the morning drinking alcohol, Anthony Paton drove his blue Commodore. In the front seat was his 30 year old son Andrew, with two other passengers in the back seat.

Paton drove to Florey shops where he was involved in a minor car accident, before speeding off. At about 1pm he drove along the Barton Highway, turning left onto Gundaroo Drive overtaking a bus, before entering the roundabout on Abena Avenue. After coming out of the roundabout he lost control of the car, sliding sideways onto the other side of the road straight into the path of a car travelling in the opposite direction. The impact killed his son instantly. A female passenger in the other vehicle was seriously and permanently injured.

Anthony Paton was cut from the vehicle and taken to hospital, where blood taken from him revealed a blood alcohol reading of 0.281, more than five times the legal level for a fully licensed driver. Further investigation found that the insurance and registration on his car had expired, and he did not hold a driver license.

He was charged with one count of culpable driving causing death, and one count of culpable driving causing grievous bodily harm. During the trial, the jury heard evidence from a number of experts including a senior physician that due to his alcohol consumption Paton would have been absolutely incapable of having proper control of the vehicle at the relevant time.

The jury returned guilty verdicts on both counts. Paton, who had six prior offences for drink driving over a period of 37 years, was sentenced to five years imprisonment, with a nonparole period of two years nine months.

## **Police v SS**

SS was charged with 20 property, traffic, violent and family violence offences over the course of a year.

In October 2012, SS was charged with taking a motorcycle without consent and associated driving disqualified.

In January 2013, SS was further charged with causing property damage to a vehicle belonging to a female associate who was trying to drive him home as he was heavily intoxicated. SS struck the woman in the chest, punched her twice in the temple and punched her in the face, the final blow occasioning a facial fracture requiring surgery.



In April 2013, SS assaulted his partner, BP, placing his hand over her mouth, pushing her onto a bed and hitting her in the face causing her left eye and forehead to swell.

In June 2013, SS again assaulted BP, this time pushing her over, throwing a set of keys wrapped in a jumper at her face, causing significant bruising to her left eye and face. He then drove BP to hospital. He was stopped by police for driving disqualified. He gave a false name to police and then took off, prompting a police pursuit. SS sped through traffic and narrowly avoided a collision. He eventually stopped the vehicle, got out and ran from police.

In September 2013, SS was charged with trespassing on BP's property when he arrived unannounced and refused to leave. BP subsequently obtained a domestic violence order and SS was arrested and remanded in custody. There was delay in remanding SS in custody as he failed to appear in court and managed to evade police and outstanding warrants. He was charged with failing to appear twice.

During September 2013 and October 2013, SS contacted BP 46 times by telephone from the Alexander Maconochie Centre. He was charged with contravening a domestic violence order.

SS ultimately pleaded guilty to all charges, and was sentenced in the ACT Magistrate's Court in April 2014. He received a head sentence of two years and 10 months imprisonment, with a non-parole period of one year and four months. He received fines totalling \$1,900 for the fine-only traffic offences.

## **Police v Johnston**

On 25 June 2014, Johnston pleaded guilty to three counts of common assault committed against his partner in June 2013. The victim is blind and was assaulted in her home by Johnston, who was acting as her carer at the time. He struck her in the side of her abdomen while pinning her down on a couch and then slapped her across the face. After being assaulted in her house, the victim fled and stumbled down the street. Johnston pursued her and grabbed her hair from behind and pushed her into a garden bed.

A number of members of the public witnessed this assault and pulled over to assist the victim. They saw her cowering on the ground with Johnston standing over her. The victim was taken to a medical centre shortly afterwards by some of the people who had stopped to help her.

Johnston pleaded not guilty. The matter was listed for hearing in the Magistrates Court, and witnesses subpoenaed. However on the morning of the hearing, Johnston pleaded guilty. Four members of the public who stopped to help the victim, including two people from interstate, had come to court to give evidence that day.

He is awaiting sentence.

## **Police v Blydenstein**

About 6:30am on 29 March 2014, a member of the public alerted police to a vehicle that was being driven erratically in the Magistrates Court car park. Police attended, identified the driver as Allyn

Blydenstein and required him to undergo a breath test. He blew 0.186 (almost four times the 0.05 limit) and was issued with an immediate suspension notice suspending his right to drive for 90 days.

About 15 minutes after the breath test Blydenstein got back in his car, drove the wrong way out of the Magistrates Court car park and headed north towards Barry Drive, where police pulled him over a second time. He undertook another breath test, the result of which was a reading of 0.197. Police then issued him with another immediate suspension notice and placed him on bail.

Despite now being on police bail, having been pulled over twice for level 4 drink driving and having been issued with two immediate suspension notices Blydenstein was pulled over a third time in Acton at around 10:45am. He was again breath tested and, after returning a reading of 0.150, was issued with a third immediate suspension notice.

Blydenstein pleaded guilty to five charges (three 'Level 4 PCA' offences and two 'drive whilst an ISN is in effect' offences). He received an \$1800 fine, was ordered to perform 240 hours of community service and was disqualified from holding or obtaining a driver license for three and a half years.

### **A sudden or extraordinary emergency?**

Late on a Friday afternoon an offender appeared in the Magistrates Court charged with driving while his licence was suspended by the Road Transport Authority for a fine default. Fortunately for him, an experienced Legal Aid lawyer was the duty solicitor and stepped in to assist him with a carefully crafted plea in mitigation.

The offender, it transpired, was not only a long-time owner and lover of ferrets, he was a breeder of ferrets. On the day of the offence the offender's "dam" (or mother ferret) had been in labour. The offender had overseen the labour and was concerned for the resulting litter of baby ferrets. On top of the tribulations of giving birth the dam suffered from a common affliction of pregnancy, infected nipples. Having delivered the baby ferrets into the world the mother was now, tragically, unable to feed them. As his distress for the survival of the litter grew, the offender considered his options. He must obtain ferret milk, and soon. But how? His licence was suspended. The only other person in the house licensed to drive had been drinking. It was a Sunday and public transportation would be problematic. Taxis were too expensive. The only option to secure the survival of the litter - so the offender reasoned - was to get behind the wheel himself.

The prosecutor disputed the implicit contention in the plea that the peril faced by the litter was a sudden or extraordinary emergency, such as would justify driving while suspended. The learned magistrate found the offence proved but, clearly moved by the plea, declined to record a conviction.

## 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 28 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 matter 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	Proved
Children's Court	243	174
Magistrates Court	3,926	2,955
Supreme Court	348	227
Court of Appeal	34	N/A
High Court	4	N/A
<b>Total</b>	<b>4555</b>	<b>3356</b>

Note: Children's Court and Magistrates 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	Proved
Homicide and related offences		
Children's Court	1	1
Magistrates Court	9	5
Supreme Court	12	9
Court of Appeal	3	N/A
High Court	1	N/A
<b>Sub Total</b>	<b>26</b>	<b>15</b>
Acts intended to cause injury		
Children's Court	47	31
Magistrates Court	455	308
Supreme Court	63	29
Court of Appeal	4	N/A
High Court		N/A
<b>Sub Total</b>	<b>569</b>	<b>368</b>

Description	Matters	Proved
Sexual assault and related offences		
Children's Court	6	2
Magistrates Court	81	20
Supreme Court	63	43
Court of Appeal	10	N/A
High Court	3	N/A
<b>Sub Total</b>	<b>163</b>	<b>65</b>
Dangerous or negligent acts endangering persons		
Children's Court	4	4
Magistrates Court	62	49
Supreme Court	7	5
Court of Appeal		N/A
High Court		N/A
<b>Sub Total</b>	<b>73</b>	<b>58</b>
Abduction and related offences		
Children's Court		
Magistrates Court	17	7
Supreme Court	7	6
Court of Appeal		N/A
High Court		N/A
<b>Sub Total</b>	<b>24</b>	<b>13</b>
Robbery, extortion and related offences		
Children's Court	15	10
Magistrates Court	45	4
Supreme Court	42	33
Court of Appeal	9	N/A
High Court		N/A
<b>Sub Total</b>	<b>111</b>	<b>47</b>

Description	Matters	Proved
Unlawful entry with intent/burglary, break and enter		
Children's Court	28	21
Magistrates Court	94	33
Supreme Court	61	51
Court of Appeal	3	N/A
High Court		N/A
<b>Sub Total</b>	<b>186</b>	<b>105</b>
Theft and related offences		
Children's Court	42	37
Magistrates Court	310	240
Supreme Court	22	14
Court of Appeal	1	N/A
High Court		N/A
<b>Sub Total</b>	<b>375</b>	<b>291</b>
Deception and related offences		
Children's Court	1	1
Magistrates Court	20	9
Supreme Court	8	7
Court of Appeal		N/A
High Court		N/A
<b>Sub Total</b>	<b>29</b>	<b>17</b>
Illicit drug offences		
Children's Court	2	2
Magistrates Court	168	121
Supreme Court	19	13
Court of Appeal	1	N/A
High Court		N/A
<b>Sub Total</b>	<b>190</b>	<b>136</b>

Description	Matters	Proved
Weapons and explosives offences		
Children's Court	16	11
Magistrates Court	80	56
Supreme Court	5	3
Court of Appeal	1	N/A
High Court		N/A
<b>Sub Total</b>	<b>102</b>	<b>70</b>
Property damage and environmental pollution		
Children's Court	19	13
Magistrates Court	82	57
Supreme Court	11	8
Court of Appeal		N/A
High Court		N/A
<b>Sub Total</b>	<b>112</b>	<b>78</b>
Public order offences		
Children's Court	1	1
Magistrates Court	39	29
Supreme Court	1	1
Court of Appeal		N/A
High Court		N/A
<b>Sub Total</b>	<b>41</b>	<b>31</b>
Road traffic and motor vehicle regulatory offences		
Children's Court	26	22
Magistrates Court	2,091	1,784
Supreme Court	18	2
Court of Appeal	2	N/A
High Court		N/A
<b>Sub Total</b>	<b>2,137</b>	<b>1,808</b>

Description	Matters	Proved
Offences against justice procedures, government security and government operations		
Children's Court	35	18
Magistrates Court	245	170
Supreme Court	7	3
Court of Appeal		N/A
High Court		N/A
<b>Sub Total</b>	<b>287</b>	<b>191</b>
Miscellaneous offences		
Children's Court		
Magistrates Court	119	63
Supreme Court	2	
Court of Appeal		N/A
High Court		N/A
<b>Sub Total</b>	<b>121</b>	<b>63</b>
Coronial		
Children's Court		
Magistrates Court	9	
Supreme Court		
Court of Appeal		N/A
High Court		N/A
<b>Sub Total</b>	<b>9</b>	<b>0</b>
<b>Total</b>	<b>4,555</b>	<b>3,356</b>

**Table 3: Committals to the Supreme Court**

Description	Matters
Children's Court	8
Magistrates Court	208
<b>Total</b>	<b>216</b>



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

Description	Children's Court		Magistrates Court		Total
	Trial	Sentence	Trial	Sentence	
Homicide and related offences			2	1	3
Acts intended to cause injury			22	5	27
Sexual assault and related offences	2		38	8	48
Dangerous or negligent acts endangering persons			3	1	4
Abduction and related offences			7	1	8
Robbery, extortion and related offences		4	20	17	41
Unlawful entry with intent/burglary, break and enter		2	12	28	42
Theft and related offences			3	6	9
Deception and related offences			2	5	7
Illicit drug offences			14	3	17
Weapons and explosives offences			1	2	3
Property damage and environmental pollution				4	4
Public order offences					0
Road traffic and motor vehicle regulatory offences					0
Offences against justice procedures, government security and government operations			1	2	3
Miscellaneous offences					0
<b>Total</b>	<b>2</b>	<b>6</b>	<b>125</b>	<b>83</b>	<b>216</b>

**Table 5: Supreme Court Matters**

Description	Matters
Trials	65
<b>Trial Outcomes</b>	
Guilty Verdicts	31
Not Guilty Verdicts	28
Other	5
Awaiting verdict	1
<b>Sentencing Proceedings</b>	
Accused sentenced after committal for sentence, after committal for trial/changed plea or re-sentenced after breach	201
Notices declining to proceed further	17

Note: 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	66	9	75
Court of Appeal	35	10	45
High Court	3	1	4
<b>Total</b>	<b>104</b>	<b>20</b>	<b>124</b>

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 Community Engagement and Support

The Office is consulted by and interacts with the Attorney-General, JACS, the AFP, other ACTPS agencies, and the legal profession, on policy matters. The Office is not typically involved in direct consultation with community groups on matters of policy. The Director does however make presentations to community groups, and participates in forums, about the role of the DPP. The Director also engages with law students from both ACT universities, most notably by organising a mooting competition held during Law Week between students from each of the universities for the "DPP Plate".

The following sponsorship was provided by the Director during the year ending 30 June 2014.

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

## B.4 Ecologically Sustainable Development

### Sustainable development performance 2012-2013 and 2013-2014

Indicator as at 30 June	Unit	2012-13	2013-14	Percentage change
Agency staff and area				
Agency staff	FTE	73.1	69.9	-4.4
Workplace floor area	Area (m2)	1600.10	1600.10	0
Stationary energy usage				
Electricity use	Kilowatt hours	135588.45	133887.55	-1.25
Renewable electricity use	Kilowatt hours	613.5	N/A	
Natural gas use	Megajoules	unavailable	unavailable	
Transport fuel usage				
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)	Kilolitres	unavailable	unavailable	
Water usage				
Water use	Kilolitres	unavailable	unavailable	
Resource efficiency and waste				
Reams of paper purchased	Reams	2460	3125	27
Recycled content of paper purchased	Percentage	75%	97.6%	30
Waste to landfill	Litres	15360	16560	7.8
Co-mingled material recycled	Litres	20640	23760	15.1
Paper & Cardboard recycled (incl. secure paper)	Litres	51360	53520	4.2
Organic material recycled	Litres	8800	2880	-67

Indicator as at 30 June	Unit	2012-13	2013-14	Percentage change
Greenhouse gas emissions				
Emissions from stationary energy use	Tonnes CO2-e	143.18	141.92	-0.9
Emissions from transport	Tonnes CO2-e	N/A	N/A	
<b>Total emissions</b>	<b>Tonnes CO2-e</b>	<b>143.18</b>	<b>141.92</b>	<b>-0.9</b>

Notes to table:

1. In June 2014, the Government established an Enterprise Sustainability Platform (ESP), to provide a consistent approach to reporting sustainability data in future years. The ESP provides continuously updated, accurate and auditable water, energy (electricity and gas), and greenhouse gas (GHG) emissions data and utility billing cost information for its assets and agencies, a function which has not previously been available. The ESP was used to provide data for 2012-13 and 2013-14 in this Annual Report. For some agencies this will result in data that is different to that published in the 2012-13 report, as more comprehensive reporting is now available.
2. As water billing is provided quarterly, the water data reported in this table is taken from the 12 months from 1 May 2013 to 30 April 2014, as the best available data at the time of publishing.
3. ACT Property Group purchased 7,530 MWh (Mega Watt hours) of GreenPower on behalf of the ACT Government, representing 5% of the ACT Government's energy consumption for 2013-14.
4. Waste figures are based on number of bins collected
5. As the office occupies a multi tenanted building; individual water and gas usage information is not available

## **C. GOVERNANCE AND ACCOUNTABILITY REPORTING**

### **C.1 Internal Accountability**

The organisation chart of the Office is set out in Section B.1 of this report.

During the reporting period, there were two senior executives employed in the Office, John Lundy and Margaret Jones. 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; conducting more complex litigation; providing high quality legal advice to the Director; 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 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, senior executives, and the director corporate services. The executive meets weekly with a senior management committee comprising the executive, the allocations manager, the practice manager, the paralegal manager and senior advocates.

Legal staff meet weekly to discuss matters of current concern, including legal and procedural issues, and administrative matters. 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
- coordinate health and wellbeing activities for the Office.

## **C.2 Risk Management and Internal Audit**

### *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

### *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.

## **C.3 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.

## **C.4 Legislative Assembly Inquiries and Reports**

There were no inquiries by the Legislative Assembly Committee that relate to the operations of the Office during the reporting period.

## **C.5. Audit-General and Ombudsmen Reports**

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

## **D      LEGISLATION BASED REPORTING**

### **D.1      Public Interest Disclosure**

Under the *Public Interest Disclosure Act 2012*, the Office is responsible for providing a mechanism by which people can report wrongdoing in the ACT public sector. The procedures for public interest disclosures are outlined in the Public Interest Disclosure Procedures of the Office. These are available through the DPP website.

The Procedures cover the following:

- how to make a public interest disclosure
- receiving public interest disclosures
- declining a disclosure
- referral to another agency/authority without investigation
- referral to another agency/authority after preliminary investigation
- no referral where there is a risk of unlawful reprisal
- investigation process
- action on completion of investigation
- relocation of officers subject to unlawful reprisals
- civil claims
- confidentiality
- false or misleading information
- protection for the person making the public interest disclosure
- progress reports and reports on disclosure.

The Office did not receive any disclosures during the year ending 30 June 2014.



## D.2 Freedom of Information

Under Sections 7, 8 and 79 of the *Freedom of Information Act 1989* (the FOI Act) the Office must report on the FOI requests they receive and handle during the reporting year.

### *Section 7 Statement*

The following statement made pursuant to section 7 of the FOI Act is correct as at 30 June 2014 and replaces all previous statements.

The functions and operations of the Director are described elsewhere in this Report. Prosecution decisions and the conduct of proceedings are guided by the Prosecution Policy and guidelines issued by the Director. The policy and guidelines are reviewed from time to time and professional legal bodies and criminal justice agencies are consulted during the review process. Public comment is also considered in the review.

The following are categories of documents maintained in the possession of the Office:

- case files
- policy files
- administrative and financial records.

The following documents are available upon request without charge:

- Annual Reports
- Prosecution Policy.

Facilities for the inspection of documents (where appropriate) and preparation of copies or extracts (if required) are available at the Office. Requests may be sent to the Director, Office of the Director of Public Prosecutions, Reserve Bank Building, 20-22 London Circuit, Canberra ACT 2601 (GPO Box 595). Business hours are 8:30am to 4.30pm Monday to Friday (public holidays excepted).

### *Section 8 Statement*

Section 8(1) of the FOI Act applies, in respect of an agency, to documents that are provided by the agency for the use of, or are used by, the agency or its officers in making decisions or recommendations for the purposes of an enactment or scheme administered by the agency. The documents that fall within this description are the Prosecution Policy and guidelines, which are available to the public.

### Section 79 Statement

During the reporting year:

- there were three applications to access documents made during the reporting year. Of these applications:
  - in two cases there were no documents which answered the request
  - partial access to the documents was granted in one case
  - access was refused to all documents in 0 case(s)
- there were no applications made during the reporting year for the internal review of decisions under section 59 which was successful;
- there were no applications made during the reporting year to the Tribunal for the review of decisions;
- there were no charges or application fees collected during the reporting year in relation to FOI requests and other applications made under the FOI Act; and
- there were no requests received during the reporting year to amend records under section 48.

### D.3 Human Rights Act 2004

Prosecutors are the ultimate defenders of human rights. As “ministers of justice”, they are obliged to ensure as far as they can that the criminal justice system respects the human rights of those involved in its processes. This traditional role of the prosecutor is re-enforced by the *Human Rights Act 2004*.

The *Human Rights Act 2004* guarantees everyone involved in the criminal process – accused persons, the community (on whose behalf the Director prosecutes), victims and others – the right to a fair trial.

The Director has taken the following steps to respect, protect and promote human rights:

- during training sessions and continuing legal education presentations, prosecutors are reminded of the ethics and obligations of the prosecutor and, in particular, the terms of the *Human Rights Act 2004*
- the DPP’s library has a collection of material relevant to human rights that is available as a resource to assist prosecutors in the discharge of their duties, and in particular to inform themselves on the legislative scrutiny process
- prosecutors ensure that the trials of persons alleged to have committed criminal offences are fair and accord with human rights law
- particularly in the prosecution of family violence and sexual offences, the Office vindicates the protection of the family and children
- the employment of witness assistants in the Office recognises the need to ensure that the rights of victims are respected
- the Director publicly promotes human rights values.

The Office does not initiate new legislative proposals; however officers are aware of the legislative scrutiny process. Similarly, while the Office has no formal role in reviewing legislation, officers are alert to the human rights implications of the operation of legislative provisions.

### *Litigation*

From time to time, applications are made in cases to which the prosecution is a party that purport to invoke the *Human Rights Act 2004*. Typically these are cases where delay is relied upon to support an application for a stay of the prosecution. In all such cases notice of the proceedings must be given to the Attorney-General and the Human Rights Commission.

## **D.4 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.

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.

## **D.5 Legal Services Directions**

The model litigant guidelines apply to civil rather than criminal proceedings and are therefore not directly applicable to the work of the Office.

In making decisions in the prosecution process, prosecutors are guided by the procedures and standards which the law requires to be observed, and in particular by the Prosecution Policy promulgated by the Director. Like the origins of the model litigant principles, that policy reflects the higher standards of behaviour and disclosure required of the Crown.

## **D.6 Notices of Non Compliance**

There are no infringement notice offences against the *Dangerous Substances Act 2004* for the reporting period.

## **D.7 Bushfire Risk Management**

The Office is neither a manager of unleased Territory Land nor an owner (ie: lessee or occupier) of Territory Land and does not have reporting requirements under the *Emergencies Act 2004* (Section 85).

## **D.8 Commissioner for the Environment**

There are no matters to be reported under section 23 of the *Commissioner for the Environment Act 1993* for the reporting period.

## **E. HUMAN RESOURCES MANAGEMENT REPORTING**

### **E.1 Human Resources Management**

The Office has continued to maintain a focus on supporting staff in a range of areas, particularly health and wellbeing, and training and development. This promotes both individual and organisational objectives.

To support the whole of government program on workplace health and wellbeing, the Office has been promoting initiatives which support a healthy workforce and workplace environment. More specific details can be found under the discussion on the Office's Working Environment Group meetings elsewhere in the report.

Five employees worked part-time during the reporting period. While the Office continues to look for opportunities to provide flexible working arrangements this presents a challenge in the face of inflexible court schedules, and where the entire effort of the Office is directed to going to court.

### **E.2 Learning and Development**

The learning and development needs of staff are incorporated into individual personal achievement and development plans. Further, for legal staff, there is a competency based performance checklist which provides a detailed listing of the key legal competencies to be achieved for each respective classification.

Training initiatives focus on the professional development needs of staff.

This year has seen a decrease in the number of staff participating in training and development opportunities. Increased work load pressures are limiting the available time for staff to devote to individual professional needs.

For lawyers, there is a particular emphasis on advocacy and continuing legal education. Advocacy workshops are held regularly, with more intense advocacy training also taking place. Continuing legal education focuses on the professional development of legal staff in the technical aspects of the criminal justice process and laws of evidence. These are covered in dedicated sessions or as part of the weekly lawyers' meeting.

The Office administers a Studies Assistance Policy, which aims to balance the operational and strategic needs of the Office with employees' needs for skills development. The policy provides for paid study leave and / or financial assistance for staff that satisfy the requirements of the policy. During the reporting period three employees requested assistance under the policy.

The Office also assists in the delivery of training as appropriate. In particular prosecutors take part in the training of members of the AFP in various courses, including as part of the FVIP.

### E.3 Work Health and Safety

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

#### Summary of incidents

Section 38 notifiable incidents	Incidents without injury	Minor injuries	Total all incidents
nil	nil	4	4

Note: Dates of incidents is in the range 1 July 2013 to 30 June 2014

During the reporting period, the Office focussed on the following areas:

#### 1. *Leadership:*

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

- Respect, Equity and Diversity (RED) training
- Manual Handling training
- The opportunity to participate in flu vaccinations
- Health and Wellbeing training
- First Aid training.

#### 2. *Injury Prevention:*

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.

#### 3. *Injury Management:*

The Office's OH&S responsibilities are encapsulated in the *Work Health and Safety Act 2011*. The Office Health and Wellbeing Policy, which reflects the principles of this legislation, outlines our commitment to the provision of a healthy and safe workplace. Because of the nature of work in the Office, staff are encouraged to avail themselves of counselling services whenever necessary. The Office had one elected Work Safety Representative for the entire year.

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

## E.4 Workplace Relations

Staff are employed under the *Public Sector Management Act 1994* to assist the Director in discharging his functions under the *Director of Public Prosecutions Act 1990*. As such, the Director holds the powers of head of service over the employment of staff under his direct control.

During most of the reporting period, the Office operated within the framework of the JACS Enterprise Agreement 2011-2013, which included a requirement for a joint staff - management consultation process. During the reporting period negotiations were conducted for revised enterprise agreements arrangement under a new agreement structure. These new arrangements were not yet fully in place by the end of the reporting period.

### *AWA/SEA Reporting*

During the reporting period no staff were employed pursuant to the terms of an Australian Workplace Agreement (AWA). Two members of staff were remunerated pursuant to the terms of a Special Employment Agreement (SEA) during the year. Information on the remuneration payable under SEA agreements has not been disclosed due to the small number of SEAs in operation within the Office and the need to retain the confidentiality requirements of these agreements.

## E.5 Staff Profile

The statistics provided in the following tables includes employees in receipt of salary as at 30 June 2014. The figures are expressed in full time equivalent terms.

### FTE and headcount

	Female	Male	Total
FTE by Gender	48.3	21.6	<b>69.9</b>
Headcount by Gender	52	22	<b>74</b>
% of Workforce	70.3%	29.7%	<b>100.0%</b>

### Classifications

Classification Group	Female	Male	Total
Administrative Officers	9	3	<b>12</b>
Executive Officers	1	1	<b>2</b>
Legal Support	13	2	<b>15</b>

Classification Group	Female	Male	Total
Professional Officers	2	0	<b>2</b>
Prosecutors	24	14	<b>38</b>
Senior Officers	3	1	<b>4</b>
Statutory Office Holders	0	1	<b>1</b>
<b>TOTAL</b>	<b>52</b>	<b>22</b>	<b>74</b>

#### Employment category by gender

Employment Category	Female	Male	Total
Casual	0	0	<b>0</b>
Permanent Full-time	35	16	<b>51</b>
Permanent Part-time	4	0	<b>4</b>
Temporary Full-time	12	6	<b>18</b>
Temporary Part-time	1	0	<b>1</b>
<b>TOTAL</b>	<b>52</b>	<b>22</b>	<b>74</b>

#### Length of service by age-group by gender

Average Length of Service	Pre-Baby Boomers		Baby Boomers		Generation X		Generation Y		Total	
	F	M	F	M	F	M	F	M	F	M
<b>0-2</b>	0	0	2	1	1	1	17	4	<b>20</b>	<b>6</b>
<b>2-4</b>	0	0	0	0	2	0	9	3	<b>11</b>	<b>3</b>
<b>4-6</b>	0	0	2	1	3	0	4	0	<b>9</b>	<b>1</b>
<b>6-8</b>	0	0	1	0	0	2	3	2	<b>4</b>	<b>4</b>
<b>8-10</b>	0	0	0	0	0	0	0	0	<b>0</b>	<b>0</b>
<b>10-12</b>	0	0	0	1	1	0	1	0	<b>2</b>	<b>1</b>
<b>12-14</b>	0	0	0	1	2	2	0	0	<b>2</b>	<b>3</b>
<b>14 plus</b>	0	0	2	3	2	1	0	0	<b>4</b>	<b>4</b>



The following explains the generations in the above table:

Generation	Year span
Pre-Baby Boomers	Born prior to 1946
Baby Boomers	Born 1946 to 1964 inclusive
Generation X	Born 1965 to 1979 inclusive
Generation Y	Born from 1980 and onwards

#### Average years of service by gender

	Female	Male	Total
Average years of service	4.8	8.0	5.7

#### Age profile

Age Group	Female	Male	Total
Under 25	3	1	4
25-34	31	8	39
35-44	9	5	14
45-54	4	1	5
55 and over	5	7	12

#### Agency profile

	FTE	Headcount
Total	69.9	74

#### Agency profile by employment type

	Permanent	Temporary	Casual
Total	55	19	0

#### Equity and workplace diversity

	Headcount	% of Total Staff
Aboriginal and/or Torres Strait Islander	1	1.4%
Culturally & Linguistically Diverse	10	13.5%
People with a disability	0	0.0%

## F. FINANCIAL MANAGEMENT REPORTING

### F.1 Financial Management Analysis

The Office is a downstream agency. Both its workload and timeframes for service delivery are externally imposed. As noted elsewhere in this report, there has been a paradigm shift in the level of Supreme Court work, while Magistrates Court work remains high. At a time when the workload of the Office is expanding, the resources available to it are contracting. In the reporting period, ongoing reductions in funding by way of efficiency dividends, budget efficiency realisation program savings and workforce planning savings added to these challenges.

### F.2 Financial Statements

The financial transactions of the Office for the year ending 30 June 2014 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 2013-14 (Output 1.4). It should be noted that total expenses in Output 1.4 include allocated JACS overheads.

### F.3 Capital Works

The following new works were completed by the Office during the reporting period.

Capital Project	Original Project Value \$000	Actual Cost \$000	Estimated Completion Date	Actual Completion Date
Supreme Court work area upgrade	20	20	December 2013	December 2013

There are no works still in progress at year end.

*Contact details capital works officer:*

Leeanne Hollow

Director corporate services

Phone: 02 6207 5399

## F.4 Asset Management

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

The current utilisation rate is 21.6m<sup>2</sup>. In February 2013 the Office commenced occupation of a section of the second floor in the Reserve Bank building. This was necessary to deal with the additional space required for staff involved in responding to the Eastman Inquiry. The utilisation rate is based on a benchmark of 15.9m<sup>2</sup> per employee. Seventy four staff occupied a total floor space of 1,600m<sup>2</sup>. 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.

## F.5 Government Contracting

The following external sources of labour and services were undertaken during the reporting period.

Output Class	Name of Contractor	Description	Expenditure 2013-14	Date services commenced	Procurement Type
1.4	Ms Dwyer	External Counsel	\$325,744.50	01 July 2014	Single Select
1.4	Mr Game SC	External Counsel	\$112,427.84	01 Nov 2014	Single Select
1.4	Mr Free	External Counsel	\$47,272.93	01 Nov 2014	Single Select
1.4	Ms Roy	External Counsel	\$33,704.50	01 Nov 2014	Single Select
1.4	Mr Kirk SC	External Counsel	\$20,490.54	01 June 2014	Single Select

### *Consultancy and Contractor Services*

For year ending 30 June 2014, no consultancy services were engaged.

## F.6 Statement of Performance

The following is extracted from the audited JACS financial statements for 2013-14:

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.					
	2013-14 Original Target	2013-14 Amended Target	YTD Actual 30 June 2014	YTD Variance %	Note
Total Cost (\$'000)	10,132	10,314	11,234	9%	1
Government Payment for Outputs (\$'000)	9,788	9,908	10,560	7%	1
Accountability Indicators					
Percentage of cases where court timetable is met in accordance with Courts' rules	80%		73%	-9%	
Average cost per matter finalised	\$2,632		\$2,470	-6%	

- 1 Total Cost and Government for Outputs results are higher than targets primarily due to the impact of the Eastman Inquiry.

For full Output 1.4, see audited JACS financial statements.

## 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 and guidelines for prosecutors.

### Prosecution Policy

#### 1 Introduction

1.1 On 1 July 1991 the Australian Capital Territory acquired its own Office of the Director of Public Prosecutions. The ODPP, as the Office is known, was created by the *Director of Public Prosecutions Act 1990*. That Act, in effect, transferred the responsibility for prosecutions relating to alleged breaches of the laws of this Territory from the corresponding Commonwealth Office to its ACT counterpart.

1.2 The Commonwealth Act, passed in 1983, had made significant changes to the institution and conduct of prosecutions. In particular, it had removed the whole process from the political arena by creating an independent Office of the Director of Public Prosecutions. The Attorney-General retained the right to give guidelines and directions but only after consultation with the Director. Even then the Act required that any such directions or guidelines be published in the *Gazette* and tabled in Parliament. The ACT Act ensures similar independence.

1.3 The Act also ensures that the prosecuting role will be independent of the police. The legislature has chosen to separate the investigative and prosecutorial functions and, in fact, each is independent of the other. Of course, in practice, there will need to be cooperation and consultation between the respective bodies. Nonetheless, once the investigation has culminated in a prosecution any decision as to whether or not it should proceed will be made independently by the ODPP. In the ACT that independence extends to summary prosecutions as well.

#### 2. The Decision to Prosecute

##### *General Criteria*

2.1 It is sometimes assumed that every allegation of criminal conduct should culminate in a prosecution. Fortunately such a blanket approach has never formed part of the system of justice in England or Australia. Sir Hartley Shawcross QC, then the English Attorney-General, explained the position to the House of Commons on 28 January 1951 in the following terms:

**"It has never been the rule in this country - and I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first regulations under which the Director of Public Prosecutions worked provided that he should ... prosecute 'whenever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest.' That is still the dominant consideration."**

(HC Debates, Vol 483, col 681, 28 January 1951).

This statement has been widely quoted in Australia and overseas. 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 breach of the law in some minor respect. 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 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 alleged offender and the general public must all be taken into account.
- 2.3 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.
- 2.4 Any assessment of the prospects of conviction must involve an analysis of many factors, including the following:
  - (a) Are the witnesses available to give evidence?
  - (b) Do they appear to be honest and reliable?
  - (c) Do any appear to be exaggerating, defective in memory, either hostile or friendly towards the defendant 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?  
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?  
Conversely are the versions so identical that collusion should be suspected?
- (h) Where essential witnesses are children, is it likely that they will be able to give sworn evidence?
- (i) Are there any grounds for believing the relevant evidence may be excluded as legally inadmissible or as a result of some recognised judicial discretion?
- (j) Where the case is largely dependent upon admissions made by the defendant, are there grounds for suspecting that they may be unreliable given the surrounding circumstances including his or her age, intelligence and apparent understanding?
- (k) If identity is likely to be an issue is the evidence that it was the defendant who committed the offence sufficiently cogent and reliable?
- (l) Where several defendants are to be tried together is there sufficient evidence to prove the case against each?

This list is by no means exhaustive. The factors, which need to be considered, will depend upon the circumstances of each individual case. However it may serve to demonstrate the complexity of the assessment, which may be required.

2.5 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 interests of the public that the prosecution proceed. In many cases the answer to that question will be obvious, but from time to time it will require careful analysis and considered judgment. Many factors may be relevant, including the following:

- (a) The seriousness or, conversely, the triviality of the alleged offence;
- (b) Whether it is of a "technical" nature only;
- (c) In appropriate cases, whether the defendant may not have known that the conduct in question was an offence and could not reasonably have been expected to have known;
- (d) Any mitigating or aggravating circumstances;
- (e) The youth, age, intelligence, physical health, mental health or special infirmity of the alleged offender or victim;
- (f) The antecedents and background of the alleged offender;
- (g) The staleness of the alleged offence;
- (h) The degree of culpability of the alleged offender in relation to the offence;
- (i) The effect on public order and morale;
- (j) The obsolescence or obscurity of the law;
- (k) Whether the prosecution would be perceived as counterproductive, for example, by bringing the law into disrepute;

- (l) The availability and efficacy of any alternatives to prosecution;
- (m) The prevalence of the alleged offence and need for deterrence, both personal and general;
- (n) Whether the consequences of any resulting conviction would be unduly harsh and oppressive;
- (o) Whether the alleged offence is of considerable public concern;
- (p) Any entitlement of the Territory or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken;
- (q) The attitude of the alleged victim to a prosecution;
- (r) The likely length and expense of a trial;
- (s) Whether the alleged offender is willing to cooperate in the investigation or prosecution of others, or the extent to which he or she has already done so;
- (t) The likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
- (u) Whether the alleged offence is triable only on indictment; and
- (v) The necessity to maintain public confidence in such basic institutions as the Parliament and the Courts.

The relevance of these and other factors and the weight, which should be accorded to them, will depend upon the particular circumstances of each case.

- 2.6 In many cases, of course, 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. 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.

Plainly the decision to prosecute must not be influenced by:

- (a) The race, colour, ethnic origin, social position, marital status, sexual preference, sex, religion or political associations or beliefs of the alleged offender;
- (b) Any personal feelings concerning the alleged offender or victim;
- (c) Any political advantage or disadvantage 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.

This rule does not mean that particular sensitivities or other factors relevant to the alleged offender's conduct should be ignored merely because they are related to the race, sex or religion concerned. It may be necessary to take into account a wide range of matters such as whether the person was acting in accordance with a perceived moral duty or religious



obligation, whether the conduct was induced by provocation felt more acutely due to racial innuendo or whether it may have been attributable to post natal depression or other medical factors related to the sex of the person.

The rule is intended to ensure that people are not discriminated against. It is not intended to exclude due consideration of factors which, as a matter of fairness, should be taken into account in assessing their level of culpability.

### *Prosecution of Juveniles*

- 2.8 Special considerations may apply to the prosecution of juveniles. In some cases prosecution must be regarded as a severe measure with significant implications for the future development of the child or young person concerned. Whilst each situation must be assessed on its merits, there will frequently be a stronger case for dealing with the situation by some means other than actual prosecution. On the other hand, the seriousness of the alleged offence and the conduct, character and general circumstances of the juvenile concerned may leave no alternative. The public interest will not normally require the prosecution of a juvenile who is a first offender where the alleged offence is not a serious one. Furthermore, whilst it may be appropriate to prosecute a 17 year old for a particular offence it may be singularly inappropriate to prosecute a 10 year old who has committed an offence of a similar kind.

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.

- 2.9 The factors set out in paragraph 2.5 are also relevant to any consideration as to whether a juvenile should be prosecuted. However, the following matters are particularly important:
- (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 and, in particular, whether the parents 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 cause emotional or social harm to the juvenile having regard to such matters as his or her personality and family circumstances.
- 2.10 Under no circumstances should a juvenile be prosecuted solely to secure access to the welfare powers of the court.

## *Choice of Charges*

2.11 In many cases the evidence will disclose conduct, which constitutes an offence against 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.

2.12 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 one to conclude that it would be appropriate to proceed with some other charge or charges.

2.13 Circumstances may arise in which negotiations may properly occur in relation to the charges pending against the defendant. Discussions between defence and prosecuting counsel are a necessary and proper feature of the administration of justice and, from time to time, disclose adequate reasons for agreeing to proceed with some charges but not others. In some cases the public interest may be served by an arrangement, which results in a defendant pleading guilty to a lesser charge or a lesser number of charges than initially laid.

When such an arrangement is being considered the general principles governing the choice of charges should be applied in the circumstances then prevailing. Viewed in that context such negotiations may constitute a legitimate and proper means of resolving criminal litigation. However they must be approached with due responsibility. Under no circumstances should more serious charges be laid in order to provide scope for "plea bargaining".

2.14 The provisions of a specific Act should normally be relied upon in preference to the general provisions of the Crimes Act unless such a course would not adequately reflect the gravity of the criminal conduct disclosed by the evidence.

2.15 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 to the circumstances revealed by the available evidence. Where conspiracy charges are laid against a number of defendants 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 individual defendants.

### 3. Private Prosecutions

- 3.1 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” (per Lord Wilberforce in *Gouriet v The Union of Post Office Workers* [1978] AC 435 at 477). Unfortunately this right is sometimes abused and, from time to time, private prosecutions instituted for quite improper motives. Furthermore, even where a prosecution has been initiated in good faith there may be sound reasons why the carriage of the matter should not remain within the discretion of a private individual. In some cases there may be sound reasons why it should not proceed at all. 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.
- 3.2 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 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.
- 3.3 Given the infinite range of circumstances which may give rise to a private prosecution it is impracticable to lay down any 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;
  - (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.
- 3.4 Where a private prosecution is instituted to circumvent an earlier decision of the ODPP 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.

## 4. Appeals

- 4.1 The Australian legal system generally confers a right of appeal on any party to legal proceedings who is aggrieved by the result. The nature and extent of that right depends upon the nature of the proceedings, the type of order made and the rules of the particular court in which the proceedings were conducted. In criminal proceedings the prosecution normally has no right to appeal against a finding that the accused is not guilty of the offence charged though, in the Australian Capital Territory, there is a limited right to have the Supreme Court review decisions of law made by a Magistrate. Furthermore, where a conviction has been quashed on appeal there may be a further appeal against that decision. An accused may, of course, appeal against conviction.
- 4.2 Both the prosecution and the defence have the right to appeal against the sentence imposed following a conviction. However, appellate courts have stressed that the prosecutor's right to appeal against the perceived inadequacy of a sentence should be exercised with due caution. The principle was explained by Sir Garfield Barwick, then Chief Justice of the High Court of Australia, in an appeal from the District Court of New South Wales decided in 1977:

**"Inadequacy of sentence ... is not satisfied by mere disagreement by the Court of Appeal with the sentence actually imposed. It means, in my opinion, such an inadequacy in the sentence as is indicative of error or departure from principle. No doubt, consistency in the sentences imposed by judges of the District Court is a desirable feature of criminal administration. Gross departure from what might in experience be regarded as the norm may be held to be error in point of principle ... But that consistency is not to be sought or secured, in my opinion, by the court of criminal appeal substituting in any case which the Attorney-General cares to bring before it, its own view of the appropriate sentence irrespective of the presence or absence of error on the part of the trial judge"**

*(Griffiths v R (1977) 137 CLR 293 at 310).*

Accordingly, an appeal against the inadequacy of sentence will normally be instituted by the prosecution only in exceptional cases where some error of principle can be identified or when the sentence is thought to be so grossly inadequate that it lies outside the range of discretion properly available to the judge in the circumstances. Where a prosecutor believes that the sentence falls into that category it is his duty to provide a report to the Director of Public Prosecutions so that the matter may receive due consideration.

## 5 Undertakings

- 5.1 The Act also enables the Director to give undertakings that evidence will not subsequently be used against the person who gave it or produced it. This may sometimes enable the prosecution to obtain evidence from people who have themselves been guilty of criminal conduct and who might otherwise be entitled to claim privilege against self incrimination. In

those circumstances the power may be used to ensure that the evidence is available to be used in the prosecution of others without prejudicing the position of the person who has given or produced it.

- 5.2 The Director also has a power 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.

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. For example, the prosecution may be reluctantly forced to conclude that it will be impracticable to prosecute those primarily responsible for a particular criminal enterprise without the cooperation of one of their accomplices. Any decision as to whether or not such an undertaking should be granted will be made by the Director personally. The factors to be considered include the following:

- (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;
- (c) The character, credibility and previous criminal record of the person concerned;
- (d) Whether any inducement has been offered to the person to give the evidence sought; and
- (e) Whether there is any other means of obtaining the evidence in question, including by granting the person a more limited undertaking of the kind referred to in paragraph 5.1.

## **6. Publication of Reasons**

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 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.

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.

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. This policy should not be regarded as an inflexible rule. It may be appropriate to provide reasons in some circumstances even when there has been no public hearing. Where, for example, the arrest and charge has attracted significant public interest it may be necessary to consider providing at least some explanation for the decision to terminate the prosecution.

## Guidelines for Prosecutors

Pursuant to section 12 of the *Director of Public Prosecutions Act 1990* the following guidelines are provided to Deputy and Assistant Directors and prosecutors who institute or conduct prosecutions on behalf of the Director:

1. All lawyers appearing for the prosecution should be conscious of the ethical obligations imposed on them by virtue of that role. The essence of those obligations is encapsulated in the following passage extracted from the rules of the New South Wales Bar Association -

**"A barrister appearing for the Crown in a criminal case is a representative of the State and his function is to assist the court in arriving at the truth. It is not his duty to obtain a conviction by all means but fairly and impartially to endeavour to ensure that the jury has before it the whole of the relevant facts in intelligible form and to see that the jury is adequately instructed as to the law so as to be able to apply the law to the facts. He shall not press for a conviction beyond putting the case for the Crown fully and firmly. He shall not by his language or conduct endeavour to inflame or prejudice the jury against the prisoner (sic). He shall not urge any argument of law that he does not believe to be of substance or any argument of fact that does not carry weight in his mind."**

(Rule 20)

2. It has long been an axiom of the criminal law that "justice delayed is justice denied". Consequently, it is incumbent upon prosecutors to cooperate in ensuring that cases are heard as quickly as practicable.

In the Magistrates Court a hearing date is frequently allocated even though the brief of evidence has not been received by the prosecution. In that event steps should be taken to ensure that the brief is received within 28 days of the date upon which the hearing date was allocated so that the case may be properly assessed. It is not appropriate to permit charges to remain pending against members of the community when it has not been possible to make any sensible assessment of the adequacy of the evidence or as to the necessity for such a prosecution.

If the brief is not delivered within a reasonable period the matter should be relisted with the view to having the hearing date vacated. In that event it will, of course, be necessary to have a further hearing date allocated once the brief has been received and the matter assessed.

Where committal proceedings have been completed and a person committed for trial in the Supreme Court a Bill of Indictment should be found within 28 days of the committal.

3. The specific approval of the Director is required for the finding of any *ex officio* Bill of Indictment where the offence charged differs substantially from the offence or offences in respect of which the accused was committed for trial or where the circumstances giving rise to the offence were not the subject of any committal for trial.
4. In exercising the right to challenge prospective jurors the prosecution must not attempt to select a jury which is not representative as to age, sex, ethnic origin, marital or economic or social background.
5. Where the defence indicates that certain evidence should not be disclosed during the course of the Crown's opening and there appears to be reasonable grounds for that indication, care should be taken to ensure that nothing is said in the opening, which may lead to the subsequent discharge of the jury.
6. It is not a legitimate forensic tactic for the prosecution to engage in "trial by ambush" and there is a general duty to disclose the whole of the prosecution case to counsel for the accused. This duty is subject only to any overriding demands of justice such as the need to prevent risk to the lives or safety of potential witnesses. Even then it will usually be possible to apprise the defence of the general nature of the Crown case even if such details as the names and addresses of particular witnesses are withheld.
7. Where prosecuting counsel knows that a witness for the Crown has prior convictions and/or has been given an undertaking pursuant to section 9 of the Act the material facts should be revealed to the defence if it appears to the prosecutor that they could be of material significance in the trial.
8. In determining whether or not to call a particular witness the prosecutor presenting the case must pay due regard to the need to be fair to the accused. In general, it is the duty of the prosecution to call all witnesses capable of giving evidence relevant to the guilt or innocence of the accused. It is only in rare circumstances that the prosecution would be justified in concluding that the overriding interests of justice require that such a witness not be called. Where the prosecutor makes a *bona fide* assessment on reasonable grounds that the evidence in question would be unreliable the defence should be informed at the earliest possible time of the decision not to call that evidence. Even then all practicable steps should be taken to enable

the defence to tender the evidence if desired. In particular, the defence should be informed of the existence, identity and whereabouts, if known, of any witness who is not to be called in the prosecution case but whose evidence may be relevant to the case, which the defence may wish to adduce.

9. Since the court has a discretion to exclude otherwise admissible evidence on the ground that it was illegally or improperly obtained prosecuting counsel will generally be obliged to inform defence counsel of any evidence which appears to fall into that category. This principle is enshrined in the rules of the New South Wales Bar Association.

**"Where in criminal proceedings a barrister appearing for the prosecution reasonably believes that a document or record included in his brief or instructions may have been unlawfully obtained, he shall, in the interests of justice:**

- a) **Inform his or her opponent of the intention to use such document or record; and/or**
- b) **Make a copy of such document or record available to his or her opponent.**

(Rule 57)

In the Australian Capital Territory a prosecuting counsel should, in addition, inform defence counsel of the reason for his belief that the document may have been unlawfully obtained unless that reason should be readily apparent to the defence.

10. Where prosecuting counsel are entitled to cross-examine an accused as to his or her credit or motive they must ensure that such an exercise is carried out fairly. In particular, accusations should not be put to an accused unless based on information, which appears to be accurate, and unless they are justified in the circumstances of the case.
11. In prosecuting charges of assault, especially sexual assault, there should be particular concern for the position of the victim. Many such people have suffered severe emotional and physical distress as a result of the offence and may be confused and apprehensive at the prospect of having to give evidence. Prosecutors should carefully explain to victims of such offences the role which they play in the prosecution process and, if appropriate, the steps that can be taken to ensure their protection. Where a decision is made not to proceed further with a particular prosecution or to accept a plea of guilty to a lesser charge the victim is entitled to be informed and given reasons for the decision in question. Conversely, where a victim does not wish the prosecution to proceed because, for example, the resultant trial would cause further humiliation and/or trauma, those wishes should receive due consideration. However, in some instances, the interests of the wider community may demand that the prosecution proceed.



These guidelines are 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 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. Nonetheless, emerging trends in the pattern of criminal behaviour and/or the manner in which proceedings are conducted may, from time to time, raise the need for further guidelines.

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