



ACT
Government

DIRECTOR OF PUBLIC PROSECUTIONS

**ANNUAL REPORT
2015-2016**



ACTDPP
OFFICE OF THE DIRECTOR
OF PUBLIC PROSECUTIONS





Ethos: the spirit of the community

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

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Glossary

Acronyms

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

Technical Terms

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



Director's Overview

In this, its 25th year of operation, the Office has completed another year of significant achievement. An outstanding feature was the large number of successful homicide prosecutions, and prosecutions in other complex matters. There is no doubt that there has been a paradigm shift in the complexity and seriousness of the work of the Office in recent years.

As recorded in this report, trials and appeals in the superior courts continue at record levels. High numbers of prosecutions for sexual offences – and the rate of convictions for such offences – also persist.

The figure for the number of Supreme Court trials (47 trials conducted in the reporting period) while significant in itself, does not reveal the full picture. In addition to those trials, there were 68 matters that were committed for trial following a plea of not guilty, where the plea changed to guilty after committal. Of those 68 matters, in 42 cases the change of plea came late, after subpoenas were issued. And in 11 of those matters the change of plea came about either **on or after the first day of the trial**, after all of the preparation had been undertaken.

The most striking increase was in the number of family violence (FV) prosecutions. The number of FV matters commenced, at 701 for the year, was a staggering 37% up from the year before, while the number completed – at 637 – was up 46%. This increase reflects the view from police that recent community focus on FV has led to an increase in victims reporting offences. In the light of that, it has to be said that the small increase for the FV area of the Office in the last budget was modest indeed, and unfortunately, will not compensate for the increase in work.

Resources

The resourcing of my Office has reached a critical level. Of course it is commonplace for public sector organisations to ritualistically intone about tight resources. But the stark reality for my Office has been that while the demands on the Office have increased, resources have actually decreased through so called “efficiency dividends” and the like. The growing ACT population is mirrored in an increase in serious offences in the Territory. The government has responded by increasing the number of beds at the prison, by appointing a fifth resident judge in the ACT Supreme Court, and by increasing the resources available to police. However our pleas for increased resources have gone unanswered.

It is particularly disappointing to note that although I cautioned as long ago as my 2012-2013 report that the appointment of a fifth judge would require additional complementary prosecutorial resources, this was not given priority in the recent budget. Similarly, the announcement of additional police resources is not complemented – as it surely must be – by an increase in resources for my Office. This does not say a lot for the agility of the budgetary processes in the Territory.

One of the problems is that although the Office is fiercely independent in relation to its decision making, all financial matters are filtered through the JACS directorate. Unfortunately, the directorate has been singularly unsuccessful in representing the interests of the Office in budgetary discussions and this had led to the current resourcing crisis. As I have consistently pointed out, complete independence for the Office will only be gained when the Office is directly appropriated, in accordance with the recommendation of Dr Hawke in his review of the Public Service. This is a pressing issue for the new government.



Senior Crown Prosecutors

There is a structural issue affecting the Office that goes further than an issue of resources. As the amount of complex and serious work increases, the need for a structure to accommodate such a volume of serious crime becomes more acute. The growing number of homicides and other difficult matters tend to be prosecuted by members of the executive (that is the Director, Deputy Director and Assistant Director). Unlike comparable DPP offices, the structure of the Office does not allow for the appointment of senior crown prosecutors at a level just below the executive to undertake the prosecution of the most serious criminal pleas, trials and applications in the Supreme Court and also to appear from time to time in the Court of Appeal. How to create such a structure is a challenge for the Office.

The Queen v GW

The result in *The Queen v GW* – which is reported at greater length in the case notes section of this report – is significant in ensuring that the evidence of children is taken seriously. Successful Crown appeals to the High Court which have the consequence of restoring a conviction are rare. In *GW*, the High Court unanimously accepted the Crown's arguments that the uniform Evidence Acts do not differentiate between the reliability of sworn evidence on one hand and unsworn evidence on the other. Of course generally those giving unsworn evidence in our courts will be children who have either experienced or witnessed sexual offending.

I am proud that my Office has been at the forefront of the developments in the prosecution of sexual offences against children, including the use where appropriate of expert evidence to explain the reactions of children who are victims of sexual offences.


The Royal Commission into Institutional Responses to Child Sexual Abuse

I attended a number of both public and private hearings of the Royal Commission during the year. The Royal Commission has rigorously examined every aspect of responses to the sexual abuse of children, including by prosecutors. The Royal Commission presents a once in a generation opportunity for the community to engage with this issue, and for reforms to be made. There is certain to be a wide range of recommendations from the Commission for reform of the criminal law.

One of the sessions at which I gave evidence concerned the experiences of a Canberra family during an unsuccessful prosecution of an accused for sexually offending against their six year old son. The family's experience with the criminal justice system had been negative. One of the issues they identified with their interactions with prosecutors was a lack of adequate communication. While on my review of the matter I was satisfied that the legal aspects of the prosecution had been appropriately dealt with by the Office, I accepted that the level of *communication* with the family left room for improvement. As a result of this, and other developments in the Royal Commission, the Office is revising its internal and external protocols for the way in which it deals with victims of sexual offending, in particular children, and their families.

Family Violence Reform

A significant law reform achieved during the year now means that a recorded statement taken by police in family violence matters can be used as the evidence in chief of the complainant in any prosecution. A similar scheme is already working well in NSW. These reforms should lead to family



violence prosecutions being resolved earlier than is presently the case. This is, however, partly dependent on listing reforms in the Magistrates Court to which I will refer below.

Many perpetrators of family violence delay entering a plea of guilty until they see whether the complainant will turn up at court to give evidence against them. The new arrangements put this out of the equation. Perpetrators know exactly what the evidence is against them, as it will be served upon their legal representatives in audio visual form very soon after the family violence incident takes place. If properly managed, this should mean that perpetrators will plead guilty earlier, and in greater numbers. This is a significant advance. Presently, it is often the case that the perpetrator and the complainant continue to reside together pending the hearing of charges. As well, as a result of coercion, complainants often seek to retract their statement. Of course the coercion can take subtle forms including financial pressure, pressure from extended family members and so on. However, under the new system the statement once taken by police becomes the evidence in chief, and the issue of a complainant attempting to retract evidence no longer exists.

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

It is to be hoped that the Magistrates Court can take up the opportunity presented by the new reforms to change its own listing practices to achieve greater efficiencies. I have to report – and I am afraid that looking back on past reports this is a theme which has continued for a number of years – that the Magistrates Court continues to be marked by inefficient practices. This is in stark contrast with the Supreme Court, where the intensive listing period model is now working well.

Independence of the Office

While many public officials make decisions that are unwelcome or unpopular in one quarter or another, the prosecutor has the unique distinction of making decisions that are unpopular in every quarter. Prosecutors are the most scrutinised of public officials.

All of this brings into sharp focus the importance to our legal system of the independence of the Office. We may well be called upon to make difficult and contentious decisions affecting powerful people. In this regard, it was disappointing to see some of the intemperate attacks I have sustained from members of the local legal profession this year, and the lack of public support for my Office from the Bar Association and Law Society in the face of those attacks. The independence of the Office should be the concern of all lawyers.



25th anniversary of the Office

To mark the 25th year of the operation of the Office a ceremony, at which both the Attorney-General and I spoke, was held at the Legislative Assembly. In my speech for the 25th anniversary, I noted some key trends in criminal justice in the Territory:

Undoubtedly, one of the fundamental changes in criminal law since the establishment of the Office relates to the role of victims. Victims were once bystanders in a criminal process which concentrated exclusively on the accused. Now victims are finding their voice, and prosecutors have a vital role to play in that. The Royal Commission into Institutional Responses to Child Sexual Abuse has shone a light on the way victims have interacted with the criminal justice system including with prosecutors. It is clear that more must be done to involve victims – to explain the various stages of the court process, to seek their views on prosecutorial decisions, and to ensure that their victim impact statements are put before sentencing courts. My Office with its witness assistance service and with close cooperation with the Victims of Crime Commissioner is taking up this challenge.

Family violence has been an ingrained part of Australian life, suppressed behind closed doors. Now, the terrible secret is out. The ACT and my Office in particular have been in the vanguard of innovative responses to family violence. We press ahead with prosecutions even when victims express reluctance – a reluctance often borne of coercion. Most recently with reform allowing interviews of complainants to be tendered as the evidence in chief of the complainant we are on the cusp of very significant advances in this area.

Sexual offending has always been complex. This is particularly so as it relates to children. The criminal law's understanding of children's evidence has evolved greatly. Children were once thought to be inherently unreliable. In the recent case of *GW*, an appeal I took to the High Court from a decision of our own Court of Appeal, the High Court accepted that unsworn evidence of children was to be treated in no different a fashion to sworn evidence of adults. This is a significant development and one of which my Office can be proud. My Office has also pioneered the use of expert evidence in sexual offence cases, for example to explain a lack of complaint, or the "freeze response" of a victim of sexual assault. Again my Office is at the cutting edge of the presentation of such evidence.

We have also tackled institutional abuse – the ADFA Skype case, which penetrated a military culture of silence, was particularly significant. And of course we have prosecuted officials from other powerful institutions such as churches.

The challenge of taking on such powerful institutions should not be underestimated. The establishment will always seek to deflect scrutiny, and mask its failings. But that is precisely why a strong and independent Director of Public Prosecutions is so vital.

The next frontier is the electronic delivery of prosecution services, for example dealing with briefs of evidence and delivering documents to Court in electronic form. Again we are at the vanguard. Already complex murder briefs are received, analysed, served and presented to the Court in electronic form. The challenge is to move to electronic briefs in all matters.



There are so many people who contribute in different ways that it is impossible to name all of them. The 25th anniversary was an opportunity to acknowledge two of our great stalwarts. Catherine Zaal has been with us from the very start of the Office and has performed exemplary service in a number of roles. Our longest serving prosecutor Dean Sahu Khan is still prosecuting to great effect, almost 25 years later.

As ministers of justice, we never lose sight of the fact that it is the community that we serve. The community wants more than a fair and efficient prosecution service; it wants a DPP in which it can have confidence, a DPP which it knows has a strong commitment to the public interest and to the protection of the community. This Office has served the community well and proudly for 25 years and I am sure we will continue to do so.

Jon White SC
Director of Public Prosecutions

A. Transmittal certificate



6 October 2016

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 2016.

This Report has been prepared under section 6(1) of the *Annual Reports (Government Agencies) Act 2004* and in accordance with the requirements under the Annual Report Directions. It has also been prepared in conformity with the *Director of Public Prosecutions Act 1990*.

I certify that the attached Annual Report, and information provided for whole of government reporting, is an honest and accurate account and that all material information on the operations of the Office during the period 1 July 2015 to 30 June 2016 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 4 months of the end of the financial year.

Yours faithfully

Jon White SC
Director of Public Prosecutions

ACT DIRECTOR OF PUBLIC PROSECUTIONS

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B. Organisational Overview and Performance

B.1 Organisational Overview

The role and functions of the Office

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

The current Director, Jon White SC, was appointed in September 2008 and is currently serving a three year term ending in September 2018. The Deputy Director Margaret Jones, and the Assistant Director Shane Drumgold are both serving five year terms.

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

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

The Act requires the Director and Attorney-General to consult with each other, if required, concerning the functions and powers of the Director. The Attorney-General may give directions to the Director, but any such directions must not be given without prior consultation; must be in writing and be presented to the Legislative Assembly; and be of a general nature only and not refer to a specific case. Any such direction or guideline is a notifiable instrument. In the reporting period the Attorney-General gave one direction to the Director, relating to possession of a laser rifle by any person who was a participant in the Snowsports ACT and Biathlon Australia biathlon event held in the ACT. This was notified as notifiable instrument NI2016-164.

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

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

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

The organisation

During the reporting period, there were two senior executives employed in the Office, being the Deputy Director and Assistant Director. 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.

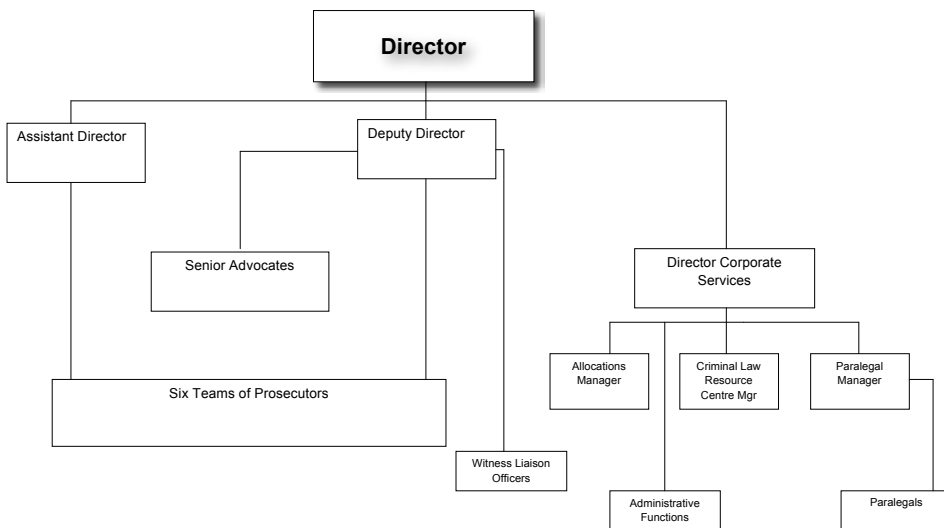
The ACT Remuneration Tribunal determines the remuneration of the Director and senior executive staff from time to time. The Director or executives may make submissions to the Tribunal on those matters.

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 and the paralegal manager. Legal staff meet weekly to discuss matters of current concern, including legal and procedural issues, and administrative matters. Continuing legal education sessions are conducted during these weekly meetings by senior prosecutors. Regular meetings of paralegal staff are held. There are also regular all staff meetings.

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

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

The Office structure during the reporting period was as follows:



Summary of performance

During the reporting period the Office's achievements included:

- prosecuting three complex and lengthy trials in the Supreme Court – two homicides and a lengthy, and complex fraud trial;
- successfully appealing a matter to the High Court, a matter which has application to jurisdictions throughout Australia (*R v GW*);
- prosecuting matters under the new harmonised work, health and safety legislation;
- the prosecution of high numbers of Supreme Court trials, sentences and appeals;
- the recalibration of the focus of the witness assistance service to increase the number of witnesses that can be assisted;
- strengthened ties between the witness assistance service and other agencies to ensure appropriate support for witnesses;
- shifting preparation of Magistrates Court and Childrens Court lists from prosecutors to paralegals to enhance efficiency;
- using CASES to assist in the rostering of paralegal staff;

- training over 600 ACT police in preparation for the roll out of the family violence evidence in chief interviews;
- contributions to significant law reform particularly in the areas of family violence and sexual offences;
- the provision of high quality and targeted training to prosecutors particularly around sexual offences;
- liaising with both levels of courts to improve processes;
- exhibiting evidence using individual tablet devices for jurors in large complex trials;
- furthering the provision of police briefs in electronic form;
- improving the presentation of evidence in child sex cases through the calling of expert evidence on responses to sexual abuse;
- increasing use of tendency evidence in a range of matters.

Outlook

Last year's report identified that the major challenge facing the Office was maintaining prosecutorial services in the face of increasing workloads and tightening resources. The outlook for the coming year is unfortunately no better. The increase in the number of complex matters, the move towards keeping all prosecutions in-house, and the decrease in resources in real terms, will continue to put real pressure on the Office. The appointment of the fifth judge in the Supreme Court with no concomitant increase in the funding of more prosecutors will exacerbate the problems of the Office this year. The Office has already had to restrict some of its non-core activities such as contributing to law reform in the territory. While this is unfortunate, it is unavoidable in the current circumstances.

The priorities for the coming year include:

- reviewing the structure of the Office to ensure the recruitment of senior lawyers;
- revising internal and external protocols for dealing with victims of sexual offending;
- improving resources available on the internet for witnesses;
- prosecuting family violence matters with the new family violence evidence in chief interviews;
- preparing for the use of evidence in chief interviews in sexual offence proceedings;
- providing ongoing training for prosecutors, particularly focused on the prosecution of sexual offences;
- continuing to prosecute a range of serious and complex matters in the Supreme Court;
- working with the Magistrates Court to improve listing and hearing processes;
- the abolition of case management hearings for family violence matters in the Magistrates Court;
- replacing paper briefs from the police with electronic briefs in all matters;
- digitising processes for appeals to the Supreme Court and the Court of Appeal;
- increasing the use of tablet devices in Supreme Court trials.

B.2 Performance Analysis

Superior Courts

We are now in the third year of the operation of criminal trial listing periods in the Supreme Court. The intensive listing of criminal trials was introduced by the present Chief Justice in 2013. There are four criminal trial listing periods throughout the year, each period lasting five weeks. A call over is held three months prior to each criminal trial listing period to set down matters for trial. Trials are over-listed on the basis that less than half will proceed to trial. During the reporting period, of the trials set down, half resulted in pleas of guilty prior to the trial commencing. This was consistent across all trial periods. A small number of trials in each period are not able to proceed for a variety of reasons and were adjourned to a later trial period; however, the majority of trials that were listed proceeded in the allocated trial period. This system of listing criminal trials has led to much greater certainty for victims of crime, witnesses, accused persons, this Office and the legal profession.

This certainty in the listing of criminal trials has allowed this Office to appropriately allocate resources to ensure the criminal trial periods can be covered. Each trial requires at least two prosecutors - counsel and an instructor. For more complex trials, more prosecutors are required. With up to six trials a week listed, a significant proportion of prosecutors in the Office are required to prepare trials for any one week in the period. Therefore, we must concentrate our prosecutor resources during these periods. There is, of course, a lot of work in the background in the lead up to the trials and we have been able to focus our resources during these busy periods.

The Magistrates Court is taking account of the criminal trial listing periods when listing hearings and this ensures we are able to provide prosecutors for both courts. Without this cooperation, it would be difficult to provide sufficient prosecutors for the Magistrates Court during the Supreme Court criminal trial listing period.

The increasing complexity of matters in the Supreme Court is not captured simply through the reporting of numbers of trials. The trend to more complex trials continues. During the reporting period two murder trials were conducted, each lasting four weeks. A complex fraud trial was heard over eight weeks, one of the longest trials in this Territory. These are further referred to in the case reports section of this report. There were, in addition, a number of complex trial matters that would have lasted for several weeks, where either pleas of guilty were entered just before the trial was due to commence or the trial date was vacated. This is not a complaint, but rather an observation of the increasing complexity of trials that require intensive resourcing on the part of the Office.

The increase in Supreme Court work has of course been addressed at the court level by the appointment of a fifth judge to the Supreme Court who commenced sitting in July this year. This significantly increases the capacity of the Supreme Court. Unfortunately, this Office has not received any increase in funding to address the increase in work that will inevitably flow due to this appointment. It is hoped that this anomaly can be addressed in the next Budget.

Notwithstanding budgetary pressures, through continuing in-house legal education, our prosecutors are at the forefront of developments in the law. For example, in child sex offence cases, evidence is now often called from experts on how children react to sexual abuse, in particular the phenomenon of children not disclosing sexual abuse when it happens, and the reasons for this. Allowing for expert evidence of this nature was a recommendation of the Australian Law Reform Commission in its report



on the Uniform Evidence Law, Report 102. The amendments were made in 2010 but were initially little used. It is now commonplace in this jurisdiction.

How to present evidence in complex trials is always a challenge. While the world is becoming increasingly digitised the legal arena is slow to catch up. This Office, in conjunction with the AFP, is moving towards briefs of evidence being provided to us and served on the defence in electronic form. The AFP have been providing briefs in more serious and complex matters electronically for the past two years. The plan is to move to electronic briefs in all matters.

This Office has been at the forefront of developing innovative ways to present evidence to juries in the court room. In murder trials, there are often large numbers of photographs. Traditionally each juror has been given a hard copy of each tendered photo – often scores of photos. We now use a combination of large screens in the court and tablet devices to present this evidence to the jury. Where a witness is called, the photographs to be tendered are put up on the large screens in the courtroom which the jury can view. In addition, there is a tablet device between each two jurors – this device displays the images that are on the screen. Individual images shown to witnesses can be annotated and these annotations can also be provided to the jurors' tablets. When it comes to deliberations each juror has a tablet device on which all of the photographs tendered in the course of the trial can be viewed. Clear indexing is the key to allowing for easy navigation through the photo books.

Through our contact with those involved in the design of the new courtrooms, it is hoped that we can further advance the use of digital technology in the presenting of evidence. Ideally digital devices could also be used to present documents, CCTV footage, and videos of police interviews.

I also look forward to working with the Supreme Court in moving towards using electronic materials in appeals rather than the paper based system we currently have.

Over the reporting period, there were a number of trials where the defence of not guilty by reason of mental impairment was raised, including in two murder trials. In some of those trials, the defence was made out. In the ACT, the judge then sets a limiting term which is the term of imprisonment that would have been imposed had the person not suffered from the mental illness. This is the maximum term that a person can be detained in custody in relation to the finding.

Once this term is set, the person then comes under the jurisdiction of the ACT Civil and Administrative Tribunal (ACAT). ACAT has jurisdiction to decide when and under what conditions a person should be released from custody. Only a limited number of people have the right to attend the ACAT hearings – they are the person the subject of the proceeding, the person's guardian if there is one, a person nominated by the person, in some circumstances the victims of crime commissioner, the public advocate, the chief psychiatrist, the director-general of the unit to which the responsibility for the provision of care and treatment is allocated, and the discrimination commissioner. Other people may appear and give evidence at the hearing with the leave of the ACAT. Significantly, prosecutors, who have a detailed and intimate knowledge of the case, having appeared in the criminal proceedings, have no right of appearance. Unlike the court proceedings there is no obvious mechanism for the provision of all relevant evidence and the testing of that evidence. Where a violent homicide or other offence of violence is committed, protection of the community is of great importance. Changing the process so that all relevant evidence can be ventilated and carefully tested, and allowing prosecutors with a thorough knowledge of the case to appear at the Tribunal, might well be a worthwhile reform.



Summary courts

Overall the figures in the summary courts were reasonably stable when compared to last year. There was a slight increase in the number of matters before the Childrens Court and a slight decrease in the number of matters before the Magistrates Court. There was, however, a sharp increase in the number of family violence (FV) matters in both the Magistrates Court and the Childrens Court. There was a 37% increase in the number of family violence matters commenced in the Magistrates Court when compared to the previous reporting period. In the Childrens Court the increase was 43%. I discuss this further in the family violence unit report which is below. A further family violence list has been added to cope with this increase.

This office participates in circle sentencing in the Galambany Circle Sentencing Court. 43 completed matters had some involvement in circle sentencing. The Office continues to have involvement in coronial matters.

Coordination between the courts and the Office is vital to ensure the delivery of a fair, high quality and efficient criminal justice system. This is thrown into sharp focus now we have moved to the intensive listing of trials in the Supreme Court in four five-week periods. Intensive listing of trials has been a great success and ensures serious criminal matters are dealt with in a timely manner. However, such listing has obvious resource implications for the Office. Having prosecutors available to conduct anywhere up to six trials in any week in a trial listing period reduces the numbers of prosecutors available to attend the Magistrates Court. When the Magistrates Court listed multiple hearings at the same time, it placed a considerable burden on the prosecutors and other staff in the Office. This has now changed. The listing of hearings in the Magistrates Court, including the block listing of hearings (which I wholeheartedly support) now takes place outside of the Supreme Court trial listing periods. The exception is family violence hearings and hearings for defendants in custody and it is, of course, important that these matters get on for hearing as quickly as possible. This is a great example of how a coordinated response can facilitate the delivery of services in the justice sector.

The reporting period saw the first full year of operation of what is referred to as the "A2" list. This is a daily list that deals with persons in custody. This is working well. Last year I wrote about the increase in lists in the Magistrates Court. The specialised list dealing with custody cases creates an opportunity to decrease the number of "A1" lists in which other matters are put (bearing in mind there are also regular FV and Childrens Court lists). Currently the "A1" list is held four days a week: this could be reduced to one or two per week.

There are also considerable efficiencies to be had if traffic matters were to be taken out of the mainstream lists and placed in a specialised traffic list. Traffic matters make up almost half of all matters that come before the Magistrates Court. Traffic matters are generally able to be dealt with more quickly than other matters such as personal violence offences or serious indictable matters. Many people charged with traffic offences are in full time employment. It would make sense to have a list one afternoon a week, from 4pm to 7pm, to deal exclusively with traffic matters. This would free the Magistrates Court up to deal with other offences in a list that could be held one or two times a week instead of four days a week. It would also enable persons charged with traffic offences to attend after work. There would be scope to have paralegals from my Office appear in traffic lists although this would require the court's consent or legislative amendment.



The reporting period also saw the first full year since case management hearings (CMHs) were abolished for all summary matters (apart from family violence matters). This new approach, which reduces case management along the way, and instead relies on a hard hearing date to focus parties' attention on the matter, has been very successful. It is time to consider this approach for family violence hearings. This is discussed further below.

I look forward to continuing to work collaboratively with the Magistrates Court, Legal Aid ACT and the profession in delivering a quality summary criminal justice service for the Canberra community.

Paralegals

During the 2015/2016 reporting year, the paralegal section has undergone exciting and significant changes in regard to processes and formal in-house training.

The training has covered a range of topics to more effectively assist legal staff and provide paralegals with comprehensive information ranging from interpretation of legislation, legal administration, staff policies and interpersonal skills. This is an ongoing program and will continue to enhance the paralegal's skills and efficiency.

During this period the paralegals have also started to prepare all matters for first mention, a task previously performed by prosecutors. This has benefited legal staff as it has allowed them to focus on more complicated legal matters and has also provided paralegals with valuable hands-on experience in preparing matters that are before the court.

The CASES system is now used to specifically roster tasks to paralegals. This has resulted in a more evenly distributed workload across the team and has also given the paralegals opportunities to learn all areas of the paralegal unit. It has also provided management with an accurate evaluation of workloads and where the high-pressure areas are. Workloads can then be allocated appropriately.


Sexual Offences Unit

The sexual offences unit continues in its work as a specialist team that coordinates the prosecution of sexual offence matters within the Office, including sexual offences against children, and provides a central point of expertise in the Office.

The setting up of the unit in 2010 was a recognition of the need in sexual offence cases for early, sustained and appropriate contact with complainants, continuity of prosecutor in such cases, a reduction in delays in sexual offence matters and to ensure maximum use of the special measures provided for as part of the legislative reforms of 2008.

The unit has initial carriage of all sexual offence prosecutions. A review is conducted of each new sexual offence matter to ensure that any issues are identified at an early stage in the prosecution. Trials, sentences, appeals and hearings are conducted by prosecutors throughout the Office. The sexual offences unit acts as a support for those prosecutors and ensures that there is consistency in the way in which these matters are prosecuted.

The Witness Assistance Service (WAS) continues to work alongside the prosecutors from the sexual offences unit, acting as a bridge between vulnerable witnesses and their family members and prosecutors. Witness liaison officers continue to provide support and information to vulnerable witnesses to ensure they are able to understand and fully participate in court proceedings. While the WAS is not a counselling or social work service, the service performs a fundamental role in relation



to the prosecution of sexual offence matters. This includes an explanation of the court process to witnesses and making appropriate referrals to other agencies to ensure that vulnerable witnesses receive the support they require and the information they need.

As noted in last year's annual report, reliable data relating to particular offences has existed for the last six years when the Office switched to a computerised case management system. The review of the figures in the previous annual report indicated a significant increase in completed sexual assault and related offences over that period of time, viewed year by year.

There has been a slight decrease in the number of sexual offence trials conducted during this reporting period when compared to last year. The reason for this is likely to be the effectiveness of the changes to the listing of trials in the Supreme Court which were the subject of comment in the annual report for 2013/14. The changes continue to ensure that trials are listed and dealt with in a timely manner, and the court has well and truly caught up with the backlog of matters that were awaiting trial when the changes were introduced.

In the annual report for the year 2014/15 it was noted that the most telling statistic from that reporting period was that for the first time, the number of pleas of guilty **exceeded** the matters run to trial on a plea of not guilty and this reflected the increasing success of the Office in prosecuting these difficult matters. That is again the case for this reporting period.

In the 17 trials that were conducted, a guilty verdict was returned to one or more counts in 13 of those trials. This reflects the increasing success of the Office in prosecuting these difficult matters and is significant for a number of reasons as it demonstrates:

- the increased levels of expertise of prosecutors in the Office and the effectiveness of the specialist unit;
- the increased use of tendency and relationship evidence;
- the effectiveness and use of special measures, such as giving evidence from a remote location, support persons and the pre recording of evidence for children;
- the increased use of expert reports to explain matters such as delay in complaint (see for example the case report on **R v Gray**).

A number of cases prosecuted by the unit are in the case reports section of this report. In the reporting period the High Court heard an appeal by this Office from the Court of Appeal's decision in **R v GW**. That case is discussed at greater length in the case reports section. The High Court, in upholding the Office's appeal, stated that there is now no difference in terms of reliability under the uniform Evidence Acts between the unsworn evidence of children and the sworn evidence of other witnesses. The case was significant for the prosecution of child sexual offences, not just in the ACT, but in the other Australian jurisdictions where the uniform Evidence Act has been enacted (NSW, Victoria, Tasmania and the Northern Territory).

The Royal Commission into Institutional Responses to Child Sexual Abuse has continued to inquire into institutional responses to allegations and incidents of child sexual abuse and related matters. I gave evidence in Case Study 38 in March 2016. This was a public hearing which focused on the experiences of young children and people living with a disability, and the difficulties faced in reporting offences to police and in giving evidence. The Office has now received a number of referrals arising out the Royal Commission. This trend will continue.

Prosecutors from the unit continue to provide training to the AFP in relation to the interviewing of vulnerable witnesses. The focus of this training is the legislation in relation to special measures for witnesses, in particular, conducting evidence in chief interviews.

Prosecutors within the Office receive internal training and continuing legal education sessions on matters which are particularly relevant in the prosecution of sexual offences including relationship evidence, special measures, vulnerable witnesses and tendency evidence. Given that our Office's model is that all matters are prosecuted internally, this is reflected in our commitment to build the capacity and expertise among our prosecutors.

It is anticipated that the prosecution of sexual offences will continue to evolve with the recent passing of the *Family Violence Act 2016* by the Legislative Assembly. This will permit the leading of police interviews as the evidence in chief of all sexual offence complainants thus implementing a recommendation of the Australian Law Reform Commission report 114 *Family Violence - A National Legal Response*. Given the increase in reporting by adults who were victims of sexual offences as children this is particularly significant. The changes take effect from 1 May 2017.

No doubt further reforms will flow from recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse when it reports.

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

Sexual Offences: Trials and Sentences in the Supreme Court - 1 July 2015 to 30 June 2016

Description	Matters
Trials	
Trials	17
Trial Outcomes	
Guilty Verdicts	13
Not Guilty Verdicts	4
Other	
Pleas of guilty entered	
Accused sentenced after committal for sentence, after committal for trial when they changed plea' or re-sentenced after breach	19
Notices declining to proceed further	
Notices declining to proceed further	8
Total	44

Sexual Offences All Matters – 1 July 2015 to 30 June 2016

	Magistrates Court	Childrens Court	Supreme Court	Total
Sexual offence matters commenced	64	8	36	108
Sexual offence matters completed	55	8	49	112
Sexual offence matters proved	12	5	27	44
Sexual offence matters discontinued	3	0	8	11

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 Office continues to have a specialist Family Violence unit with six prosecutors and two paralegals. The team prosecutes the majority of family violence matters. This ensures a consistent approach to family violence. The unit manages each family violence prosecution as it proceeds through the court process and matters are allocated to a prosecutor early in the proceedings. This allows an earlier consideration of the police brief and discussions with defence. The team works collaboratively, sharing their knowledge and experience.

Family violence has received increasing media and political attention in the last year, acknowledging the significant impact it has not only on the families involved but the whole community. Prosecuting those responsible for inflicting violence on their family members recognises this harm. It aims to maximise victim safety and offender accountability.

This reporting period has seen a significant change in the prosecution of family violence offences with the commencement of the family violence evidence in chief provisions. Police now record statements of family violence complainants when they attend an incident on a device. This audiovisual recording is then played as the complainant's evidence in chief at the hearing or trial. These are known as family violence evidence in chief interviews (FVEIC).

The Office worked collaboratively with the AFP in developing and delivering training to all members of ACT Policing (over 600 officers) on conducting these recorded statements. In May 2016 the provisions came into effect and many briefs now contain these statements. The audiovisual record, taken immediately after the incident, provides compelling and reliable evidence and eliminates the need for the witness to recount the whole incident many months later at the hearing. It is expected this will have a significant impact on the prosecution of family violence offences, as was experienced in NSW when similar provisions were introduced last year.



The Office continues to participate in the interagency Family Violence Intervention Program (FVIP) which is a coordinated community and criminal justice response to family violence in our community. Family violence prosecutions are also considered by this group through case tracking.

Being on the front line of the criminal justice response to family violence, the Office is able to suggest and consider law reform in this area. A new offence of choking (without the need for the victim to be rendered insensible or unconscious) was introduced last year. This recognises the danger of such conduct and provides a higher maximum penalty to what would otherwise have been a common assault.


Most family violence complainants give their evidence from a remote witness room, so they do not need to see the defendant. However, the legislation permitting evidence to be given in this manner did not allow it where the defendant was charged with contravening a domestic violence order. The same issues of complainants feeling intimidated and fearful arise in these matters. I raised these issues with the Attorney-General, following which amendments were made in November 2015 allowing complainants in these matters to give evidence from a remote witness room with a support person present. These special measures were also extended to apply to complainants in stalking offences (non-family violence), criminal damage (family violence) and burglary (where the complainant was present in the premises when the offence was committed).

This year has seen a significant increase in the number of family violence matters commenced, proved and completed from previous years. In the previous reporting period, 517 family violence matters were commenced, whereas in this reporting period 710 matters were commenced. This is an increase of 37%, a startling increase in the reporting of family violence offences. 436 family violence matters were completed in the 2014/2015 reporting period and 637 completed this year – a 46% increase. 322 matters were proved in 2014/2015 compared to 479 proved this year. There has also been a significant increase of 43% in the number of FV matters commenced in the Childrens Court when compared to last period.

The increase in family violence matters over the reporting period is also a significant increase when compared to the figures for the past five years as illustrated in this table where the numbers of matters commenced and completed have been reasonably stable since 2011:

Family Violence matters – 5 year comparison

	2011/2012	2012/2013	2013/2014	2014/2015	2015/2016
Family violence matters commenced	503	425	425	517	710
Family violence matters completed	568	441	437	436	637



These figures reflect the increased reporting of family violence and the commitment of this Office to prosecuting these offences. The increase is due, I would suggest, to the greater awareness of family violence in the community. Family violence was brought into sharp focus with a series of family violence related homicides in the early months of 2015. These shocking events and the greater awareness of family violence appear to have led to increased levels of reporting.

The four family violence homicides in early 2014 have progressed through the courts. Marcus Rappel pleaded guilty to murdering his former partner, Tara Costigan, and is awaiting sentence. Jeffrey Lee pleaded guilty to murdering his step-father, Neal Wilkinson. He was recently sentenced in respect of this and associated offences to 13 years imprisonment. An appeal has been lodged by this Office in respect of that sentence, on the ground that it is manifestly inadequate. Josaia Vosikata pleaded guilty to murdering his former girlfriend, Daniela D'Addario and is awaiting sentence. The fourth matter is listed for trial.

The increase in family violence prosecutions has also resulted in the Magistrates Court adding an additional family violence list each week. Unfortunately, there continue to be significant delays in the listing of family violence matters for hearing in the Magistrates Court. Hearings are sometimes listed up to eight months ahead. The delay is exacerbated by the case management hearing process in the Magistrates Court. Case management hearings (CMH) were abolished for all but family violence matters at the end of 2014. This has led to the more efficient listing of non-family violence hearings. However, this reform was not made to family violence hearings. Going through the CMH process delays the proceedings unnecessarily by adding a number of court dates in a bid to case manage matters. The experience in the Supreme Court has shown that a definite trial or hearing date ensures that parties focus on the issues. Case management does not achieve this.

The introduction of the FVEIC procedure signals a shift in how FV matters are prosecuted. This provides an ideal opportunity to look at how FV matters might be streamlined in the Magistrates Court to ensure they are dealt with in a timely manner. This could be achieved by:

- taking advantage of the new procedure to streamline the disclosure of material and compress timeframes for listing matters for hearing;
- abolishing case management hearings for FV matters;
- block listing FV hearing matters in the same way that trials are currently block listed.

This will reduce the stress for victims and witnesses in family violence matters including children who witness violence in the family. This will ultimately benefit not just the participants in the matter, but the whole community. We look forward to working with the Magistrates Court, the AFP, Legal Aid ACT and the Law Society in the coming year on this very important issue.

A number of cases prosecuted by the team are in the case reports section of this report. One case in particular, serves to illustrate the challenges in prosecuting family violence. In the case of GSR the defendant was charged with assault occasioning actual bodily harm. The defendant threw a hot cup of tea at his partner during an argument causing major burns on her body. The victim did not provide a statement to police, however, she disclosed how the injury occurred to a nurse at the hospital, as well as telling her about the violence within the relationship and that she was quite isolated within the community. The nurse made a contemporaneous note of the conversation. The victim also told her mother how she sustained the injury. Police were notified and the victim also told them the defendant threw a hot cup of tea at her. She told police of the violence within the

relationship and that she was scared of her husband, however, she refused to make a statement to police.

At the hearing the complainant stated she burnt herself. She stated that she loved her husband and was worried he would be deported if convicted. She also gave evidence that she was entirely reliant upon him, both financially and emotionally. The prosecution relied on the earlier complaints made by the victim to the nurse, her mother and the police. The defendant was convicted of the offence.

This case illustrates some of the difficulties in prosecuting family violence charges. It is not unusual for a complainant to give evidence that is contrary to complaints made at the time of, or shortly after, the incident. This may be due to family or community pressure, financial pressure or other factors. Having a specialist family violence team allows prosecutors to develop expertise in understanding the dynamics of family violence, and the evidentiary tools to ensure all relevant evidence is before the court. The FVEIC provisions which allow the recorded statement made shortly after the incident to be tendered as the evidence in chief of the complainant will further ensure that the best evidence is placed before the court.


Significant statistics during the reporting period are:

	Magistrates Court	Childrens Court	Supreme Court	Total
Family Violence matters commenced	641	53	16	710
Family Violence matters completed	553	58	26	637
Family Violence matters proved	425	47	7	479
Family Violence matters discontinued	33	0	0	33

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 assist vulnerable witnesses in their interaction with the court process. The WAS' role is targeted towards providing assistance in the form of information and liaison between prosecutors and witnesses, informing vulnerable witnesses about the court process, and ensuring that referrals are made to appropriate external service providers for further support. Arrangements are made for the provision of appropriate support when witnesses are giving evidence. The WAS assists prosecutors across a range of matters. The WAS continues its



strong focus on assisting witnesses in sexual assault and family violence matters, and those matters where a child is required to give evidence.

The WAS is now staffed by witness liaison officers, a change of name reflected in a redefinition of duties within the WAS. Witness liaison officers are very much a bridge between prosecutors on the one hand and victims and other vulnerable witnesses on the other.

Ongoing contact with witnesses is maintained in line with key progressions throughout the court process. The key contact times include when a matter first appears before court, a plea is entered, a matter is committed to the Supreme Court, a hearing, trial or sentence date is set, when there is a verdict or sentence, or an appeal is lodged and listed for hearing. WAS contact ensures that witnesses are provided relevant updates on the progress of the court proceedings and to give witnesses the opportunity to raise questions or concerns, taking into account the needs of the particular witness. At the finalisation of matters before the court, debriefing sessions with witnesses and prosecutors can be arranged.

During the 2015/2016 financial year, the WAS continued to provide assistance to witnesses throughout the court process. For WAS matters, this included making initial contact with witnesses and updating them on the criminal proceedings, providing a general overview of the court process, organising meetings between witnesses, prosecutors and the WAS to discuss the forthcoming court process, scheduling and sitting in on proofings, facilitating court familiarisation tours, as well as ensuring witnesses had the required support when they gave evidence by making appropriate referrals and liaising with witnesses and external service providers.

The WAS provided referrals for witnesses to a number of external service providers, who were able to offer additional support and assistance. The WAS continues to work closely with these agencies in assisting witnesses throughout the court process, particularly in relation to providing court support. However, the focus of the WAS has shifted away from sitting in with witnesses when they give evidence and more towards linking witnesses with appropriate external service providers so that they have the required support both during and after the court process. This will enable the WAS to assist a greater range of witnesses.

Victim Impact Statements

The WAS continued to assist witnesses in the preparation of Victim Impact Statements (VISs). There was a noted increase in assistance provided with VISs during the 2015/2016 financial year for matters where WAS was already involved, but a drop off in other matters. The WAS has been liaising more closely with external agencies in relation to support already in place for assistance with VIS, reflecting better communication with external agencies who were already in contact with those witnesses.

Meetings with external agencies and service providers

During the 2015/2016 financial year, the WAS continued to attend weekly Family Violence case tracking meetings with relevant external agencies and service providers including the AFP, ACT Corrective Services, Child and Youth Protection Services, VSACT and DVCS. This forum is important in identifying those agencies linked in with victims of family violence throughout the court process, and to ensure that assistance is offered to those identified as not receiving or engaging in support.

The WAS continued to attend monthly Wraparound Sexual Assault Reform Program meetings with the AFP, Child and Youth Protection Services, 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.

Assistance in other matters

During the 2015/2016 financial year, the WAS provided increased assistance to prosecutors in matters not marked as WAS matters and where previous contact with the WAS had not occurred. In these instances, although the WAS did not have ongoing contact with the witness, the prosecutor had requested WAS assistance for a particular reason. This included taking witnesses to and from court, court familiarisation tours, confirming or arranging a support person for witnesses for upcoming hearings or trials, liaising with external agencies in relation to assistance for witnesses in the preparation of VISs, or referrals to external service providers for ongoing support.


WAS Caseload

A breakdown of all WAS matters within the 2015/2016 financial year is as follows:

Offence type categories	Number of WAS matters	Percentage*
Death	5	2.8
Adult sexual assault	60	33.5
Child sexual assault	45	25.1
Historical sexual assault	43	24
Child pornography	1	0.6
Serious violence offence (adult)	5	2.8
Serious violence offence (child)		
Less serious violence offence (adult)	16	8.9
Less serious violence offence (child)		
Other	4	2.2
TOTAL	179	100

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

The caseload statistics reflect a decrease in the number of witnesses supported by the WAS during the 2015/2016 financial year when compared to the previous reporting period. This is due to a number of factors including a change to the way the numbers of WAS matters are reported, increased WAS involvement in other matters (which is not reflected in the above figures), and the reduction in WAS staffing for six months of the reporting period due to resourcing pressures.



While the number of child sexual assault matters in which the WAS was involved has reduced when compared the previous reporting period, the number of *historical* sexual offence matters has increased considerably from the last financial year.

Confiscation of Criminal Assets

The restraint and confiscation of assets used in connection with or derived from the commission of criminal offences is one of the Offices' principal duties. It is an effective tool in the fight against serious crime.

The Office continues to pursue the restraint and forfeiture of property in cases where there is clear evidence that property was either used in the commission of an offence, or where the property is the proceeds of crime. The Office has a team of three prosecutors who oversee and appear in confiscation proceedings working closely with the AFP Criminal Assets Investigations Team.

Restraint and forfeiture of property can act as a significant deterrent to criminal activity. The Office commonly pursues the restraint and forfeiture of property which has been used in relation to a criminal offence such as houses, cars and firearms, as well as property derived from the commission of a crime, such as cash which has been obtained as a result of drug trafficking.

During the reporting period, 17 matters were completed. Of these, ten resulted in restraining orders and seven resulted in forfeiture orders being made. \$956,050.26 worth of property was restrained and \$142,070.41 worth of property was forfeited to the Territory. A number of these matters involved a significant sum of money. For example, the DPP successfully restrained \$46,355.00 in cash which was located by police at the residence of a defendant who was trafficking in drugs. In another case finalised during the reporting period, the DPP applied for and was granted a penalty order in favour of the Territory against a defendant who had defrauded her employer of \$114,432.21 by using a corporate credit card over a period of nearly three years. A penalty order is an order for the payment by an offender of the value of benefits derived from the commission of an offence. Money that is forfeited to the Territory is then deposited into the Confiscated Assets Trust Fund. From this fund, payments may be made for purposes such as crime prevention, assistance to victims of crime and the rehabilitation of drug users.

Regulatory matters

Regulatory matters are those matters referred to the Office by regulatory agencies rather than police. Over the past year the Office has prosecuted a range of regulatory matters relating to unsafe and unhygienic kitchens, neglected animals, the dishonest receiving of government grants and matters arising out of the culling of kangaroos within the territory. Of the 38 matters that proceeded to court, 28 were found proved.

In late May 2016, significant changes were made to the Animal Welfare Act and therefore to the way that RSPCA matters are now prosecuted. The amendments were made following the decision of the Supreme Court in *Croatto v Banks*. That case highlighted that where a person was being prosecuted for charges of animal neglect, the prosecution was required to show that a person had *caused pain* to an animal. This was very difficult to prove beyond reasonable doubt. The legislative amendment created a charge which criminalises the neglect of an animal without the need to prove the causing of pain.

The past year has seen an increase in the number of banning orders being issued to people who have been found guilty of offences under the Animal Welfare Act. A banning order prohibits a person from obtaining an animal or keeping, caring for or having control of an animal for a specified period of time. Recent amendments have given courts the power to grant interim animal banning orders against defendants who are yet to have matters finalised by the court. These changes provide greater protection for animals.


The variety of regulatory matters prosecuted in the Office is shown by the following table:

Act	Matters (No.)	Proved
<i>Animal Welfare Act 1992</i>	18	16
<i>Criminal Code 2002</i>	2	1
<i>Domestic Animal Act 2000</i>	2	1
<i>Electoral Act 1992</i>	3	
<i>Fisheries Act 2000</i>	1	1
<i>Food Act 2001</i>	5	5
<i>Liquor Act</i>	1	
<i>Medicines, Poisons & Therapeutic Goods Act 2008</i>	1	1
<i>Nature Conservation Act 1980</i>	1	1
<i>Tree Protection Act 2005</i>	1	1
<i>Trespass on Territory Land Act 1932</i>	1	
<i>Working with Vulnerable People Act 2011</i>	1	1
Total	37	28

Work Health and Safety prosecutions

Work Health and Safety (WHS) prosecutions have featured highly in the Office's caseload during the reporting period. They have continued to attract a large amount of public and media attention. Matters have been conducted both under the now repealed 2008 legislation, and the new nationally harmonised *Work Health and Safety Act 2011*. As prosecutions under the new Act are still a rarity nationally, ACT prosecutions attracted national attention.

Three WHS matters in particular attracted significant interest and took up the bulk of the WHS practice: the matter of Kenoss Contractors Pty Ltd and Munir Al Hasani; the matter of Canberra Contractors Pty Ltd; and the matter of Schwing Australia Pty Ltd and Phillip James O'Rourke.



The Kenoss Contractors matter involved the prosecution of a company in liquidation, and its project manager, Munir Al Hasani, for offences pursuant to section 32 of the *Work Health and Safety Act 2011*. This was the first time that a project manager had been charged personally with an offence under the nationally harmonised WHS legislation. A report on the case is included in the case reports section of this report.

The prosecution against Canberra Contractors Pty Ltd was the only major WHS matter in the reporting period where a plea of guilty was entered. Mr Wayne Vickery was killed when he was struck by a reversing road grader on a building site in MacGregor. Mr Vickery was an experienced grade checker and grader operator. A prosecution was commenced against Canberra Contractors Pty Ltd as the contractor with responsibility for the site. The defendant company admitted to failing to provide a safe workplace and safe system of work. Many of the systems in place were satisfactory on paper but were not implemented in practical terms. The most obvious of these was a prohibition on staff standing or kneeling behind moving plant equipment. In addition, the grader did not have side mirrors and hand signals were not used between the grade checker and grader operator. Penalties under the now repealed *Work Safety Act 2008* were lower than those which now apply under the 2011 legislation. The company had a good safety record and had never been prosecuted. In sentencing, Burns J had regard to other similar cases, particularly in NSW, also featuring lower maximum penalties at the time. In line with the NSW authorities, a penalty of \$82,500 was imposed.

The third major WHS matter involved a catastrophic industrial incident which occurred in July 2012 at the Kingston Foreshore construction site. The bolts holding a slew ring of a concrete pump failed during operation of the pump. This resulted in the collapse of the pump boom. The boom struck Joel Catanzariti, Cian Ebert and Joel Baines. All three were working on a concrete pour taking place on the site. Mr Ebert and Mr Baines were injured. Mr Catanzariti was tragically killed.

Arising from the incident, charges under the *Work Health and Safety Act 2011* were brought against a company which had shortly before serviced the pump, Schwing Australia Pty Ltd, and Phillip James O'Rourke, the company engineer who was the "competent person" who signed off on the inspection report for the service.

The prosecution case as originally pleaded against both defendants was that the slew ring bolts on the pump were incorrectly tightened during the service of the pump. This allegation was based on an expert opinion obtained during the investigation which concluded that the bolts failed as they were unevenly tightened. However, shortly before the matter was due to come on for hearing, defence served upon the DPP an expert report which alleged that the cause of the failure of the bolts was due to a metallurgical phenomenon called hydrogen embrittlement. After that report was received, a separate metallurgical expert was engaged by Worksafe ACT on behalf of the prosecution to comment upon the conflicting expert conclusions. This further expert concluded that the failure of the bolts was due to a metallurgical phenomenon called stress corrosion cracking. Three expert theories thus existed as to the cause of the bolt failure.

In those circumstances, although it was anticipated that the prosecution could prove that the defendants owed a health and safety duty, it could not be proved that they had failed to comply with that duty. The prosecution therefore could not make the case against either defendant out to the very high criminal standard of "beyond reasonable doubt" and the prosecutions were discontinued.

The following matters were dealt with during the year:

Act	Matters (No.)	Proved
ACT Work Health & Safety Regulations 2011	1	
<i>Work Health & Safety Act 2011</i>	2	1
<i>Work Safety Act 2008</i>	2	2
Total	5	3

Parking matters

The Office prosecutes those parking offences which end up in court. There were 206 parking matters completed in the reporting period, a significant increase on previous years.

Criminal Law Resource Centre


The role of the Criminal Law Resource Centre (CLRC) is to provide access to the relevant resources required by staff to carry out their work. This may be in the form of law reports, legal commentary, sentencing information or legislation, all for use in court. In addition to this, staff require examples of previous work, including submissions and internal advice on case law, as well as training notes, manuals, office news, staff and prosecution policies, rosters, meeting room bookings, events calendars or internal telephone directories.

All of this and more is managed by the CLRC in three key areas, the intranet, the CLRC catalogue, and the DPP website. During 2015/2016 the intranet was upgraded to Sharepoint 2013 providing a much cleaner interface and improved functionality. The CLRC Catalogue also underwent a significant upgrade which allowed for improvements to the look and feel of the system. The DPP website was migrated to the 'cloud' during this period improving speed and performance.

R v Eastman

I have reported on the progress of the *Eastman* case in previous reports. On 22 August 2014, following an inquiry into Mr Eastman's conviction for the murder of Assistant Commissioner Winchester in 1989, the Full Court of the Supreme Court quashed Mr Eastman's conviction and ordered a re-trial. As had been foreshadowed by Mr Eastman, Mr Eastman applied for a stay of proceedings. After a number of delays, in July 2015, Ashley AJ (formerly of the Victorian Court of Appeal) was appointed to hear the stay application.

The stay application was heard over nine days in February 2016. The stay was opposed by the Crown. Given the complexity of the matter and the voluminous material which had to be considered, the Court sat for extended hours to ensure the matter could be completed in the time allocated. Because of extensive non-publication orders made over the hearing, little can be said about the arguments that were mounted at the stay application. At the end of the hearing, his Honour reserved his decision.



It is worth noting that the court and the parties used an electronic document management system during the proceedings in order to better control and navigate the vast swathes of documentary material. This system allowed documents to be quickly located and shown to the judge, the parties and witnesses in court. This particular system has not been used in any other matters in the ACT, but given the move towards electronic briefs of evidence and electronic filing of documents, this system or similar may become the norm.

On 14 April 2016, Ashley AJ delivered judgment in the stay application. His Honour refused to grant a permanent stay of proceedings. His Honour's judgment is subject to a non-publication order, however, a short summary of his judgment is available to the public (*R v Eastman (No 9)* [2016] ACTSC 69). In the summary, his Honour noted that Mr Eastman had raised a number of matters the combination of which he submitted justified a stay of proceedings. Those matters were as follows:

1. what he alleged was the blameworthy conduct of the prosecution legal team in failing to disclose certain information in its possession before the 1995 trial;
2. what Eastman alleged was deliberately unfair conduct of the 1995 trial by the prosecution legal team;
3. incidents, specifically in the period between January 1989 and the end of 1992, of police harassment;
4. alleged non-disclosure by the prosecution of matters said to have come to the attention of the prosecution after trial and after Eastman's subsequent unsuccessful appeal against conviction;
5. a contention that the prosecution case, contrary to the opinion of the Full Court, was not strong;
6. delay, and what Eastman claimed would be prejudice to him in the event that a new trial was held;
7. alleged adverse publicity with respect to his role in the murder;
8. his age and other personal circumstances;
9. the expense of conducting a new trial, which he asserted would be unwarranted; and
10. a contention that, in the event of a new trial, the prosecution would be presenting, in part, a 'new' case.

The Crown disputed almost all of the factual allegations raised by Mr Eastman.

After hearing all of the evidence and extensive submissions, his Honour found, as recorded in the summary, that Mr Eastman had "not satisfied the Court that the proceeding against him should be permanently stayed" and "that the failure of Eastman's application does reflect the rejection, or partial rejection, as the case may be, of various matters which he raised."

Shortly after his Honour's decision was handed down, Mr Eastman filed an appeal against the refusal to grant a stay of proceedings. The appeal will be heard in mid October of this year and the result will be reported upon in the next reporting period.

Following Ashley AJ's refusal to grant a stay, this matter has been listed on a number of occasions for trial directions. The Crown has pressed for the matter to be set down for trial in early 2017. However, as at time of publication of this report, the Court has not listed the matter for trial nor appointed a



judge to hear it. It is anticipated that the trial (if the appeal is unsuccessful) will be heard sometime next year.

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.

High Court matters

The Office was a party to a number of High Court matters this past year. One of those cases, *The Queen v GW*, has implications for the prosecution of child sexual offences throughout Australia. The other two cases were *TI v The Queen* and *Martin v The Queen*.


The Queen v GW

Australian courts observe with disturbing regularity that sexual offending against children has profound and deleterious effects on victims, their families, and the community. It is also difficult to prosecute. In *The Queen v GW* the High Court unanimously accepted arguments put by this Office which clarify the law around children giving evidence – as stated in the uniform Evidence Acts – which will hopefully make it easier for them to do so and to prosecute offenders.

GW was convicted by a jury of one count of an act of indecency on his daughter R when she was five years old. R gave an evidence in chief interview to police and later gave pre-trial evidence before Burns J. At the time of that pre-trial hearing R was six years old and Burns J considered her competence to give sworn or unsworn evidence. His Honour ruled, under s 13 of the *Evidence Act 2011* (ACT), that R was incompetent to give sworn evidence as he was “not satisfied that [R] has the capacity to understand that in giving evidence today she has an obligation to give truthful evidence”. As a result, R gave unsworn evidence. At the trial – despite agreeing at a court appearance before Murrell CJ to be bound by Burn J’s pre-trial rulings – GW’s counsel objected that Burns J had not considered the statutory test correctly. Penfold J, the trial judge, overruled this objection and admitted R’s evidence. Her Honour also refused to give a direction requested by GW’s counsel that would have informed the jury that R’s evidence was unsworn. GW appealed his conviction because of, among other reasons, the rulings of Burns J and Penfold J.

The ACT Court of Appeal upheld the appeal and ordered a retrial. The Count found that there were two defects in the trial which caused it to miscarry: (1) Burns J had incorrectly applied s 13 by treating unsworn evidence as the “default position” under the Evidence Act and (2) the failure to warn the jury that R’s evidence was unsworn, because sworn evidence was more reliable than unsworn evidence and therefore given “primacy” by the Evidence Act, something that the jury would need to know when considering R’s evidence. GW’s other appeal grounds were dismissed.

My Office sought special leave to appeal to the High Court. Special leave was granted. The High Court heard the appeal in November 2015. The Crown argued that: (1) in the circumstances Burns J’s reasons were sufficient to discharge the s 13 test, and (2) unsworn evidence was no less reliable than sworn evidence, the Evidence Act not creating a hierarchy of evidence or the reliability of evidence, meaning no “unsworn evidence warning” was required. It was noted that primacy was a concept alien to the Evidence Act, having been found in a unique provision of the *Evidence Act 1929* (SA).



The High Court unanimously ruled in favour of the Crown and rejected GW's arguments, which the Court said were "unsustainable" at [27] and "strain[ed] credulity." The Court stated that the Court of Appeal's analysis of the Evidence Act harked back to an earlier version of the Act which had been substantially changed in 2008 to create the current Act and so held Burns J's ruling had been sufficient to allow R to give unsworn evidence. The Court stated that the Evidence Act does not create a primacy of evidence and reaffirmed the fundamental proposition that the reliability of evidence, whether sworn or unsworn, remains a matter for the jury. The Court held that no unsworn evidence warning was required because neither the Evidence Act nor the common law treats unsworn evidence as evidence of a kind that may be unreliable.

The decision demonstrates the distance the law has travelled in its treatment of children's evidence. No longer should courts worry that child witnesses are "apt to allow their imaginations to run away with them and to invent untrue stories", as one English decision from 1918 put it, or about "the possibility of child fantasy about sexual matters", as Deane J put it more recently in *Longman v The Queen* in 1989. These legal developments are based on science, as noted by Spigelman CJ in *JJB v The Queen*. This science led the ALRC and HREOC to note in a 1997 report at [14.22] that: "there is no psychological evidence that children are in the habit of fantasising about the kinds of incidents that might result in court proceedings or that children are more likely to lie than adults." One hopes these developments, and others such as the SARP program, will help ease the terrible burden children (and others) assume as victims of crime.

TI v The Queen

This case was mentioned in last year's annual report (under the name SH) where it was noted an appeal had been filed. The appeal process has now concluded.

TI was convicted by a jury of one count of incest and two counts of committing an act of indecency on the complainant, his 11 year old step-daughter. Following this, the complainant attempted over a number of years to tell people, such as school friends, her boyfriend, and her mother what had happened. In 2013 she gave an evidence in chief interview to police and gave further evidence at a pre-trial hearing. Her evidence included that the offending had happened after she had had a nightmare and got into bed with TI. TI committed the sexual offending in this context. The complainant recalled TI speaking to her during the incident, including comments such as that he was going to show her something. At some point the complainant asked TI to stop what he was doing and he replied "Do you want me to smack you?" Immediately after committing the offences he said to her, "Don't tell". The complainant's evidence was that she fell asleep and woke again to TI touching her. Evidence was led at the trial that she thought TI was awake.

At trial the defence case was that TI had been asleep at the time of the offences. TI called evidence of a family history of parasomniac behaviour. Expert evidence was led from two psychiatrists that he suffered from sexomnia ("sleep sex"), a sleep disorder. The offender gave evidence at the trial that after finding himself performing sexual acts on the complainant he went back to sleep because he was tired.

Both psychiatrists gave evidence that TI's comments to the complainant (referred to above) were more consistent with TI being awake, that sleep disorder events usually occur at least one hour after falling asleep, and that sleep disorder events are generally "unitary", that is, do not recur on the same night. This was difficult to reconcile with the other evidence.



The trial judge in his summing up to the jury warned the jury that the key issue in the trial was voluntariness. His Honour told the jury that: "Unless you are satisfied beyond reasonable doubt that [TI] was not asleep at the moment he committed the acts said to constitute the offences, then you must return a verdict of not guilty" and that "you must examine [F's] evidence very carefully before deciding whether you are prepared to accept it beyond reasonable doubt in relation to critical matters", i.e. voluntariness. No issue was raised by TI's trial counsel about the jury directions. The jury convicted TI and he appealed.

On appeal the offender complained that the direction on voluntariness had been inadequate and further, that the evidence that the complainant thought he was awake during the offending was an opinion and unreliable, and the jury should have been warned that was the case.

The ACT Court of Appeal dismissed the appeal. Burns and North JJ, with whom Penfold J agreed, noted at [126] that it was "very clear" voluntariness was the issue at the trial was and this "must have been equally clear to the jury." The Court observed that it must have also been obvious to the jury that the complainant's evidence that the offender was awake was her opinion. The Court of Appeal dismissed the appeal from the conviction, reaffirming (as the High Court recently did in *The Queen v Baden-Clay*) the constitutional role of the jury and the advantages the jury had in seeing and hearing the witnesses in what they called at [137] a "classic jury case."


TI sought special leave to appeal to the High Court. He argued that, in short: (1) the Court of Appeal had failed to discharge its obligation to assess the evidence for itself before deciding not to overturn the jury's verdict and (2) the absence of a jury warning about the complainant's opinion evidence caused the trial to miscarry. Responding to the special leave application the Crown argued that: (1) it was plain from the record of the trial and the Court of Appeal's reasons there was ample evidence to support a conviction and that the Court of Appeal had discharged its duties in accordance with the law and (2) directions need to be examined in the context of the issues at the trial and as a whole. The Crown cautioned, drawing from earlier High Court authority, that the offender's approach risked turning directions into a "mechanistic recitation of abstract propositions."

Special leave was refused. The High Court, as is the normal practice, offered only a brief explanation: "The application does not raise any issue of principle suitable for the grant of special leave. If special leave to appeal were granted, the appeal would have insufficient prospects of success. Special leave is refused."

While it may be difficult to read too much into why special leave was refused, a more recent case also dealing with jury directions may provide a clue. In *Graham v The Queen*, an appeal to the High Court from Queensland, Gordon J noted three reasons for dismissing the appeal in a concurring judgment: (1) directions are to be read as whole (2) at the trial Graham's senior counsel took no issue with the direction later complained about to the High Court, and (3) the jury were directed on the real issue in the trial and why it was important and it was then up to them to deliver a verdict. French CJ, Kiefel and Bell JJ took a similar approach. With directions becoming ever more numerous and ever more complicated, the emphasis on ensuring that directions are tailored to the issues in a trial is a welcome one.

Martin v The Queen

In 2010, Corey Martin killed Andre Le Dinh during a brutal robbery inside the deceased's home. After a violent attack, which rendered Mr Le Dinh unconscious, Mr Martin stole cannabis and \$30,000 in cash. He did not contact anyone in relation to Mr Le Dinh after he left the premises. Mr Le Dinh



died of the injuries sustained during the robbery. Mr Martin spent the proceeds on drugs, a car and a television. Mr Martin pleaded not guilty to murder. Following a trial he was convicted. He was sentenced to imprisonment for 22 ½ years, with a non-parole period of 17 ½ years. Mr Martin appealed to the Court of Appeal against the conviction and sentence. The Court of Appeal dismissed both appeals.

Mr Martin then sought special leave to appeal to the High Court in relation to the sentence. His argument was that the sentencing judge (and the Court of Appeal when it dismissed his appeal) had erred in the way the judge assessed the objective seriousness of the offence and current sentencing practice for the offence of murder.

In an appeal against sentence, an appeal court will only intervene in two broad circumstances: that a specific legal error occurred in the sentencing judge's reasons, or the outcome of the sentence was outside the range of permissible sentences in all the circumstances. The Court of Appeal decided that Mr Martin's complaints of specific legal errors were in reality merely arguments suggesting that the final sentence was excessive in the circumstances. Mr Martin sought to challenge that distinction in the High Court.

This Office opposed the application, providing written submissions to the High Court as to why the decision of the Court of Appeal was correct. The application for special leave was dismissed. The sentence imposed will stand.

Complex trials

As reported above, the Office prosecuted three long, complex trials this reporting period: two murder trials and a complex fraud trial: *R v Navin*, *R v Klobucar* and *R v Fischetti*.

R v Navin

After having dinner with his family on Boxing Day 2013, Christopher Navin drove to the home of his former housemate, Nicholas Sofer-Schrieber. Mr Sofer-Schrieber suffered from visual impairment and lived alone. Mr Navin appears to have been allowed in by Mr Sofer-Schrieber, who then sat at a table in the lounge room. Mr Navin approached him from behind and stabbed him, stabbing him multiple times in the back and side before stabbing him through the neck, killing him. He used two knives he had brought with him from his home to inflict the injuries. In total 73 stab wounds were inflicted.

Mr Navin then left Canberra driving approximately 800 km through the night to a family property. He had collected the keys for the property from his parents earlier that evening and had filled his car up with petrol before attending Mr Sofer-Schrieber's premises. On the way to the family property he disposed of the clothing he had been wearing when he killed Mr Sofer-Schrieber.

Once at the family property he erected a campsite on the property concealed in a ring of trees, using a tent he took from Mr Sofer-Schrieber's premises after killing him. Mr Sofer-Schrieber had purchased the tent earlier that day in Big W in the city.

While on the property Mr Navin burnt the two knives he used and threw the blades into a dam. He burnt the front driver's side door mat from the car he had travelled in after killing Mr Sofer-Schrieber.

Mr Sofer-Schrieber's body was discovered by friends two days after the killing. With no signs of a break-in and no obvious motive on the part of anyone to kill Mr Sofer-Schrieber, police interviewed a wide range of people. Mr Sofer-Schrieber had a large group of devoted friends, having been involved in the punk music movement in Canberra. Mr Navin had lived with Mr Sofer-Schrieber



for some months the previous year and their relationship had soured, with Mr Sofer-Schreiber commencing proceedings in ACAT claiming money from Mr Navin in respect of damage done to his property while Mr Navin was living with him.

AFP detectives located Mr Navin at the property in northern NSW a few days after the killing. He had possession of the tent and a camping chair that belonged to the Mr Sofer-Schreiber. The police drained dams at the property and found the two blades. AFP forensics officers found remnants of the knives and the car door mat in camp fires near the campsite Mr Navin had set up.

Mr Navin was charged with murder in February 2014 and was refused bail. In the days and weeks following being taken into custody, Mr Navin exhibited some symptoms of psychosis and reported symptoms of psychosis to mental health workers at the AMC.

Mr Navin had a history of mental illness having been admitted to a psychiatric ward of a hospital in 2011 for three months. He had been a client of ACT Mental Health throughout 2012 and 2013.

After being charged with the murder of Mr Sofer-Schreiber Mr Navin admitted to a psychiatrist that he had killed Mr Sofer-Schreiber. He told the psychiatrist that in the months leading up to the killing, he became convinced that Mr Sofer-Schreiber was plotting against him and his family. Mr Navin reported that by Boxing Day 2013, he believed that Mr Sofer-Schreiber was in the process of hiring an assassin to kill his family and that the only way to prevent this from occurring was to kill him. Mr Navin repeated this to two further psychiatrists.

Mr Navin entered a plea of not guilty by reason of mental impairment. In the alternative, Mr Navin relied on the partial defence of diminished responsibility, which if accepted, would reduce his culpability from murder to manslaughter due to his mental condition. That Mr Navin suffered from schizophrenia was not in issue: the question at trial was whether, at the time of the killing, he was suffering to the extent that he claimed to psychiatrists after his arrest.

For a verdict of not guilty by reason of mental impairment, the jury had to decide that it was more likely than not that (in this case) Mr Navin did not know that the killing was wrong.

Over four weeks, the jury heard evidence that variously supported and weighed against the arguments that the killing was the product of Mr Navin's psychotic delusions. Broadly speaking, the evidence supporting the argument concerned Mr Navin's psychiatric history in the years leading up to the killing, his psychiatric history while in custody, and the description he gave of psychotic symptoms to assessing psychiatrists. Weighing against Mr Navin's argument were the facts that no treating mental health professional was able to detect psychotic symptoms in the months leading up to the killing, discrepancies between his account of the killing and the forensic evidence, evidence of animosity between Mr Navin and Mr Sofer-Schreiber, and the fact that Mr Navin fled the scene and deliberately destroyed evidence.

The psychiatric evidence was unanimous that if Mr Navin was telling the truth about his thought processes at the time of the killing, the special verdict of not guilty by reason of mental impairment would be available to him. The Crown case was that there were questions around the veracity of the account Mr Navin gave the psychiatrists.

The jury rejected the defence of not guilty by reason of mental impairment. The jury found Mr Navin guilty of manslaughter on the basis of diminished responsibility.

Mr Navin was sentenced to imprisonment for 12 years, with a non-parole period of six years. He will be eligible for release on parole in 2020.



R v Klobucar

The defence of mental impairment was also raised in the trial of Danny Klobucar on the charge of murder. Mr Klobucar was accused of killing Miodrag Gajic at Mr Gajic's home in Phillip on New Year's Day in 2014. The accused denied killing Mr Gajic, however, he also relied on a defence of mental impairment, that is, if he did kill Mr Gajic, he did not know that his conduct was wrong.

The Crown led forensic evidence and called a number of experts including experts in the fields of DNA, blood pattern analysis, shoe mark analysis, pathology, and telecommunications. The Crown led evidence of other incidents which it said showed a tendency on the part of the accused to have an obsession with paedophiles, a tendency to perceive certain older males as being paedophiles, and a tendency to act violently and aggressively towards such people.

As in the trial of *R v Navin*, the jury were given tablet devices to view photographs rather than being given multiple photo books. Hundreds of photographs were able to be viewed by the lawyers, the accused and members of the jury through a wireless system which sent files containing photos to each device as they were tendered by the Crown.

The jury returned a verdict of not guilty by way of mental impairment, meaning that while the jury were satisfied beyond reasonable doubt that it was Mr Klobucar who killed Mr Gajic, they were of the view that he was suffering from a mental impairment at the relevant time which had the effect that he did not know that his conduct was wrong.

The trial judge was required to consider what sentence of imprisonment would have been imposed had Mr Klobucar been convicted of murder. This is the maximum period of time that a person found not guilty by reason of mental impairment can be detained in prison.


Justice Penfold characterised the killing as *"a brutal and pitiless attack on a frail old man... which, if committed by a person who realised how wrong it was, would have called for a very severe sentence."* Justice Penfold nominated a term of imprisonment of 20 years. This was reduced to 17 years and nine months after her Honour took into account the time that Mr Klobucar had already spent in custody.

The offender was detained in custody for immediate review by the ACT Civil and Administrative Tribunal (ACAT). Pursuant to the *Mental Health Act 2015*, ACAT has jurisdiction to decide when and under what conditions persons found not guilty by reason of mental impairment should be released from custody.

R v Fischetti

The trial of Frank John Fischetti highlights the observations made elsewhere in this report about the increasing complexity of matters in the Supreme Court. The trial, which took place earlier this year over nine weeks, was one of the longest running trials in the ACT. It was a complex fraud matter involving numerous witnesses from Canberra and interstate and a large number of documentary exhibits. Three prosecutors worked on the trial for well over three months to prepare and present the case before the jury. Organising such a large trial is a feat in itself involving many sections of the Office.

The accused, Frank John Fischetti, has a number of aliases. He was also known by the names Franco Fischetti, Frank Nicholson, Frank Divito and Franco Divido. At the time of the offending he was an undischarged bankrupt in receipt of Centrelink benefits. Prior to that, he had reported a modest income of less than \$22,000 in the financial years ending 2011, 2012 and 2013. As a bankrupt,



Mr Fischetti was precluded from being the director of a company. Notwithstanding his modest circumstances, Mr Fischetti (using the name Divido) presented himself to others as a wealthy and successful businessman. He presented himself this way over a period of years to a Canberra man who owned a family run business, Mr M. Mr Fischetti promised short-term lucrative investment returns if Mr M lent him money for specific projects. Over a period of seven months, Mr M transferred four amounts ranging from \$15,000 to \$80,000 to a bank account nominated and controlled by Mr Fischetti. In total Mr M gave Mr Fischetti \$195,000.

Once the money was transferred much of it was spent on lifestyle expenses including bills, shopping, hotels and expensive restaurants, or withdrawn as cash withdrawals.

Mr Fischetti was also charged with charges involving an attempt to obtain a loan for \$1.4 million from the National Australia Bank to be secured on a Gungahlin residential property which Mr Fischetti was proposing to live in with his family. This application was supported by fraudulent tax returns and financial statements, purportedly signed by a Sydney investment banker who Mr Fischetti had recruited as a front for the loan. The loan was approved by the bank but did not proceed due to the intervention of ACT Policing.

Mr Fischetti was found guilty of 11 fraud offences and is awaiting sentence. Mr Fischetti has lodged an appeal against the conviction.

Significant drug cases

There were many other trials held during the reporting period, and matters where, following extensive preparation, pleas of guilty were entered just before the trial commenced or, in the case of *R v Hou*, after the trial was due to commence. Two such cases were significant drug supply and manufacture cases – *R v Kristiansen, Malec, Rasic and Krsteska* and *R v Hou*. These cases were both significant as they involved the prosecution of sophisticated drug operations. They also illustrate that the resources of this Office often go into preparing long, complex trials that do not proceed to trial. This of course is an essential part of the work of the Office, and worth reflecting in this report.

R v Kristiansen, Malec, Rasic and Krsteska

In 2013, three prisoners in custody at the AMC in Canberra – Thor Kristiansen, Anthony Hagen and Adley Tsang – developed a plan to sell methylamphetamine from inside the prison. The drugs were to be sold both within the prison and in the ACT community. Once Mr Tsang was released from prison he began to arrange for shipments of the drug to be imported from Hong Kong hidden in printer toner cartridges. At times the methylamphetamine and money obtained from the sale of the drug was stored at various locations, including the homes of friends and family. Large batches of methylamphetamine were divided and distributed for profit by lower level dealers, or alternatively stored and then over time introduced into the prison.

Deliveries into the prison were carried out in two ways: packages would be thrown over the perimeter fence and then collected by Mr Kristiansen or one of his associates inside the prison, or someone visiting the prison, would deliver the drugs during contact visits with inmates.

Mr Kristiansen in particular was able to organise an increasingly sophisticated operation by using mobile phones that were smuggled in to the prison. Unfortunately for Mr Kristiansen and his co-conspirators, police became aware of his operation and were soon monitoring his phone.



From January to May 2014, the operation was able to sell a number of shipments, which were identified by the ink colour that had stained the drugs in their transit from Hong Kong. Some colours were more popular than others, and police were able to arrest Mr Tsang's and Mr Kristiansen's associates as they exchanged brown coloured methylamphetamine (which the organisation had been unable to sell) for the more popular pink coloured variety. During search warrants executed across Canberra, police were able to recover over \$79,000 in cash which had been derived from the sale of the drugs.

Following an exhaustive investigation by the police, Mr Kristiansen, Mr Hagen and three co-conspirators were charged with conspiracy to supply methylamphetamine. Having been arrested in Sydney, Mr Tsang pleaded guilty and was sentenced in NSW. In the ACT, each co-conspirator entered pleas of guilty in the Supreme Court shortly before the trial was due to commence. The sole exception was Mr Hagen, who passed away before a trial date was set. The trial would have taken several weeks had it gone ahead.

At the time of writing, three of the conspirators are awaiting sentence.

R v Hou

On 12 August 2014 an ACTEW Water employee attended the suburb of Hume to investigate a possible chemical spill. While door knocking business premises, someone complained about chemical odours coming into his unit and surrounding units. ACT Worksafe inspectors were called and decided to inspect some premises pursuant to the *Dangerous Substances Act 2004*. They called police to assist. Stanley Hou left the premises while police and Worksafe inspectors were preparing to enter. He was detained.

When the police and Worksafe inspectors entered the premises they were met with a very strong odour of chemicals and the sight of drums of chemicals, and equipment - they had found a large clandestine laboratory operated by Mr Hou for the manufacture of MDMA. The Fire Brigade and Police Clandestine Laboratory Team were called in to assist. As it turned out, Mr Hou was in the process of manufacturing MDMA (a fact he disclosed at the lab to police), hence the smell.

Mr Hou was arrested. The investigation revealed that he had rented the premises at Hume from October 2013 and operated the clandestine lab from that time. The activities ceased only upon discovery. The premises were well set up and well resourced. Police recovered very large quantities of a precursor and a quantity of manufactured MDMA. Amongst the evidence implicating Mr Hou was an MDMA "cook book" located by police at premises associated with Mr Hou. This was effectively a "recipe" which outlined in detail (including pictures) the process for manufacturing MDMA. Mr Hou's DNA was located all over numerous pages of the document.

Mr Hou pleaded not guilty and a four week trial was set down. On the day the trial was due to commence Mr Hou's lawyers sought a delay to the start of the trial. On what would have been day three of the trial, Mr Hou pleaded guilty to manufacturing a controlled drug (MDMA), possessing a large commercial quantity of a controlled precursor and trafficking in a controlled drug other than cannabis. The maximum penalties for the offences ranged from 10 to 25 years.

Mr Hou had tertiary qualifications in the maths and finance fields. He had been employed as a financial planner prior to operating the lab. He reported he had a gambling problem which had spiralled out of control in the months prior to the offending however the sentencing judge found there was no causative relationship between the gambling and the offending. Evidence was led at



the sentencing hearing that Mr Hou and his wife owned two properties at the time he had gambling debts, but the properties had not been sold to cover the debts.

Mr Hou was sentenced to four years imprisonment with a non-parole period of two years. I have appealed the sentence on the ground it is manifestly inadequate.

Sex offences

During the reporting period the Office prosecuted a number of sexual offences including a number of historic child sexual offences. Some of these are reported below. In addition, a very long-running child sexual offence prosecution, *R v Dennis Nona*, came to an end after seven years.

R v Nona

This saga is finally at an end. In 2009, the AFP charged Mr Nona in relation to a number of sexual offences committed in 1995 and 1996 against two sisters, H & J, who were between the ages of 11 and 14 years old at the time of the offending. The offences occurred while Mr Nona was residing in Canberra and studying art at the Australian National University. Mr Nona was in a relationship with the victims' mother and spent a considerable amount of time at the family home. He sexually abused both sisters over a period of months. One of the girls, J, fell pregnant to him at the age of 12. DNA evidence formed a central part of the case against Mr Nona in relation to that victim.

The first trial against Mr Nona was conducted in July 2012 and related to the victim J. Prior to the trial commencing, the Crown overcame an application to permanently stay the proceedings, which was determined in March 2012 by Burns J.


Mr Nona was convicted of the sexual offences committed upon J. He appealed to the Court of Appeal. In October 2013 the Court of Appeal, in a two to one judgment, held that the trial judge had misdirected the jury in relation to hearsay complaint evidence. The court quashed the convictions and ordered a re-trial. Mr Nona had also appealed the decision of Burns J not to stay the proceedings. This part of the appeal was dismissed.

The order of the Court of Appeal quashing the convictions and ordering a re-trial was the subject of an application for special leave to appeal to the High Court by my Office. Mr Nona also sought special leave to appeal to the High Court from the decision dismissing his appeal against the decision of Burns J not to stay the proceedings.

Both special leave applications were dismissed in March 2014. Therefore, the order of the Court of Appeal to re-try Mr Nona remained in force.

The first trial for the second victim (H) was conducted in September 2012, which resulted in a hung jury. A subsequent trial was conducted in July 2013, which resulted in Mr Nona being convicted of a number of sexual offences against H when she was aged 13 and 14 years old. Mr Nona appealed the convictions to the Court of Appeal. That appeal was dismissed in July 2015.

Meanwhile, the re-trial for the victim J was set down in December 2014. By this stage, the victims and their mother were very distressed by the events of years ago and the process of repeatedly giving evidence. The Crown successfully applied to lead the evidence of these three witnesses by playing the recording of the evidence given in the first trial in 2012. The ground for the application to play their previous evidence at the re-trial, was that they were *unavailable witnesses* as defined in the *Evidence Act 2011*, as they were mentally unable to give evidence. Due to later legislative amendments requiring courts to record the evidence of all sexual offence complainants for replaying



at any re-trial, such applications are likely to be rare in the future. Unfortunately, this change came too late for J and H.

The Crown's application was granted and J, H and their mother were spared the trauma of having to give evidence again. The audio-recording of the evidence from the first trial was played in the second trial. By this stage, advances in DNA evidence meant that the DNA evidence linking Mr Nona to the pregnancy was even stronger. Mr Nona was again found guilty following the trial. Mr Nona appealed the convictions to the Court of Appeal.

On 13 April 2016 Mr Nona withdrew the appeal to the Court of Appeal thus bringing to an end a seven-year long process.

Mr Nona was sentenced to a total term of five years imprisonment for the offences against victim J and seven years and six months imprisonment for the offences against victim H. The sentences were ordered to be served partly concurrently. The total head sentence was nine years with a non-parole period of four years and six months.

R v Goold

John Goold was charged with one count of engaging in sexual intercourse with a person without consent, the complainant being his former partner. On a separate indictment he was charged with numerous child sex offences. The child of the complainant in the other matter was the victim of those offences. The child sex offences were tried first. He was found guilty of the majority of those offences. He then pleaded guilty to the charge involving his former partner.

The allegations arose from complaints made by his former partner and her three children from when they lived together as a family in the early 1990s. The family initially lived in Victoria in 1991, then Canberra from 1992. Complaints were first made to police in 2007, 15 years after the offending.

The case was first listed for trial in 2014. A temporary stay was granted when it became apparent that evidence the Crown sought to lead in proceedings as tendency and relationship evidence was subject to criminal trial proceedings in Victoria. Following the stay, Mr Goold was charged in Victoria and pleaded guilty to an offence of violence against his former partner in 1992.

The trial in relation to the child sex offences commenced in late 2015. The Crown was permitted to lead evidence of events that occurred throughout the relationship. The jury heard evidence of a family silenced by an environment of violence.

Special measures meant that the witnesses were saved the distress of giving evidence in the court room, and in this case, even travelling a great distance: each witness gave evidence from a remote location closer to their home linked to the court by audiovisual link. Nevertheless the distress of the victims was apparent. One witness was so distressed he left the location from where he was giving evidence, temporarily unable to continue.

At the conclusion of the evidence, the jury returned verdicts of guilty in relation to the majority of the counts on the indictment. The offender was sentenced on 9 May 2016 to a sentence of eight years imprisonment with a non-parole period of four years and nine months. The offender has appealed the conviction and sentence.

In August 2016 the offender was further sentenced to six years imprisonment for the offence of sexual intercourse without consent. The offender's non-parole period was adjusted from four years and nine months to six years and nine months.



What was exceptional about this case was seeing the journey upon which the victims travelled. Initially they were very broken, hurt by what had happened to them, and their inability at the time to help or protect each other. The victim impact statement of one of the victims was greatly moving. It not only described the pain she endured and continues to endure as a result of the offending, it was powerful testimony of a brave woman who is doing everything she can to rise above the horror of her broken childhood to better serve the community in her chosen field of employment.

The criminal justice system is typically an imperfect vehicle for victim healing, but through specialist policing (the AFP Sexual Assault and Child Abuse Team), DPP processes such as a specialised sexual offence team, early engagement with victims, our Witness Assistance Program, and support for victims provided by other agencies, the victims have expressed feeling a sense of regaining control over what has happened to them, and being able to finally begin the process of healing.

R v Tamawiwy

Sex offences often do not come to light because of the unwarranted, but entirely understandable, shame that victims feel preventing them from coming forward.

Mr Tamawiwy was a university student at the time he committed his offences. He created two Facebook accounts – one under his own name and one under the fictitious name of ‘Tayla Edwards’, purportedly a young woman. It appears his intent was to encourage young men to engage in sexual activity with him. Between 2013 and 2014 he used these accounts to contact a number of young men pretending to be ‘Tayla Edwards’. He attempted to entice them to engage in sexual activity with him by telling them that if they had sex with him, they could then engage in sexual activity with the fictitious ‘Tayla’ and her friends. One of the young men with whom he made contact engaged in sexual activity with him.


The central issue at the trial was whether the victim’s apparent consent to sexual activity had been negated because of the offender’s ‘fraudulent misrepresentation of fact’. Pursuant to section 67 of the ACT Crimes Act the fraudulent misrepresentation of any fact is capable of negating what might be described as apparent consent. Mr Tamawiwy’s case at the trial was that he had merely promised that the victim could engage in sex with ‘Tayla’ and that this was not capable of negating the victim’s consent. Following a trial, he was found guilty of sexual intercourse without consent and a number of other offences. He was sentenced to four years and 10 months imprisonment with a non-parole period of two years and one month.

The Queen v WG

The case of WG highlights the difficulties in prosecuting historical sexual offences. WG was charged with sexual offences committed between 1982 and 1985 upon his younger half-sister. At that time, the accused was aged between 17 and 20 years old, and the victim was aged between seven and 10 years of age. The accused was charged with sexual offences relating to two specific incidents.

The first incident occurred in 1982. On that occasion, the victim awoke to see the accused enter the bedroom and lay on top of her. The accused placed his hand over her mouth and warned her not to say anything or she would get into trouble. He then committed a sexual offence upon her. The victim felt too afraid to call out.

The second incident occurred on a day between 1983 and 1985 when the victim was aged between eight and 10. The victim gave evidence that this offence occurred in the bathroom and continued in one of the bedrooms.



The victim also gave evidence that there were numerous other occasions when she was aged between seven and 10 where the accused would sexually abuse her however she was unable to further particularise these other occasions. The victim said that during her childhood she was too afraid to tell anyone about the abuse, including her parents or other family members. As the victim got older she began disclosing some details of the sexual abuse to those close to her such as her mother, her brothers, and female cousins. Twenty years after the accused had stopped sexual abusing the victim, she first spoke to police about it; however, at that stage she still did not feel ready to make a formal complaint. In January 2015, the victim felt she had enough support to make a formal complaint to police about what the accused had done to her.

In 1985 the law in the ACT relating to sexual assault was changed significantly. The accused was charged with sexual offences as they existed under the law prior to the 1985 changes. At the trial there was some uncertainty as to whether the second incident had occurred before or after the 1985 changes. This uncertainty about dates is not unusual in historic sexual offence trials. The Crown was therefore unable to prove beyond reasonable doubt that this incident took place before the law had changed. There was therefore a directed verdict of not guilty in relation to the charges arising out of the second incident.

The jury was left to consider the offences relating to the first incident which had occurred in 1982 before the change in the law. During the trial, the jury heard evidence from a number of witnesses, including expert evidence from an experienced doctor from the Child at Risk Health Unit at the Canberra Hospital. She gave evidence relating to the behaviour of, and the reporting patterns for, victims of childhood sexual abuse. Her evidence was that it was not uncommon for victims of childhood sexual abuse to delay reporting such abuse. She explained that this delay can be for a number of reasons including fear, shame, and confusion.

The jury found the accused guilty of the sexual offences relating to the first incident in 1982.

Culpable driving causing death

All too often we see the terrible impact of dangerous driving offences on our community. *R v Wolter* was one such case where the effects of drugs and speed had tragic consequences.

R v Wolter

On 16 August 2013 there was a collision between a black Mazda car and an elderly pedestrian, Natalie Ashley. As a result of the collision, Mrs Ashley died. Mrs Ashley crossed Mawson Drive almost daily as she went to her artist's studio. The evidence led at the trial was that Mrs Ashley was conscious of the flow of traffic and would not attempt to cross unless the road was clear in both directions. Mr Wolter, then 20 years old, was driving the black Mazda car to the shops to get cigarettes when he hit Mrs Ashley.

The road had a 60km/h speed limit. While the weather was clear the glare from the setting sun was in Mr Wolter's eyes and he pulled the sun visor down as he drove towards the shops. Despite finding it difficult to see, Mr Wolter accelerated up the slight incline in the road travelling at 87 kph, according to the inboard car computer, at 3.5 seconds before impact. At 0.5 seconds before impact, Mr Wolter applied his brakes hard however hit Mrs Ashley who was crossing the road. At the point of impact he was driving at 76 kph. He stopped the car and a number of people came to Mrs Ashley's assistance. An ambulance attended and Mrs Ashley was pronounced dead a short time later. Mr Wolter was



taken to hospital where a sample of his blood was taken and later analysed which revealed he had taken methamphetamine ('ice').

During the trial, Dr Vanita Parekh gave evidence that bright light shone into the human eye (such as glare of the sun) had the effect of causing constriction of the pupil. Her evidence was that the effect of methamphetamine can slow down the response time for this to occur - that is the person finds it harder to see for longer. She also described how methamphetamine impairs the ability of drivers to safely control a motor vehicle including drivers exhibiting increased risk taking. Mr Wolter had told police that he did not see Mrs Ashley before he hit her.

Following a four-day trial a jury found Mr Wolter guilty of culpable driving causing death. He was sentenced to four years imprisonment with a non-parole period of two years.

Work safety

As reported above, this year saw the first prosecution under the new *Work, Health and Safety Act 2011*.

Kenoss Contractors


A truck driver, Michael Booth, was fatally electrocuted in 2012 after his tipper truck came into contact with live overhead wires at a construction site in Turner operated by Kenoss Contractors. As project manager for the site, Mr Al Hasani was aware that live wires were overhead at the site, but allowed for a materials storage compound to be established underneath it. He was instrumental in making the decision and signed off on the application to use the land. The electricity to that section of the overhead wires was not turned off - an option which was available to the company and could have been easily facilitated. No warning decoys were placed on the live wires. No warning signs or markers were placed on the fence around the compound. The compound was unlocked. Mr Al Hasani knew of the risk to health and safety but decided that the use of small machinery by his employees would avert the risk. Mr Booth, however, was a contractor and was not site inducted or warned of the risks. He was not supervised in tipping his load. The lack of any measures to contain an obvious and well known risk had fatal consequences.

The corporate culture of the company in terms of safety showed lax attitudes and limited commitment to safety. Paper systems were not implemented. The company had previously been issued a prohibition notice by WorkSafe ACT stopping it from working on any site where live wires were overhead. This had been served on Mr Al Hasani at the time.

Following a hearing in the newly established Industrial Court, Kenoss Contractors was convicted in absentia and was fined a record \$1.1million. The legislation provided for a maximum penalty of \$1.5million. The fact that it was in liquidation did not prevent the court in imposing the penalty, although it is unlikely it will ever be paid.

In relation to Mr Al Hasani, the Industrial Magistrate found that he was fully aware of the risks associated with the live overhead power lines and did not exercise due diligence with respect to safety compliance. As a result, it was for the court to consider whether Mr Al Hasani fell within the definition of an officer under the *Work Health and Safety Act 2011* and therefore held a positive duty to exercise due diligence in respect to Kenoss' safety requirements.

In considering the definition of an officer, the Industrial Magistrate relied on the definition in the Corporations Act - which was someone who "makes, or participates in making, decisions that affect



the whole or a substantial part of the business of the corporation.” Mr Al Hasani gave evidence that he was the project manager for all of the projects Kenoss was undertaking at the relevant time. He agreed that he made major decisions in respect of all of them. Despite this, the Industrial Magistrate was not satisfied that Mr Al Hasani was an officer of Kenoss and dismissed the matter against him.

Family violence

Family violence cases are predominantly heard in the Magistrates Court. Some cases are reported below. One case in which an assault charge was dismissed in the Magistrates Court, *Cattanach v Harrison*, was appealed by this Office to the Supreme Court.

Cattanach v Harrison

Prosecutors are the fiercest proponents of human rights, standing up for the rights of victims of crime, and the community generally. Despite the fact that the ACT has a Human Rights Act, courts are sometimes slow to recognise changing attitudes to human rights.

In this case, the complainant was the eight year old daughter of the defendant. Although there were no formal custody arrangements in place, the complainant had for many years lived with her grandmother (the defendant’s mother) and went to school in the area where she lived. The defendant, who lived on the other side of Canberra, visited her irregularly.

On the evening in question, the defendant was visiting her mother’s house and had an argument with her mother. About 1.30am in the morning, the defendant went into the complainant’s bedroom and woke her up. The complainant ran upstairs calling out to her grandmother for help. The defendant grabbed the complainant around the waist and carried her down the stairs. The complainant’s grandmother was woken by the noise and saw the defendant forcefully dragging the complainant away against her will. The defendant carried the complainant to her car and drove to her house on the other side of Canberra. The grandmother called the police who attended the defendant’s address. The defendant ignored police requests to open the door. Police entered the house using a locksmith and the complainant was restored to her grandmother’s care.

The defendant was charged with assaulting the complainant in the course of taking the complainant forcibly away from her home, and the matter came on for hearing in the Magistrates Court. The magistrate found that the first two elements of assault were satisfied; the prosecution had proved beyond reasonable doubt that the defendant applied force to the body of the complainant and that that force was intentional. However, the magistrate found that the prosecution had not proved the third element, namely that the application of force was without lawful justification or excuse.

In reaching this finding, the Magistrate observed:

Then a situation developed, for whatever reason, whether the defendant was acting entirely in the best interests of the child or not, from her perception, I am satisfied, she made a decision that the child should return home with her that night. She had a choice at that stage to go home and leave the child or to take the child with her. Her decision, which according to law she was entitled to make, was that the child was to go with her and spend the night with her... Clearly there was the application of force, but in a context that she was the mother of a child who was refusing at that stage to go with her. It was her decision the child should go with her...



In my view what occurred was an unreasonable application of force ([sic] semble “not unreasonable application of force” or “a reasonable application of force”) by the mother to give effect to her parental power to insist the child go with her.

The prosecution appealed inter alia on the basis that the magistrate had erred by failing to interpret the provision creating the offence of common assault in a way that was compatible with human rights. Those rights included:


- the complainant’s rights as a child to the protection needed by the child because of being a child, without distinction or discrimination of any kind pursuant to section 11(2) of the Human Rights Act;
- the complainant’s right not to have her privacy, home or family interfered with unlawfully or arbitrarily pursuant to section 12 of the Human Rights Act; and
- the complainant’s right to liberty and security of person pursuant to section 18(1) of the Human Rights Act.

The prosecution argued that in effect the magistrate had found that a parent had a right to possess their child, and the effect of the magistrate’s ruling was to create a new defence to the offence of assault, namely that a person with parental responsibility can exercise physical control over their child “for whatever reason.” The prosecution argued that this judicial law making did not have regard to the rights protected by the Human Rights Act.

In developing its argument on appeal, the prosecution pointed out that the law had moved away from the Victorian notion that children were the property of their father. Parents, it was argued, are now seen as having *responsibilities* for their children rather than *powers over* them. Reference was made to observations made by McHugh J in *Marion’s case* in the High Court where his Honour noted that the historical absolute right of control by a father over a child had been taken away by legislation “and by the social and judicial recognition of children as persons of independent rights.” The High Court in *Marion’s case* had endorsed views expressed by the House of Lords to the effect that parental rights to control a child did not exist for the benefit of the parent but for the benefit of the child “and they are justified only in so far as they enable the parent to perform his duties towards the child.”

Further, the prosecution argued, the common law shift to recognise the autonomy of children was mirrored by human rights jurisprudence. The Convention on the Rights of the Child states unambiguously that in all actions concerning children undertaken by courts of law and other bodies, the best interests of the child should be the primary consideration. The Convention on the Rights of the Child was part of the international law background against which the Human Rights Act should be interpreted. Clearly, the prosecution argued, there had been no intention shown by the legislature to permit a parent to interfere with the child’s human rights on the sole ground that they are the persons with parental responsibility. Any such interference must clearly be guided by what is reasonable in all the circumstances and such conduct must be for the welfare benefit or protection of the child.

Further, the concept of family and home should be given a broad interpretation in the judicial application of human rights. In the present case, the “family” included the relationship between the complainant and her grandparents who cared for her on a daily basis, and “home” included where



the complainant actually lived being her grandparents' place. The actions of the defendant had constituted an arbitrary interference with the child's right to her home and to her family.

The Supreme Court rejected the prosecution's arguments and dismissed the appeal.

The Court observed:

46. The appellant said the child's human rights were violated by reason of the assault, and this was; another example of children [being] treated as though they were pawns or chattels in disputes between adults. However, I regard that as somewhat emotive language, more appropriate to political discourse. As the respondent had a lawful excuse to do what she did, it follows that the arguments concerning the Human Rights Act have no application.

47. The appellant argued the findings by the magistrate interfered with the child's right as a person before the law (s 8(1)) and her right as a child to have protection (s 11(2)), her right not to have her privacy, family or home interfered with unlawfully or arbitrarily (s 12) and the right to liberty and security (s 18(1)). Given the simple proposition that the appellant failed to prove its case beyond reasonable doubt before the magistrate, I see no place for those principles. The Human Rights Act does not displace the appellant's obligation to prove an alleged offence beyond reasonable doubt. If it did, there would be a more significant interference with the rights of the respondent.

The result of the appeal was disappointing, particularly the Court's rejection of the relevance to the proceedings of the human rights of the child involved. Disappointed but undeterred, the Office will continue to seek to vindicate the human rights of victims and other members of the community.

Adam Beniamini

Adam Beniamini pleaded guilty to numerous charges of assault and damage property against his partner, including having dragged her by the jaw across the floor of her house, and throwing a pair of scissors at her. He was put on a deferred sentencing order, the sentencing magistrate having found that he had 'shown insight into his offending and demonstrated remorse.' A deferred sentencing order requires an offender to attend court at a future date to finalise the sentence.

While Mr Beniamini was on bail in respect of these offences he was arrested and charged with committing further, even more serious, family violence offences against his partner. This further offending occurred when the defendant and his partner were on a night out and the defendant accused his partner of infidelity. He became more aggressive towards her. He picked her up off her stool by her hair and shook her back and forth, before throwing her onto the ground. She fled to the ladies toilets. The defendant followed her into the toilets, kicked in the cubicle door and picked her up off the toilet by her throat. When she was able to breathe, she screamed for help and staff rushed to her aid. The defendant left the club. He was eventually apprehended by police after evading them for several weeks.

Mr Beniamini pleaded not guilty to these further offences. Following a hearing he was found guilty of the charges and sentenced to 21 months imprisonment. The sentencing magistrate found that the offences displayed significant intimidation, aggression and humiliation and that the acts were 'aggressive and degrading'. He was resentenced on the earlier matter for which he had received a deferred sentencing order. In light of the significant breach of the deferred sentencing order, the defendant was sentenced for those offences to a further 21 months in prison-giving him a head



sentence of 42 months, with a non-parole period of 24 months. The defendant has appealed the second sentence.

BM

BM was charged with family violence offences against his girlfriend in October 2015. At the time he was on bail conditions not to contact her. The most serious charge of committing an act endangering the health of another, involved BM, in breach of his bail conditions not to be near his girlfriend, attending her house and forcing his way inside. When she would not speak to him, he stood in front of her, doused himself in petrol and threatened to light himself on fire if she did not speak to him. Mr BM was granted bail several times in relation to these offences. He ultimately pleaded guilty to these offences. He was sentenced to six months imprisonment suspended after 67 days.

Prosecuting driving offences in the Magistrates Court

The prosecution of driving offences in the Magistrates Court is an important and significant part of the work of the Office. This case report is but one example.

Jason Goodwin

Just before 6pm on Tuesday, 5 May 2015, two motorcycles, a black Suzuki GSX1000R and a red Yamaha R1, were travelling along Yamba Drive in Isaacs. The two motorcycles were observed to be travelling close together at high speeds, weaving between traffic through several busy intersections. The black Suzuki motorcycle was being ridden at the time by Raymond Bertram, whilst the red Yamaha motorcycle was being ridden by Jason Goodwin. Mr Bertram's motorcycle was in front of Mr Goodwin's motorcycle as they approached the Erindale Drive and Sulwood Drive roundabout in Fadden. Mr Bertram's motorcycle collided with the rear of a car resulting in Mr Bertram coming off his motorcycle and sustaining injuries. He was conveyed to hospital for medical attention. Mr Bertram succumbed to his injuries, and died a few hours later. Mr Goodwin was not injured in the collision.

Police issued a media release to help identify possible witnesses to the fatal collision. More than a dozen witnesses came forward to assist police in their investigation. The witnesses described seeing two motorcyclists travelling together along Yamba Drive on the night in question. They reported witnessing high speed lane filtering and racing by both motorcyclists.

Police obtained CCTV footage from ACTION buses travelling along Yamba Drive and Erindale Drive. The footage captured two motorcyclists riding closely together and overtaking heavy traffic at high speeds.

Based on the witnesses' accounts, a survey of the collision scene and the bus CCTV footage, the AFP Collision Investigation and Reconstruction Team estimated that moments before the fatal collision, Mr Goodwin was riding behind the deceased's motorcycle at a speed that was well above the posted speed limit of 80km/h. The deceased's motorcycle was estimated to have been travelling at approximately 120km/h immediately prior to the collision.

Mr Goodwin was charged with dangerous driving. He has pleaded guilty to that charge in the ACT Magistrates Court and is waiting to be sentenced.



Statistics

A note on statistics used in this report

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

Because a different system is used by ACT Law Courts, there is potential for a divergence between statistics produced by this Office and those produced by the courts. In particular, if charges were finalised at different court appearances in the same case for a defendant and these were counted as finalised at each appearance rather than being aggregated as a single finalised defendant, there would be a greater number of matters recorded. This would particularly affect 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
Children's Court	232
Magistrates Court	3844
Industrial Court	5
Supreme Court	263
Court of Appeal	28
High Court	4
Total	4376

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

Table 2: Matters finalised disaggregated by matter type

Description	Matters
Homicide and related offences	
Children's Court	
Magistrates Court	5
Industrial Court	
Supreme Court	6
Court of Appeal	2
High Court	1
Sub Total	14

Description	Matters
Acts intended to cause injury	
Children's Court	51
Magistrates Court	522
Industrial Court	
Supreme Court	41
Court of Appeal	1
High Court	
Sub Total	615
Sexual assault and related offences	
Children's Court	8
Magistrates Court	55
Industrial Court	
Supreme Court	49
Court of Appeal	13
High Court	3
Sub Total	128
Dangerous or negligent acts endangering persons	
Children's Court	6
Magistrates Court	99
Industrial Court	
Supreme Court	3
Court of Appeal	
High Court	
Sub Total	108

Description	Matters
Abduction and related offences	
Children's Court	2
Magistrates Court	24
Industrial Court	
Supreme Court	5
Court of Appeal	2
High Court	
Sub Total	33
Robbery, extortion and related offences	
Children's Court	13
Magistrates Court	34
Industrial Court	
Supreme Court	29
Court of Appeal	2
High Court	
Sub Total	78
Unlawful entry with intent/burglary, break and enter	
Children's Court	24
Magistrates Court	91
Industrial Court	
Supreme Court	43
Court of Appeal	3
High Court	
Sub Total	161

Description	Matters
Theft and related offences	
Children's Court	39
Magistrates Court	276
Industrial Court	
Supreme Court	9
Court of Appeal	1
High Court	
Sub Total	325
Deception and related offences	
Children's Court	1
Magistrates Court	19
Industrial Court	
Supreme Court	9
Court of Appeal	
High Court	
Sub Total	29
Illicit drug offences	
Children's Court	2
Magistrates Court	200
Industrial Court	
Supreme Court	25
Court of Appeal	2
High Court	
Sub Total	229

Description	Matters
Weapons and explosives offences	
Children's Court	13
Magistrates Court	102
Industrial Court	
Supreme Court	9
Court of Appeal	
High Court	
Sub Total	124
Property damage and environmental pollution	
Children's Court	25
Magistrates Court	97
Industrial Court	
Supreme Court	4
Court of Appeal	
High Court	
Sub Total	126
Public order offences	
Children's Court	6
Magistrates Court	60
Industrial Court	
Supreme Court	1
Court of Appeal	
High Court	
Sub Total	67

Description	Matters
Road traffic and motor vehicle regulatory offences	
Children's Court	32
Magistrates Court	1788
Industrial Court	
Supreme Court	20
Court of Appeal	2
High Court	
Sub Total	1842
Offences against justice procedures, government security and government operations	
Children's Court	9
Magistrates Court	209
Industrial Court	
Supreme Court	4
Court of Appeal	
High Court	
Sub Total	222
Miscellaneous offences	
Children's Court	1
Magistrates Court	261
Industrial Court	
Supreme Court	11
Court of Appeal	
High Court	
Sub Total	273



Description	Matters
Coronial	
Children's Court	
Magistrates Court	2
Industrial Court	
Supreme Court	
Court of Appeal	
High Court	
Sub Total	2
Total	4376

Table 3: Committals to the Supreme Court

Description	Matters
Children's Court	3
Magistrates Court	156
Industrial Court	1
Total	160

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

Description	Children's Court		Magistrates Court		Industrial Court		Total
	Trial	Sentence	Trial	Sentence	Trial	Sentence	
Homicide and related offences			5				5
Acts intended to cause injury			10	2			12
Sexual assault and related offences	1	1	28	6			36
Dangerous or negligent acts endangering persons			4	3			7
Abduction and related offences			9	2			11
Robbery, extortion and related offences			8	7			15
Unlawful entry with intent/ burglary, break and enter			18	6			24
Theft and related offences			7	4			11
Deception and related offences			1	1			2
Illicit drug offences		1	11	7			19
Weapons and explosives offences			3	3			6
Property damage and environmental pollution			4	7			11
Public order offences							0
Road traffic and motor vehicle regulatory offences							0
Offences against justice procedures, government security and government operations							0
Miscellaneous offences					1		1
Total	1	2	108	48	1	0	160



Table 5: Supreme Court Matters

Description	Matters
Trials	47
Trial Outcomes	
Guilty Verdicts	26
Not Guilty Verdicts	17
Other	1
Awaiting verdict	3
Pleas of guilty entered	
Accused sentenced after committal for sentence, after committal for trial when they changed plea, or re-sentenced after breach	130
Notices declining to proceed further	10

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	63	4	67
Court of Appeal	30	3	33
High Court	3	1	4
Total	96	8	104

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



B.3 Scrutiny

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

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

B.4 Risk Management

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

B.5 Internal Audit

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

B.6 Fraud Prevention

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

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

B.7 Work Health and Safety

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

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

The Office Health and Wellbeing Policy outlines our commitment to the provision of a healthy and safe workplace. 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.

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

- Respect, Equity and Diversity (RED) training
- The opportunity to participate in flu vaccinations
- Health and Safety Representative training

- Fire Warden training
- Asthma Training

All staff attended mandatory Health and Wellbeing training sessions which focused on mental health wellbeing.

Notifiable incidents

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

Section 38 notifiable incidents	Incidents without injury	Minor injuries	Total all incidents
nil	1	3	4

Note: Dates of incidents is in the range 1/07/2015 to 30/06/2016.

B8. Human Resources Management

The Office has continued to maintain its focus on supporting staff in a variety of ways including health and wellbeing and appropriate training.

All staff in the Office participated in mandatory Mental Health awareness training. Legal staff had the opportunity to participate in continuing legal education and training sessions. Again this year participation rates have been lower than is optimal due to court commitments and workloads taking priority.

Two employees worked part-time for the entire reporting period. A further eleven had short term part-time arrangements 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.

The Office continues to work with staff to collaborate and promote opportunities in support of leading a healthy lifestyle. Further information on this is contained elsewhere in the report under the office Working Environment Group Forum.

ARins Reporting

Two members of staff were remunerated pursuant to the terms of Attraction and Retention Initiative (ARins). Information on the remuneration payable under ARins has not been disclosed due to the small number in operation within the Office and the need to retain the confidentiality requirements of these agreements.

Agency profile

Branch/Division	FTE	Headcount
Corporate	7.1	8
Executive	2.0	2
Legal Support	25.6	27
Prosecutor	36.6	37
Total	71.3	74

FTE and headcount

	Female	Male	Total
FTE by Gender	49.2	22.0	71.2
Headcount by Gender	52	22	74
% of Workforce	70.3%	29.7%	100.0%

Classifications

Classification Group	Female	Male	Total
Administrative Officers	7	1	8
Executive Officers	1	1	2
Legal Support	16	5	21
Professional Officers	1	0	1
Prosecutors	24	13	37
Senior Officers	3	1	4
Statutory Office Holders	0	1	1
TOTAL	52	22	74

Employment category by gender

Employment Category	Female	Male	Total
Casual	0	0	0
Permanent Full-time	30	16	46
Permanent Part-time	5	0	5
Temporary Full-time	16	6	22
Temporary Part-time	1	0	1
TOTAL	52	22	74

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	1	1.4%

Age profile

Age Group	Female	Male	Total
Under 25	4	0	4
25-34	30	13	43
35-44	9	4	13
45-54	6	1	7
55 and over	3	4	7

Average years of service by gender

Gender	Female	Male	Total
Average years of service	5.0	7.4	5.7

Recruitment and Separation Rates by Division

Division	Recruitment Rate	Separation Rate
Corporate	0.0%	18.8%
Executive	0.0%	0.0%
Legal support	4.9%	14.8%
Prosecutor	0.0%	10.6%
Total	1.8%	12.8%

Recruitment and Separation Rates by Classification Group

Classification Group	Recruitment Rate	Separation Rate
Administrative Officers	0.0%	18.8%
Legal Support	6.7%	13.3%
Professional Officers	0.0%	79.4%
Prosecutors	0.0%	10.3%
Senior Officers	0.0%	0.0%
Total	1.8%	12.8%

Recruitment and Separation Rates - Executive

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

B.9 Ecologically Sustainable Development

Sustainable development performance - current and previous financial year

Indicator as at 30 June	Unit	Current FY	Previous FY	Percentage change
Agency staff and area				
Agency staff	FTE	71.3	73.3	-2.7
Workplace floor area	Area (m2)	1600.10	1600.10	0
Stationary energy usage				
Electricity use	Kilowatt hours	143,741	146,918	-2.2
Renewable electricity use	Kilowatt hours	N/A	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	3306	2937	12.6
Recycled content of paper purchased	Percentage	100%	100%	0
Waste to landfill	Litres	23040	20640	12.2
Co-mingled material recycled	Litres	21600	21120	2.3

Indicator as at 30 June	Unit	Current FY	Previous FY	Percentage change
Paper & Cardboard recycled (incl. secure paper)	Litres	65040	54240	19.9
Organic material recycled	Litres	0	0	0
Greenhouse gas emissions				
Emissions from stationary energy use	Tonnes CO2-e	111	117.83	-5.8
Emissions from transport	Tonnes CO2-e	N/A	N/A	N/A
Total emissions	Tonnes CO2-e	111	117.83	-5.8

Notes

1. ACT Property Group purchased 7,700 MWh (Mega Watt hours) of GreenPower on behalf of the ACT Government, representing an indicative 5% of the ACT Government's energy consumption for 2015-16.
2. No water consumption data is captured in the ESP for DPP's occupancy. The ACT Government is not formally billed for its water consumption as it is factored into the landlord's rent.
3. Greenhouse gas emissions for electricity have been calculated using an emission factor of 0.773 kilogram (kg) CO2-e /kWh. This has been revised from 2014-15 FY report and has been used to validate the data from the Previous FY (2014-15). The emissions factors include total GreenPower purchases for the ACT calculated in the third quarter of the respective financial years and are specific to the ACT. These emissions factors (Scope 2 + Scope 3) reflect the increasing contribution of renewable electricity generated under the ACT's 90% Renewable Energy Target (RET). Consequently they are lower than those reported in the latest National Greenhouse Accounts (NGA) Factors. Emissions factors will be recalculated to account for the ACT's 100% RET after 2015-16 annual reporting. It is expected that the emissions factors reported here are unlikely to be altered.
4. Differences between Enterprise Sustainability Platform sourced data in the previous FY (2014-15) and that in the original 2014-15 Report is due to updates to agency occupancy and historical consumption data.
5. Missing data in the current period - Electricity (0.1%), Main Gas (16%), Water (5.6%), gas estimated using large market data and averages.



B.10 Territory Records

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

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

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

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

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

C. FINANCIAL MANAGEMENT REPORTING

C.1 Financial Management Analysis

The Office is a downstream agency. Both its workload and timeframes for service delivery are externally imposed. The level of Supreme Court work continues to increase in both time and complexity, while Magistrates Court work remains high. At a time when the workload of the Office is expanding, the resources available to it are contracting with further efficiency dividends continuing to add to the challenges.

C.2 Financial Statements

The financial transactions of the Office for the year ending 30 June 2016 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 2015/2016 (Output 1.4). It should be noted that total expense in Output 1.4 include allocated JACS overheads.

C.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
Upgrade of Evidence Room	22	22	February 2016	March 2016

There are no works still in progress at year end.

Contact details capital works officer:

Emma Flukes
Director corporate services
Phone: 02 6207 5399

C.4 Asset Management

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

The current utilisation rate is 21.6m². 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 15.9m² per employee. Seventy Four staff occupied a total floor space of 1,600m². Factors relevant to the utilisation rate include the need to provide facilities such as witness interview rooms, waiting rooms for vulnerable witnesses, a conference room, the Criminal Law Resource Centre, areas for professional staff undertaking sensitive and confidential work, and areas for confidentially dealing with acutely personal and intimate issues.

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

The assets of the Office are mainly comprised of the Office fit out (partitioning and cabling) and the Criminal Law Resource Centre. Total replacement costs are estimated at \$2m.

C.5 Government Contracting

For year ending 30 June 2016, the following suppliers of goods, services and works with a value greater than \$25,000 were undertaken.

Output Class	Name of Contractor	Description or Reason for Contract	Expenditure 2015-16	Date services commenced	Procurement Type
1.4	Mr Thangaraj	External Counsel	\$158,455	01 July 2015	Single Select
	Ms Dwyer	External Counsel	\$60,055.65	01 July 2015	Single Select
	Itec Pty Ltd	Case Management System	\$50,000.00	01 July 2015	Single Select

For the year ending 30 June 2016, no consultancy services were engaged

C.6 Statement of Performance

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.

	2015-16 Original Target	2015-16 Amended Target	2015-16 Actual	YTD Variance %	Note
Accountability Indicators					
a Percentage of cases where court timetable is met in accordance with Courts' rules	80%		87%	9%	
b Average cost per matter finalised	\$2,632		\$2,744	4%	

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

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. There are no further guidelines at present.

Prosecution Policy

1. INTRODUCTION


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

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

2. THE DECISION TO PROSECUTE

General criteria

- 2.1 It is not the case that every allegation of criminal conduct must culminate in a prosecution. The decision to prosecute should not be made lightly or automatically but only after due consideration. An inappropriate decision to prosecute may mean that an innocent person suffers unnecessary distress and embarrassment. Even a person who is technically guilty may suffer undue hardship if, for example, he or she has merely committed an inadvertent or minor breach of the law. On the other hand, an inappropriate decision not to prosecute may mean that the guilty go free and the community is denied the protection to which it is entitled. It must never be forgotten that the criminal law reflects the community's pursuit of justice and the decision to prosecute must be taken in that context.
- 2.2 Further, the resources available for prosecution are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue, with appropriate vigour, those cases worthy of prosecution.
- 2.3 Whilst a number of general principles may be articulated, it is not possible to reduce such an important discretion to a mere formula. Plainly, the demands of fairness and consistency will be important considerations, but the interests of the victim, the accused and the general public must all be taken into account. (In this context the term "the accused" includes an alleged offender, a defendant and an accused.)
- 2.4 The decision to prosecute can be understood as a two-stage process. First, does the evidence offer reasonable prospects of conviction? If so, is it in the public interest to proceed with a prosecution?

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- 2.5 The initial consideration will be the adequacy of the evidence. A prosecution should not be instituted or continued unless there is reliable evidence, duly admissible in a court of law, that a criminal offence has been committed by the person accused. This consideration is not confined to a technical appraisal of whether the evidence is sufficient to constitute a *prima facie* case. The evidence must provide reasonable prospects of a conviction. If it is not of sufficient strength any prosecution would be unfair to the accused and a waste of public funds.
- 2.6 The decision as to whether there is a reasonable prospect of a conviction requires an evaluation of how strong the case is likely to be when presented in Court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact. The prosecutor should also have regard to any lines of defence which are plainly open to or have been indicated by the accused, and any other factors which are properly to be taken into account and could affect the likelihood of a conviction.
- 2.7 The factors which need to be considered will depend upon the circumstances of each individual case. Without purporting to be exhaustive they may include the following:
- (a) Are the witnesses available and competent to give evidence?
 - (b) Do they appear to be honest and reliable?
 - (c) Do any appear to be exaggerating, defective in memory, unfavourable or friendly towards the accused, or otherwise unreliable?
 - (d) Do any have a motive for being less than candid?
 - (e) Are there any matters which may properly form the basis for an attack upon the credibility of a witness?
 - (f) What impressions are the witnesses likely to make in court, and how is each likely to cope with cross-examination?
 - (g) If there is any conflict between witnesses, does it go beyond what might be expected; does it give rise to any suspicion that one or both versions may have been concocted; or conversely are the versions so identical that collusion should be suspected?
 - (h) Are there any grounds for believing that relevant evidence is likely to be excluded as legally inadmissible or as a result of some recognised judicial discretion?
 - (i) Where the case is largely dependent upon admissions made by the accused, are there grounds for suspecting that they may be unreliable given the surrounding circumstances?
 - (j) If identity is likely to be an issue, is the evidence that it was the accused who committed the offence sufficiently cogent and reliable?
 - (k) Where several accused are to be tried together, is there sufficient evidence to prove the case against each of them?

- 2.8 If the assessment leads the prosecutor to conclude that there are reasonable prospects of a conviction, he or she must then consider whether it is in the interest of the public that the prosecution should proceed. In many cases the interests of the public will only be served by the deterrent effect of an appropriate prosecution. Mitigating factors may always be put forward by an offender when the court is considering the appropriate sentence to be imposed, and it will usually be appropriate that they be taken into account only in that manner. Generally, the more serious the offence the more likely it will be that the public interest will require that a prosecution be pursued.
- 2.9 Nevertheless, the Director is invested with significant discretion, and, in appropriate cases, must give serious consideration to whether the public interest requires that the prosecution be pursued. Many factors may be relevant to the public interest, and the weight which should be accorded to them will depend upon the circumstances of each case. Without purporting to be exhaustive those factors may include the following:
- (a) the seriousness or, conversely, the triviality of the alleged offence;
 - (b) whether it is of a "technical" nature only;
 - (c) any mitigating or aggravating circumstances;
 - (d) the youth, age, physical health, mental health or special vulnerability of the accused, a witness or victim;
 - (e) the antecedents and background of the accused;
 - (f) the staleness of the alleged offence;
 - (g) the degree of culpability of the accused in relation to the offence;
 - (h) the effect on public order and morale;
 - (i) the obsolescence or obscurity of the law;
 - (j) whether the prosecution would be perceived as counterproductive, for example, by bringing the law into disrepute;
 - (k) the availability and efficacy of any alternatives to prosecution;
 - (l) the prevalence of the alleged offence and need for deterrence, both personal and general;
 - (m) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
 - (n) whether the alleged offence is of considerable public concern;
 - (o) any entitlement of a person or body to criminal compensation, reparation or forfeiture if prosecution action is taken;
 - (p) the actual or potential harm occasioned to any person as a result of the alleged offence,
 - (q) the attitude of the victim of the alleged offence to a prosecution;
 - (r) the need to give effect to regulatory priorities;

- (s) the likely length and expense of a trial;
- (t) whether the accused is willing to cooperate in the investigation or prosecution of others, or the extent to which he or she has already done so;
- (u) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
- (v) whether the alleged offence is triable only on indictment; and
- (w) the need to maintain public confidence in such basic institutions as parliament and the courts.

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

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

Prosecution of juveniles

- 2.11 Special considerations apply to the prosecution of juveniles. In this context a juvenile is a child (a person who is under 12 years old) or a young person (a person who is 12 years old or older, but not yet an adult). The best interests of the juvenile must always be considered. Juveniles should be encouraged to accept responsibility for their behaviour, and should be dealt with so as to provide them with the opportunity to develop in socially responsible ways. Prosecution of a juvenile must always be regarded as a severe step. Generally, a much stronger case can be made for methods of disposal which fall short of prosecution unless the seriousness of the alleged offence or the circumstances of the juvenile concerned dictate otherwise. In this regard, ordinarily the public interest will not require the prosecution of a juvenile who is a first offender in circumstances where the alleged offence is not serious.
- 2.12 Different considerations may apply in relation to traffic offences where infringements may endanger the lives of the young driver and other members of the community.
- 2.13 In deciding whether or not the public interest warrants the prosecution of a juvenile regard should be had to such of the factors set out in paragraph 2.9 as appear to be relevant and to the following matters:
- (a) the seriousness of the alleged offence;
 - (b) the age, apparent maturity and mental capacity of the juvenile;

- (c) the available alternatives to prosecution and their likely efficacy;
- (d) the sentencing options available to the court if the matter were to be prosecuted;
- (e) the family circumstances of the juvenile particularly whether those with parental responsibility appear willing and able to exercise effective discipline and control over the juvenile;
- (f) the juvenile's antecedents including the circumstances of any previous cautions that he or she may have been given; and
- (g) whether a prosecution would be likely to have an unduly harsh effect on the juvenile or otherwise be inappropriate, having regard to such matters as the vulnerability of the juvenile and his or her family circumstances.

2.14 Under no circumstances should a juvenile be prosecuted solely to secure access to the welfare powers of the court.


Prosecution of Corporations

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

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

Discontinuing a prosecution

- 2.21 Generally the considerations relevant to the decision to prosecute set out above will also be relevant to the decision to discontinue a prosecution. The final decision as to whether a prosecution proceeds rests with the Director. However, wherever practicable, the views of the police (or other referring agency) and the views of the victim will be sought and taken into account in making that decision. Of course, the extent of that consultation will depend on the circumstances of the case in question, and in particular on the reasons why the Director is contemplating discontinuing the



prosecution. It will be for the Director to decide on the sufficiency of evidence. On the other hand, if discontinuance on public interest grounds is contemplated, the views of the police or other referring agency, and the views of the victim will have greater relevance.


3. OTHER DECISIONS IN THE PROSECUTION PROCESS

Choice of Charges

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

Mode of trial

- 3.6 Summary disposition usually provides the speediest and most efficient disposition of justice. In relation to some indictable offences, the prosecution has the power to elect whether those matters are dealt with summarily. In other cases the consent of the prosecution may be required before an indictable matter can be dealt with summarily.
- 3.7 In making the election or giving or withholding consent for summary disposal, each case is to be considered on its merits. The over-riding consideration is to achieve justice. The principal matter to be considered will be whether in the circumstances the



Magistrates Court can adequately deal with the matter should it proceed to sentence. In turn, that will depend on:

- the nature and circumstances of the alleged offending;
- any other matters that a court would have to consider in sentencing the alleged offender, were the offence to be proved; and
- the criminal history if any of the alleged offender.

3.8 Other factors to be considered are:

- whether the alleged offence is part of a series of related alleged offences, and if so whether it is appropriate to deal with those alleged offences summarily;
- whether there are any co-offenders of the alleged offender, and if so whether it is appropriate for the alleged offender to be dealt with together with the co-offenders; and
- any delay, increased costs or adverse effects upon witnesses likely to be occasioned by proceeding on indictment.

3.9 Under no circumstances will the election be made, or consent given or withheld, for tactical reasons.


Consent to prosecution

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

Charge negotiation

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

3.12 There are obvious benefits to the criminal justice system from a plea of guilty. The earlier it is achieved, the greater will be the benefits accruing to the accused, the victim, witnesses and the community. Accordingly, negotiations between the defence and the prosecution are to be encouraged. They may occur at any stage and may be initiated by the prosecution or the defence. Charge negotiations must be based on principle



and reason, and not on expediency. A clear record of the negotiations must be kept in the interests of transparency and probity.

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

Jury selection

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

Retrials

- 3.17 Where a trial has ended without a verdict, prompt consideration should be given to whether or not a retrial is required. Factors to be considered include:
- (a) the reason the trial ended, that is, whether the jury was unable to agree or other reason;
 - (b) whether or not another jury would be in any better or worse position to reach a verdict;
 - (c) the seriousness of the alleged offence;

- (d) the cost to the community;
- (e) the cost to the accused;
- (f) whether the accused has spent time in custody;
- (g) the views of the victim.


3.18 Where two juries have been unable to agree upon a verdict, a third or additional trial will be directed only in exceptional circumstances.

Sentence

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

4. DISCLOSURE

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



material it was not seen as relevant to an issue in the case or otherwise disclosable.


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

5. THE UNREPRESENTED ACCUSED

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

6. PRIVATE PROSECUTIONS

- 6.1 Not all prosecutions are initiated by police officers or other officials acting in the course of their public duty. The right of a private individual to institute a prosecution has been described as "*a valuable constitutional safeguard against inertia or partiality on the part*




of authority". Nevertheless, the right is open to abuse and to the intrusion of improper personal or other motives. Further, there may be considerations of public policy why a private prosecution, although instituted in good faith, should not proceed, or at least should not be allowed to remain in private hands. Consequently, section 8 of the Act enables the Director to take over the conduct of prosecutions initiated by another person. Thereafter the prosecution may be continued or brought to an end.

- 6.2 Section 13 of the Act provides that where the Director has taken over the conduct of a private prosecution or is considering doing so the informant must provide to the Director a full report of the circumstances giving rise to the prosecution together with copies of the statements of any witnesses and other documentary evidence, and furnish any further information the Director requires. In addition, section 14 enables the Director to seek police assistance in investigating the matter. These provisions enable a full assessment to be made of the prosecution case before any decision is made or, alternatively, after the matter has been taken over.
- 6.3 Given the large range of circumstances which may give rise to a private prosecution it is impracticable to lay down inflexible rules as to the manner in which the discretion will be exercised. In general, however, a private prosecutor will be permitted to retain the conduct of the proceedings unless:
 - (a) there is insufficient evidence to justify the continuation of the prosecution, that is to say, there is no reasonable prospect of a conviction being secured on the available evidence;
 - (b) the prosecution is not in the public interest;
 - (c) there are reasons for suspecting that the decision to institute a private prosecution was actuated by improper motives or otherwise constituted an abuse of the prosecution process; or
 - (d) it would not be in the interests of justice for the conduct of the prosecution to remain within the discretion of a private individual having regard to the gravity of the offence and all the surrounding circumstances.
- 6.4 Where a private prosecution is instituted to circumvent an earlier decision of the Director not to proceed with a prosecution for the same offence, it will usually be appropriate to take over the prosecution with a view to bringing it to an end.

7. UNDERTAKING THAT A PERSON WILL NOT BE PROSECUTED

- 7.1 The Director has a power under the Act to give an undertaking that a person will not be prosecuted for a specified offence or in respect of specified acts or omissions. Where such an undertaking has been given, no proceedings may subsequently be instituted in respect of the offence or conduct so specified. The undertaking may be given subject to such conditions (if any) as the Director considers appropriate.
- 7.2 In principle it is desirable that the criminal justice system should operate without the need to grant any concessions to persons who have participated in the commission of offences or who have guilty knowledge of their commission. It is obviously a grave step to grant, in effect, immunity from prosecution to someone apparently guilty of a



serious offence. However it has long been recognised that exceptional cases do arise in which the interests of justice demand that such a course be pursued.

- 7.3 As a general rule an accomplice should be prosecuted irrespective of whether he or she is to be called as a witness, subject of course to the usual evidentiary and public interest considerations being satisfied. If tried and convicted or acquitted with respect to the offences in issue, the person will then be a compellable witness for the prosecution, without the need for the issuing of an undertaking. Upon pleading guilty the accomplice who is prepared to co-operate in the prosecution of another can expect to receive a substantial reduction in the sentence that would otherwise have been appropriate.
- 7.4 The central issue in deciding whether to give an accomplice an undertaking under the Act is whether it is in the overall interests of justice that the opportunity to prosecute the accomplice in respect of his or her own involvement in the crime in question should be foregone in order to secure that person's testimony in the prosecution of another. The factors to be considered include:
- (a) the importance of the evidence which may be obtained as a result of the undertaking;
 - (b) the extent of the criminal involvement of the person seeking the undertaking compared with that of the accused;
 - (c) whether the person seeking the undertaking has given a full and frank statement of his or her prospective evidence, including an acknowledgement of his or her own role in the offences in issue;
 - (d) the character, credibility and previous criminal record of the person concerned;
 - (e) whether any inducement has been offered to the person to give the evidence sought; and
 - (f) whether there is any other means of obtaining the evidence in question, including by granting the person a more limited undertaking such as under section 9(1) or section 9(4) of the Act.
- 7.5 Any undertaking given by the Director will generally be subject to the condition that the recipient of the undertaking will give evidence as and when called to do so, and that any evidence the person is called upon to give will be given truthfully, accurately and on the basis that the person will withhold nothing of relevance.
- 7.6 Requests for consideration of the giving of an undertaking will usually come from the police. Where such a request is made, the Director should be provided with a full copy of the brief of evidence against the principal offender, a copy of the brief or other material against the proposed witness, a full and frank statement signed by the proposed witness, and a comprehensive report adverting to each of the standard indemnity criteria, as listed above. Given that undertakings will rarely be given, it is prudent for investigators to consult with the Director as soon as practicable if they intend requesting an undertaking for a potential witness in criminal activity under investigation.


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

8. VICTIMS OF CRIME

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

9. PUBLICATION OF REASONS

- 9.1 Where the Director decides to exercise the power conferred by the Act to decline to proceed further with a prosecution, reasons may be given to any enquirer with a legitimate interest in the matter. For example, the person said to be the victim of the alleged offence or those responsible for the investigation will normally be informed. It is acknowledged that the community through the media have a legitimate interest in the administration of justice and where a person has been publicly committed for trial there will generally be no objection to the reasons for any decision not to proceed with such a trial being made public.
- 9.2 However reasons will not be given where to do so might give rise to further harm or serious embarrassment to a victim, a witness or to the accused, or where such a



step might significantly prejudice the administration of justice. Similarly, even where reasons are given it may be necessary to limit the amount of detail disclosed. Under no circumstances will the Director engage in public debate concerning the reasons.

- 9.3 Reasons will not normally be given for a decision to discontinue proceedings before there has been any public hearing, because to do so would involve publishing allegations against members of the community in circumstances where there is insufficient evidence to substantiate them or, for some other reason, a prosecution would not be justified.



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