Director of Public Prosecutions

Annual Report 1985–86

Director of Public Prosecutions Annual Report 1985–86

Australian Government Publishing Service
Canberra 1986

ISSN 0816–6420

Typeset and Printed in Australia by Canberra Publishing and Printing Co, Fyshwick A.C.T., 2609

DPP

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The Hon. Lionel Bowen M.P.,
Deputy Prime Minister and
Attorney-General,
Parliament House,
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My dear Attorney,

I have the honour to submit my report on the operations of the Office of the Director of Public Prosecutions for the year ending 30 June 1986, in accordance with section 33(1) of the Director of Public Prosecutions Act 1983.

Yours faithfully,

Ian D. Temby.

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Introduction

This is the third Annual Report of the Office of the Director of Public Prosecutions.

The year has seen the continued development of the Office and an expansion in the number and range of matters dealt with. The work of the Office is detailed in the Chapters which follow and the reports, which appear in Appendix I, on the activities of each regional office. This year reports are included from the offices of the Directors of Legal Services in those places where the DPP has no direct presence.

An attempt has been made to give more statistics than in the past to assist in an understanding of the work of the Office. However, the statistics must be treated with caution in view of differences from jurisdiction to jurisdiction in the procedures for the prosecution of Commonwealth offences.

The DPP remains a decentralised organization, as will be clear from a reading of the regional reports. While this creates some administrative difficulties, it ensures a high degree of flexibility within the organization and a generally high level of job satisfaction.

The year has not been without difficulties however. In particular, we have seen a high level of staff turnover. Peter Clark, the Senior Deputy Director, has returned to the Melbourne Bar, Robert Greenwood QC, the Deputy Director Canberra, has taken a 12 month appointment with the National Crime Authority and Mark Le Grand, the Deputy Director Melbourne, has been appointed General Counsel assisting the National Crime Authority in Melbourne. Turnover has not been restricted to senior levels.

The continued loss of experienced officers places pressure on those who remain. It is not easy to continue to attract officers with the skills and ability needed to replace those who have gone. We are tied into Public Service pay rates and they are not always competitive. Unfortunately we are in a seller's market. The skills gained by lawyers within the Office are highly negotiable.

Another major difficulty we face in the staffing area is the resources required to prosecute the 'bottom of the harbour' cases inherited from former Special Prosecutor Gyles QC. Most of these matters have now passed through committal and some have reached the trial stage. Committal proceedings and trials in these matters often last for months and require a tremendous amount of preparation.

The first two Annual Reports contained a Statement of Objectives of the DPP. That has not been done this year because the objectives have not changed. The crucial objectives remain: to seek to achieve a standard of excellence in all that is done, and to aim to be a first class, decentralised, specialist law office.

While it would be foolish to suggest that all matters arising during the year were handled with perfect promptitude and efficiency, this Report bears witness to the fact that, despite our problems, by and large we are meeting our objectives. The challenge will be to continue to improve.

2. Organisation

General

The Office of the DPP was established primarily to take over the criminal law functions previously performed by the Crown Solicitor's Division of the Attorney-General's Department. The Director also took over most of the functions of the Attorney-General in relation to the prosecution of offences against Commonwealth law.

The Office has primary responsibility for the conduct of Commonwealth prosecutions. It also has functions in relation to the recovery of civil remedies and pecuniary penalties, which are described in more detail in subsequent chapters.

As at 1 July 1985 the Office comprised 5 Divisions, being a Head Office in Canberra and regional offices in Sydney, Melbourne, Brisbane and Canberra. In December 1985 a regional office was established in Perth, bringing the number of divisions to six. A sub-office of the Brisbane Office was established in Townsville in December 1985.

In Adelaide, Hobart and Darwin Commonwealth prosecutions are conducted for and on behalf of the DPP by the Directors of Legal Services pursuant to an arrangement under section 32 of the DPP Act.

The opening of an office in Adelaide has been considered but the decision deferred due to resource constraints. It is not presently proposed to open offices in Hobart or Darwin.

During the year the sub-offices in Melbourne and Perth, which were performing work taken over from Special Prosecutor Gyles under direction from Sydney, were absorbed into the Melbourne and Perth Offices.

Reports on the activities of all regional offices appear in Appendix I.

Head Office

The Head Office consists of 4 branches: Executive, Legal, Policy and Administrative Support.

The Executive Branch is responsible for providing policy and legal advice to the Director in matters warranting consideration at the highest level, controlling and co-ordinating the activities of the Office throughout Australia, and providing administrative and other assistance to the Director.

The Legal Branch maintains oversight of, and provides input into, the more important prosecutions and recovery proceedings conducted by regional offices. It also provides advice on questions which have general application and assists the Director in the discharge of his statutory powers.

The Policy Branch assists the Director in the formulation and implementation of policy.

The Administrative Support Branch is responsible for the management of the Office throughout Australia. It also provides administrative support to the other Head Office branches.

Sydney Office

The Sydney Office comprises 4 branches: Major Fraud, Prosecutions, Civil Remedies and Administrative Support.

The Major Fraud Branch is responsible for the work taken over from former Special Prosecutor Gyles in the investigation and prosecution of 'bottom of the harbour' tax offences. The Branch comprises lawyers, financial investigators and tax officers.

The Prosecutions Branch is responsible for all prosecutions not dealt with by the Major Fraud Branch, including general fraud offences.

The Civil Remedies Branch has responsibility for pursuing, and co-ordinating the recovery of, civil remedies in those matters where the DPP has authority to act.

The Administrative Support Branch is responsible for managing the Sydney Office.

Melbourne Office

The Melbourne Office has 4 branches: Major Fraud, Fraud, Prosecutions and Administrative Support.

The Major Fraud, Prosecutions and Administrative Support Branches have the same basic responsibilties as their counterparts in Sydney except that some matters that would be dealt with by the Prosecutions Branch in Sydney are dealt with by the Fraud Branch in Melbourne. The other main difference between the Melbourne and Sydney Offices is that the civil remedies function undertaken by the Civil Remedies Branch in Sydney is the responsibility of the Fraud Branch in Melbourne.

Brisbane Office

The Brisbane Office comprises 5 branches: Prosecutions, Major Fraud, Fraud, Civil Remedies and Administrative and Legal Support. The branches have the same functions as their counterparts elsewhere.

Commonwealth prosecutions in Northern Queensland are conducted by the sub-office of the Brisbane Office located in Townsville.

Perth Office

The Perth Office comprises 4 branches: Fraud, Prosecutions, Civil Remedies and Administrative Support.

The Fraud Branch undertakes a high proportion of major fraud work. Otherwise the branches have the same functions as their counterparts elsewhere.

Canberra Office

The Canberra Office comprises a General Prosecutions Branch and administrative support staff who assist it. The General Prosecutions Branch deals with all matters which arise in the ACT and also prosecutes offences against Commonwealth law arising in the Australian Federal Police's southern policing district of NSW.

The Canberra Office, unlike any other regional office, prosecutes all offences in the criminal calendar and not just those arising under Commonwealth Acts.

Directors of Legal Services

The DLS Office in Adelaide has a separate prosecutions section. In Hobart and Darwin prosecutions are conducted as part of the general work of those offices by lawyers who also have carriage of civil matters.

Review

The organisation and operation of each DPP Office is currently under review. Some changes will be made to the organisation of the Office to reflect operating experience and changes to workload, functions and priorities.

The changes may see a greater degree of uniformity in the structure of each office, although as the DPP is a decentralised organisation there will continue to be regional variations.

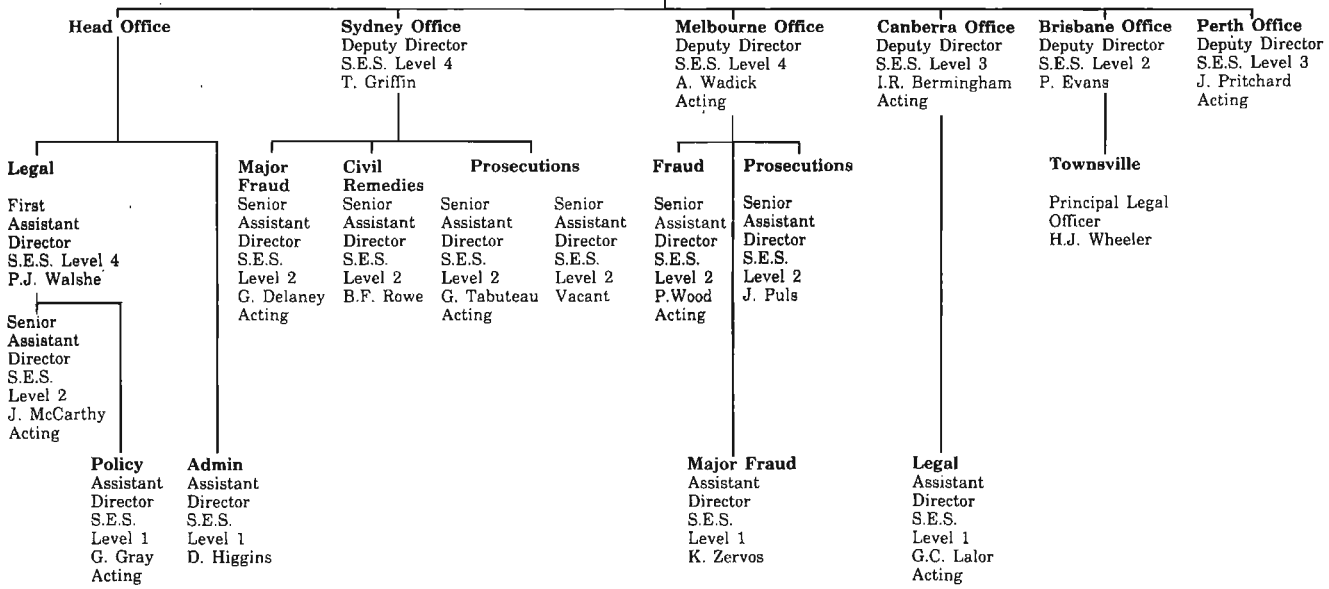
Reviews of each office will be carried out regularly.

Senior Management

The Senior Executive Service of the DPP is set out on the following page.

In 1985–86 there were 2 Deputies Conferences, both held in Canberra, to discuss operational problems and national organization. The conferences were attended by the Director, the Deputy Directors and other senior staff. It is proposed in future to hold one such conference each year in Canberra and one in an alternating regional office. The Directors of Legal Services in Adelaide, Hobart and Darwin may also be invited to future meetings.

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
TOP STRUCTURE CHART



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3. The DPP Act

The DPP was established under the *Director of Public Prosecutions Act 1983* which came into operation on 5 March 1984.

The DPP Act has been amended on a number of occasions, the principal amendments being made by the *Director of Public Prosecutions Amendment Act 1985* and the *Director of Public Prosecutions Amendment Act (No. 2) 1985*. The first of these Acts came into effect on 1 July 1985, and was described in the last Annual Report. The second Act passed through Parliament in June 1986 and is described below.

Statutory Functions and Powers

The main function of the DPP is to conduct prosecutions for summary and indictable offences against the laws of the Commonwealth.

Other functions of the Director under the DPP Act and Regulations include:

- to prosecute on indictment offences against State law where, with the consent of the Attorney-General, he has been appointed to do so by the authorities of that State;
- to carry on committal proceedings and summary prosecutions for offences against State law where the informant is a Commonwealth officer or employee;
- to take, or co-ordinate or supervise the taking of, civil remedies on behalf of the Commonwealth in circumstances which are outlined more fully below;
- to institute or carry on, or co-ordinate or supervise the institution or carrying on, of proceedings for the recovery of pecuniary penalties in circumstances which are also outlined more fully below;
- to appear in extradition proceedings;
- to represent the Chief of Staff of the Defence Force in court martial appeals; and
- to consent to prosecutions where he holds authority to do so.

The Director has also been authorized under a number of Commonwealth Acts to consent to prosecutions for offences against those Acts.

The powers of the Director, prescribed in section 9 of the DPP Act and the sections immediately following it, include power to:

- prosecute by indictment in his official name indictable offences against the laws of the Commonwealth;
- authorize others to sign indictments on his behalf;
- take over prosecutions and committal proceedings for Commonwealth offences that have been commenced by others and either carry them on or decline to proceed further;
- give undertakings to witnesses appearing in Commonwealth prosecutions that their evidence will not be used against them;
- exercise in respect of prosecutions any right of appeal available to the Commonwealth Attorney-General; and

– issue directions and guidelines to the Commissioner of the Australian Federal Police and other persons who conduct investigations or prosecutions for offences against Commonwealth law.

The Director has delegated all of his powers under the DPP Act to the First Deputy Director, other than the power to authorise the signing of indictments and his power of delegation. He has also authorised persons in all States and the internal Territories to sign indictments on his behalf.

Civil Remedies

Under section 6(1)(fa) of the DPP Act it is a function of the Director to take, or co-ordinate or supervise the taking of, civil remedies for the recovery of taxes, duties, charges or levies due to the Commonwealth in matters connected with an actual or proposed prosecution or a matter being considered with a view to prosecution.

Under section 6(1)(h) the Director has power to take, or co-ordinate or supervise the taking of, civil remedies in respect of any other matter specified by the Attorney-General in an instrument in writing published in the Gazette. Again, the power may only be exercised in matters connected with an actual or proposed prosecution or a matter being considered with a view to prosecution.

A number of instruments have been signed for the purpose of section 6(1)(h). The only instrument of general application was signed on 21 August 1985 and empowers the Office to act in relation to the recovery of monies improperly obtained under the *Social Security Act 1947*. Other instruments have empowered the DPP to continue matters commenced by former Special Prosecutors Redlich and Gyles and to take action against specified defendants. Additional instruments may be sought from time to time.

The powers under sections 6(1)(fa) and 6(1)(h) form the basis of the civil remedies practice dealt with in chapter 7 below.

Pecuniary Penalties

Under section 6(1)(g) of the DPP Act, it is a function of the Director to institute or carry on proceedings, or supervise or co-ordinate action by others, to recover pecuniary penalties under Commonwealth law in respect of any matter specified in an instrument signed by the Attorney-General and published in the Gazette.

A number of instruments have been signed for the purpose of section 6(1)(g). The only instrument of general application was signed on 3 July 1985. It empowers the DPP to recover pecuniary penalties in three types of matter:

(a) matters connected with an actual or proposed prosecution;

(b) proceedings to recover pecuniary penalties under any taxation law; and

(c) proceedings to recover a pecuniary penalty under Division 3 of Part XIII of the *Customs Act 1901*.

The instrument reflects a division of functions between the DPP and the Attorney-General's Department under which the DPP has responsibility for matters most closely connected with the enforcement of criminal law, including all taxation prosecutions, and the Australian Government Solicitor has retained responsibility for the matters that remain.

Role of the Attorney-General

For all practical purposes the Director bears independent responsibility for conducting Commonwealth prosecutions and performing his other functions. The only qualification is that the Attorney-General has power under section 8 of the DPP Act to issue directions or guidelines to the Director. Directions or guidelines may be general in nature or may relate to particular cases but can only be issued after consultation between the Attorney-General and the Director. Any direction or guideline must be by an instrument in writing which must be published in the Gazette and laid before each House of Parliament within 15 sitting days.

There was only one direction under section 8 during the past year. That direction, which was issued with the agreement of the DPP, required the DPP to make available to the Parliamentary Commission of Inquiry reviewing certain allegations against Mr Justice Murphy all material in the possession of the Office relating to the prosecution of the judge.

There was extensive informal discussion and liaison between the DPP and the Attorney-General on a range of matters during the year.

Amendments to the DPP Act

The *Director of Public Prosecutions Amendment Act (No. 2) 1985* introduced a number of amendments to the DPP Act which were sought by the Office on the basis of operating experience since 1984.

The first amendment clarifies the Director's powers to indict when a defendant has not been committed for trial or has been committed on charges which are not thought appropriate for indictment.

Section 3 of the amending Act confirms that the Director may not file an indictment where there has been no committal but provides that if there has been a committal the indictment may include any offence disclosed by the evidence and need not be restricted to those on which the defendant has been formally committed. An indictment may also be filed without prior committal proceedings if the defendant consents to that course. The amendment reflects the present practice of the Office and removes any doubt about the validity of the practice.

The second amendment, also introduced by section 3 of the amending Act, gives the Attorney-General a discretion on whether an instrument issued by him empowering the DPP to pursue civil remedies or pecuniary penalties should be published in the Gazette.

It was previously obligatory for such instruments to be published in the Gazette. Publication could in some cases give a potential defendant advance notice of proposed civil proceedings and an opportunity to dispose of assets.

The third amendment confirms that the Director may act in any civil matter which relates to the performance of his functions. While it is arguable that he already had such power under the 'incidental' function in section 6(1)(n) of the DPP Act, the amendment puts the issue beyond doubt.

The fourth amendment enables the Director to be represented by State or Federal police officers in summary or committal proceedings. This will facilitate prosecutions in remote areas where the DPP has no permanent presence. Previously the Director could only be represented by a legal practitioner, which ruled out most State police prosecutors.

The fifth amendment gives discretionary power to courts to prohibit or restrict the publication of evidence or information in pecuniary penalties proceedings instituted, carried on, supervised or co-ordinated by the Director. This mirrors a similar provision enacted earlier in relation to proceedings to recover civil remedies.

The sixth amendment empowers the DPP to employ people on term contracts, with the approval of the Attorney-General, on conditions approved by the Public Service Board. This gives the Office scope to employ people with special skills who it may not be able to employ under the *Public Service Act 1922*.

The final amendment empowers the DPP to employ consultants without first seeking approval from the Attorney-General. This brings the DPP into line with all Commonwealth Departments, which have power to engage consultants without first seeking ministerial approval.

As appears elsewhere in this report, several other amendments have been, or may be, sought to the DPP Act. In particular, legislation should be introduced in the Budget session concerning prosecutions in Commonwealth places and amendments will be sought to permit the Director to grant indemnities in relation to evidence given in extradition proceedings conducted by the Office.

4. Exercise of Statutory Functions and Powers

No Bill Applications

During 1985–86 there were 39 matters in which the DPP was formally requested by a defendant or his solicitor to discontinue proceedings following committal for trial by a magistrate.

In 10 cases the Director or First Deputy Director decided that the matter should not proceed to trial. In the remaining 29 cases an indictment was filed on some or all of the charges on which the defendant was committed.

In a further 44 cases a matter did not proceed to trial following committal on the basis of a recommendation by a regional office that an indictment not be filed. This does not include cases where the indictment contained fewer or different charges from those on which the defendant was committed, or where the defendant pleaded guilty to some charges and others were withdrawn.

In 8 of these cases committal proceedings had been brought in respect of offences which, due to changes to the relevant legislation, could only be dealt with summarily. In all cases summary charges were subsequently laid.

The 54 cases which did not proceed following committal included cases in which the defendant died, the defendant had been dealt with under State law for offences arising from the same events as the Commonwealth charges, the committal proceedings were conducted by State authorities in circumstances not consistent with DPP policy, and the matter did not proceed to a second or third trial following failure by a previous jury or juries to reach a verdict.

In only a few cases were proceedings discontinued solely because it was considered unlikely that a jury would convict, although this was the most common argument raised in representations received from defendants and their solicitors.

In the 29 matters which proceeded despite formal representations from the defence, 12 defendants were convicted on one or more charges, 9 were acquitted and 8 matters remain unresolved.

Undertakings Not to Prosecute

During the year the Director and First Deputy Director signed a total of 80 instruments under section 9(6) of the DPP Act undertaking that the evidence of the proposed witness would not be used in any subsequent court proceedings.

Forty eight undertakings were issued in one matter. The defendant was an accountant accused of conspiring to defraud the Commonwealth and the prosecution depended on evidence from 2 of his associates, who were given undertakings before the trial, and 46 of his clients, who were not. When the first client was called as a witness, the trial judge cautioned him that as his evidence might incriminate him he could not be compelled to give it. It then became necessary to provide undertakings to all 46 clients, even though they had all made full statements in the matter and it had already been decided that none of them should be charged.

The remaining 34 undertakings were given in 20 matters. It remains an unusual step for the DPP to use evidence from an alleged co-offender.

The decision in all cases was made in accordance with the criteria set out in paragraph 4.16 of the Prosecution Policy of the Commonwealth.

There was no occasion in the past year on which the Attorney-General was asked to sign an indemnity for a proposed witness.

Taking Over and Terminating Prosecutions

There were only 4 occasions during 1985—86 on which the Director exercised his power under section 9(5) of the DPP Act to take over and discontinue a prosecution commenced by another. In all 4 matters the informant was an officer of the Australian Federal Police.

In the first matter, which arose in the ACT, the Director took over the prosecution of a defendant on charges of culpable driving and negligent driving after the informant declined to accept advice that there was insufficient evidence to sustain the culpable driving charge. The matter proceeded on the negligent driving charge.

In the second matter, also in the ACT, the Director took over and discontinued proceedings against 37 defendants charged with offences under the *Motor Traffic Ordinance 1936* arising from a demonstration outside the South African Embassy. It was the Director's view that in all the circumstances of the case, including the insufficiency of the evidence, it was not in the public interest that the prosecution proceed. The informant wished the matter to proceed. The Director had previously issued guidelines for Civil Disobedience Prosecutions, a copy of which appears in Appendix II.

In the third matter, arising in South Australia, the Director took over and discontinued committal proceedings against a defendant suffering from cancer with poor prognosis for recovery, especially if the matter proceeded. While the charges were serious, involving the alleged importation of drugs, the person at whose instance the defendant became involved in the importation had already been convicted. The informant was not prepared to withdraw the charges.

The final matter was the Social Security Conspiracy Case, in which the DPP formally took over and withdrew all remaining conspiracy charges following the ruling by the Federal Court setting aside committal orders in the matter.

The power under section 9(5) is rarely exercised and only where there is a clear public interest in the matter not proceeding. The level of co-operation and understanding between the DPP and the Australian Federal Police is generally high and it is unusual for there to be irreconcilable disagreement. However, it is fundamental to the concept of the DPP as an independent prosecuting authority that where there is such disagreement the views of the DPP must prevail.

In a number of other matters charges were withdrawn by an informant on the basis of advice from the DPP.

Appeals

In the past year the Office brought 43 appeals in superior courts against the level or type of penalty imposed at first instance. In addition there were 24 appeals brought by the DPP outside the sentencing area.

The two types of matter in which most appeals against sentence were brought were narcotic offences (7 cases), where it is in the community's interest that proper penalties be maintained, and prosecutions under the

Social Security Act 1947 (20 cases), where some courts seem reluctant to impose more than nominal penalties even in cases of blatant and repeated fraud.

Out of the 43 appeals brought against sentence, 34 have been decided and in 26 the penalty was increased. In addition 5 matters outstanding from 1984—85 have now been resolved. In 3 the penalty was increased.

Appeals brought outside the sentencing area sought to review a range of decisions by magistrates and judges including the granting of bail, the dismissal of charges by magistrates and the refusal by magistrates to commit.

Tables 4(a) and 4(b) illustate the range of appeals brought by the DPP.

Ex Officio Indictments

In 1985—86 the Attorney-General signed 6 indictments on the basis of submissions from the DPP in cases where there was no, or no valid, committal order.

In one matter (James William Shepherd), an ex officio indictment was filed to enable charges against co-defendants to be dealt with together. The co-defendant (Choo Cheng Kui) had been committed for trial but Shepherd was extradited to Australia after the committal proceedings were over. Both defendants were subsequently convicted.

In another matter the defendant had been erroneously committed for trial to the District Court of South Australia rather than the Supreme Court. An ex officio indictment was filed to enable the Supreme Court to hear the matter.

In 3 matters the defendant requested that an ex officio indictment be filed to enable charges to which he or she intended to plead guilty to be dealt with expeditiously.

In only one case (Charles Lo Surdo) was an ex officio indictment filed on charges in respect of which a magistrate had declined to commit the defendant. The defendant had been charged with both State and Commonwealth counts concerning the alleged importation and possession of drugs. The magistrate committed the defendant on the State charges but not the Commonwealth charges. It was considered that the magistrate had erred and that the defendant should stand trial on all counts. Lo Surdo was subsequently found guilty on the Commonwealth charges and sentenced to 25 years imprisonment with a minimum term of 15years.

Prosecutions in External Territories

The Director has issued guidelines for the conduct of prosecutions in the external Territories. The guidelines appear at AppendixIII.

Table 4(a): Crown Appeals Against Penalty

State	No. of Appeals	Type of Proceeding		Type of Matter			Outcome of Appeal		
		Summary	Indictment	Drugs	Social Security	Other	Upheld	Dismissed	Undecided
NSW	4	0	4	4	0	0	3	0	1
Vic	21	16	5	1	15	5	12	4	5
Qld	1	0	1	0	1	0	1	0	0
WA	0	0	0	0	0	0	0	0	0
SA	1	0	1	1	0	0	1	0	0
Tas	8	8	0	0	4	4	3	3	2
ACT	8	0	8	1	0	7	6	1	1
NT	0	0	0	0	0	0	0	0	0

Table 4(b): Other Crown Appeals

State	No. of Appeals	Decision Appealed From			Outcome of Appeal		
		Failure to convict or commit	Grant of Bail	Other	Upheld	Dismissed	Undecided
NSW	7	2	5	0	6	0	1
Vic	4	2	1	1	1	1	2
Qld	3	1	0	2	0	1	2
WA	0	0	0	0	0	0	0
SA	5	1	1	3	4	1	0
Tas	3	2	0	1	0	0	3
ACT	2	1	0	1	1	0	1
NT	0	0	0	0	0	0	0

5. The Conduct of Commonwealth Prosecutions

This Chapter seeks to give an overview of the general work of the DPP. It should be read in conjunction with the reports from the regional offices that appear in Appendix I and with the reports in Chapters 6 and 7 on the work of the Office in relation to major fraud and the recovery of civil remedies.

Prosecution Workload

Tables 5(a), (b), (c) and (d) give some idea of the prosecution work of the Office during 1985—86. The statistics should be treated with caution in view of regional variations in the procedures for the prosecution of Commonwealth offences. They are, nonetheless, indicative of the range and nature of our work.

The tables include details of all prosecutions conducted by the DPP and by the Directors of Legal Services in Adelaide, Hobart and Darwin. They do not include prosecutions conducted by other Commonwealth agencies, private prosecutions and prosecutions conducted by State police prosecutors. They do, however, include major fraud prosecutions.

Prosecution Policy

On 20 February 1986 the Attorney-General tabled in Parliament a statement on the Prosecution Policy of the Commonwealth. The statement was prepared by the DPP following consultation with major client departments and agencies. It supersedes the earlier statement presented to the Parliament on behalf of the then Attorney-General in December 1982.

The document is a public document and copies are available on request to the DPP.

The new statement was necessary as a result of the significant changes to the Commonwealth prosecution process brought about by the establishment of the DPP. While the essential nature of decisions in the prosecution process has not changed, those decisions are now made in the context of the Director's functions and powers under the DPP Act, particularly the Director's supervisory role in respect of prosecutions for Commonwealth offences.

The new statement covers essentially the same ground as the 1982 statement and in many areas there have been few changes of substance. One area where there has been change is in the criteria for prosecution.

The 1982 guidelines provided what was essentially a three stage test in deciding whether to prosecute. The first requirement was that the evidence disclose a prima facie case. Secondly, it was provided that 'a prosecution should not normally proceed unless there is a reasonable prospect of conviction; it should be rather more likely than not that the prosecution will result in a conviction'. Thirdly, there was the requirement that prosecution be in the public interest.

The requirement that the available evidence disclose a prima facie case is preserved in the new guidelines. However, it cannot be the sole determinant of the sufficiency of evidence. In the words of the English DPP, 'the universal adoption of a bare prima facie case standard would not only clog up our already over-burdened courts but inevitably result in an undue proportion of innocent (persons) facing criminal charges'.

The second stage of the test in the 1982 statement was 'reasonable prospect of conviction', which was equated with it being 'rather more likely than not that the prosecution will result in a conviction' — the so-called '51% rule'. Such a theoretical approach gave rise to difficulties in practice.

It is absurd to assert that a prosecutor, no matter how experienced, can assess the prospects of a conviction down to one percentage point. The reality is that a dispassionate evaluation of the prosecution's prospects can be most difficult. There will be some cases where it will not be possible to say with any confidence whether conviction or acquittal is the more likely result. In such cases the decision whether to prosecute must depend on whether there are any public interest factors relevant to the case. Just as there are public interest factors which militate against instituting a prosecution — the triviality of the offence or the youth of the offender are obvious examples — there can also be public interest factors which weigh in favour of prosecution — for example, the seriousness of the offence.

It is for this reason that the '51% rule' has not been adopted in the new guidelines as an inflexible test. Rather it has been incorporated within the public interest requirement so that the likelihood of conviction becomes a dominant, but not dispositive, consideration in determining whether the public interest requires prosecution. In the grey area where the outcome on a dispassionate appraisal is uncertain the various public interest factors assume special importance.

On close analysis the criteria to prosecute in the new statement will not be found to differ in any significant respect from the recommendations of the Shorter Trials Committee set up by the Victorian Bar and the Australian Institute of Judicial Administration.

The guidelines will be kept under review and any changes will be made public.

R v. Murphy

The last Annual Report included a narrative of the proceedings against Mr Justice Murphy up until July 1985. This note continues the account.

On 1 August 1985 the High Court ordered, pursuant to a notice of motion by the Attorney-General for NSW, that questions relating to the validity and construction of sections 43 and the then 85E of the *Crimes Act 1914* and section 68(2)(b) of the *Judiciary Act 1903* be removed into the High Court.

The defence's argument was that section 43 of the Crimes Act did not apply to committal proceedings in respect of an offence against a law of the Commonwealth. This was upon the basis that a magistrate in committal proceedings is exercising an administrative function and that the proceedings are accordingly not related to the exercise of the judicial power of the Commonwealth. In the alternative, it was submitted that section 68(2)(b) of the Judiciary Act and section 85E of the Crimes Act were unconstitutional as they purported to invest a State court with non-judicial powers. If either of these arguments was upheld, then it would follow that MrJustice Murphy had been wrongly convicted.

On 14 August 1985 the High Court rejected both arguments. The Court proceeded to order that 21 questions of law which had been reserved by the trial judge under section 72 of the Judiciary Act be remitted to the Full Court of the Supreme Court of New South Wales.

On 3 September 1985 the trial judge sentenced Mr Justice Murphy to imprisonment for 18 months and ordered that after 10months he could enter

into a recognizance to be of good behaviour for the balance of the sentence. This sentence was respited until the outcome of the appeal.

In November 1985 the NSW Court of Appeal heard argument on the questions of law reserved by Cantor J., together with 19 further grounds of appeal. On 28 November 1985 the Court allowed the appeal on the ground that the trial judge erred in the way in which he charged the jury, set aside the conviction and ordered that there be a new trial. On the same day the Premier of New South Wales made certain remarks in relation to the matter for which the Director initiated proceedings for contempt of court. Those proceedings are listed to be heard by the NSW Court of Appeal on 1 September 1986.

On 4 December 1985 the Director announced that there would be a re-trial, which commenced on 14 April 1986 before Hunt J. On 28April Mr Justice Murphy was found not guilty.

On 2 May 1986, after intense media speculation, the Director made it publicly known that he had received advice prior to the jury verdict that a further charge should be laid against Mr Justice Murphy. The Director decided that the available material did not justify a further charge. That decision was made prior to the jury verdict.

The DPP has no role in the Parliamentary Commission of Inquiry which has since been convened to review certain allegations against Mr Justice Murphy.

Medifraud

An important part of the work of the DPP involves the prosecution of offences against the *Health Insurance Act 1973* and the *Crimes Act 1914* involving the alleged improper obtaining of Medicare and other benefits. The bulk of the work involves alleged offences by medical practitioners who have submitted false and misleading claims for Medicare benefits.

Commonwealth prosecutors have been involved in this area since 1948, when the Commonwealth first began to subsidise health insurance, but the work has assumed a higher profile with the establishment of the Medicare system in 1984 and allegations that medical fraud and overservicing is costing the community an ever growing amount. A recent report by the Parliamentary Public Accounts Committee has highlighted the scope for abuse of the system by pathologists, an area which until recently received little attention.

When the DPP was established there was already in place a mechanism for formal consultation between police, prosecutors, the Department of Health, the Health Insurance Commission and the Department of Veteran's Affairs. The mechanism involved regular monthly meetings of State Co-ordinating Groups and a Central Co-ordinating Committee. The DPP has participated in the work of the groups and the committee.

In the course of 1985–86 prosecutions were completed against 4 medical practitioners. Three were convicted on some or all of the charges against them and one was acquitted. One conviction was subsequently set aside on appeal and one appeal is outstanding.

As at 30 June 1986, 14 matters were before the courts, including matters before appellate courts. By contrast, a total of 232 matters were listed for investigation by either the Australian Federal Police or the Health Insurance Commission.

These statistics do not, of course, tell the full story. In the majority of matters considered by the HIC or the AFP, investigation shows that no offence

has been committed or that the conduct in question occurred through inadvertance or error.

However, even if investigation discloses apparent fraud, substantial difficulties face the prosecution in these matters. First, it is necessary to lay a separate charge in relation to each alleged offence, most of which generally involve only a small sum of money. An offender may have committed many offences, but there is a limit to the number of charges that can be effectively dealt with at committal and trial. Consequently, the charges laid often do not reflect the full extent of the alleged criminality. Secondly, the legislation is generally in an unsatisfactory state for the purpose of prosecution. The Health Insurance Act is beneficial in nature and was not drafted with the purpose of prosecution in mind. In many areas the legislation is vague and ambiguous. As a general principle criminal courts will read ambiguities in favour of the defendant. Thirdly, the prosecution often depends upon evidence from patients on matters such as the length of a consultation or who was present when it was performed. Often the patients are unwell or infirm and, unless the patient concerned has a particular reason to remember the consultation, his or her memory of it may not be reliable by the time the matter comes to trial (often 2 or more years after the event).

Prosecution has an important part to play in this area and its deterrent effect should not be underrated. However, it is not a complete answer. The primary control of medifraud must rest with administrative procedures designed to make it difficult to perpetrate fraud and to enable the ready detection of fraud and the curtailment of payment when it occurs.

Conduct of Prosecutions by Others

Not all prosecutions for offences against Commonwealth law are conducted by or on behalf of the DPP.

Section 10(2) of the DPP Act preserves the right of any person to bring summary prosecutions and take committal proceedings for Commonwealth offences.

Few truly private prosecutions are brought, although a notable example has been the proceedings brought by the Non-smokers Movement against United Telecasters Sydney Ltd in relation to the televising of the 1983 Sydney Rugby League Grand Final. It is alleged that the telecast of the match contravened section 100(5) of the *Broadcasting and Televison Act 1942* which prohibits the televising of advertisements for cigarettes. The match was played for the Winfield Cup and the telecast gave coverage to promotional material for Winfield cigarettes.

The defendant has been committed for trial and the DPP, after consultation with the Department of Communications, decided that an indictment should be filed. The matter is the first of its kind and may have far reaching implications for the television industry.

A number of Commonwealth prosecutions are conducted by Commonwealth Departments and agencies as part of the administration of the legislation under which charges have been laid. These are generally routine, high volume matters in which pleas of guilty are common.

As a general policy, the DPP has no objection to routine matters being dealt with in-house provided that the Office is kept informed of the number and type of matters involved and that all matters which are likely to cause difficulty are referred to us, preferably before problems arise.

We have recently entered into discussions with the Australian Taxation Office to establish guidelines for the conduct of taxation prosecutions by ATO officers. Those guidelines should provide a model for arrangements with other Commonwealth agencies which conduct in-house prosecutions.

Some prosecutions are also conducted by the Australian Government Solicitor by agreement with the DPP. For example, summary prosecutions for offences against the *Quarantine Act 1908* are normally conducted by the Australian Government Solicitor if they are related to pecuniary penalty proceedings under the *Customs Act 1901*. The alternative would be for the two aspects of the matter to be dealt with by different agencies, which would be an inefficient use of resources.

Commonwealth prosecutions are often also instituted and conducted by State police, usually in conjunction with State charges relating to the same series of events. Most of these matters concern relatively minor offences, and they are often prosecuted in remote localities where the DPP has no regular presence. It would unduly strain the resources of the DPP to deal with all such matters. However, it is important that we be kept informed of these prosecutions.

It is also important that the DPP be given the opportunity to take over prosecutions for serious offences. In some matters we have only become aware that charges have been laid for an indictable Commonwealth offence after the defendant has been committed for trial. In one matter, the first the DPP knew of the prosecution was when a report was received from the State police recommending that the Director appeal against a non-custodial sentence imposed at first instance.

There is a clear need for greater consultation with the various State police forces. The matter will receive priority in 1987.

Welfare Fraud Prosecutions

Early in 1986 the DPP initiated discussions with the Department of Social Security and the Australian Federal Police on a number of areas of concern in the investigation and prosecution of welfare fraud.

The move reflected concern on the part of this Office that welfare fraud is not being effectively controlled. While there are a number of reasons for this, one significant factor is that many serious cases are not being referred to the DPP simply because they have not been investigated.

The majority of less serious matters are investigated by DSS, but more serious cases are referred to the AFP for investigation. Unfortunately, the AFP does not have the resources to cope with more than a few of the large number of cases referred to it. The AFP seeks to concentrate its efforts on the very serious cases. The result is that minor cases and very serious cases are investigated, by the DSS and the AFP respectively, but a large group in the middle are not. This unsatisfactory state of affairs can only undermine the deterrent value of prosecution in this area.

The DSS and the AFP are preparing guidelines which, amongst other things, will assist DSS to identify cases that should be referred to the AFP for investigation. However, without an increase in investigation resources, guidelines are unlikely to have much impact on the overall problem.

Another difficulty is that the briefs of evidence received from DSS are not always of good quality. DSS briefs are compiled following investigation by field officers. Those officers often have little or no experience or training in

conducting criminal investigations and preparing briefs of evidence. By the time they have developed expertise they are often promoted out of the area. DSS does not see investigation as the primary function of its field officers and, in these circumstances, it is perhaps understandable that briefs are sometimes deficient.

DSS has recognised that there is a need to improve the quality of its briefs. The DPP has offered to assist by instructing the DSS field officers how to compile briefs of evidence. The AFP has also offered to do what it can to assist in instructing field officers in interview techniques and other areas of investigation. We are hopeful that the quality of briefs will improve.

An area in which change is likely is that of penalties imposed for welfare fraud. For many years there has been a disturbing disparity in the sentences imposed in different jurisdictions. In some places a defendant will receive a bond or a small fine for an offence for which he or she would be sent to prison in another State or a different court in the same State. There appears to be a perception in some places that welfare fraud is really symptomatic of a social problem rather than a manifestation of criminal behaviour. This is despite the fact that every effort is made to filter out the cases in which real hardship explains the defendant's conduct. During 1985—86 the DPP launched a number of appeals against sentence in welfare fraud cases. Most were successful. In a number of cases relatively lengthy terms of imprisonment were substituted for a bond or fine. In addition, a number of superior courts emphasised the need for sentencing courts to have regard to the need for general deterrence when imposing sentences for welfare fraud.

There should be a more consistent sentencing pattern in these matters in future, especially now that non-custodial sentencing options are available for federal offenders in a number of jurisdictions. The new options, which include community work orders and periodic detention, may be attractive to judges and magistrates who appear reluctant to send welfare fraud offenders to gaol.

Table 5 (a) — Matters Dealt with Summarily in 1985–86

State	*No. of Defendants*	*No. of Convictions (i)*	*Acquittals*	*Other*
NSW	1391	1231	31	129
Vic	2161	2109	32	20
Qld	413	385	4	24
WA (ii)	498	454	7	37
SA	868	844	15	9
Tas	151	143	2	6
ACT	n.a. (iii)	—	—	—
NT	80	65	1	14

Notes

(i) 'Conviction' means any case in which the defendant was convicted or had a case found proven on at least one charge.

(ii) Figures for W.A. includes prosecutions conducted by DLS Perth prior to 2 December 1985.

(iii) A total of 30,639 charges were dealt with summarily in 1985/86, 27,771 in the Magistrates Court and 2,868 in the Children's Court. Many defendants were charged with more than one offence. A breakdown of these figures is not available.

Table 5 (b) — Matters Dealt with on Indictment in 1985–86

			Trials		*Outcome of Trials*		
State	*Total No. of Defs.*	*Pleas of Guilty*	*No. of Trials*	*No. of Defendants (i)*	*Conviction (ii)*	*Acquittal*	*Other*
NSW	152	86	47	66	48	16	2
Vic	40	31	9	9	6	3	0
Qld	62	48	12	14	11	3	0
WA(iii)	44	32	7	12	6	6	0
SA	115	101	12	14	11	3	0
Tas	3	1	2	2	1	1	0
ACT	97	53	40	44	23	14	7
NT	6	5	1	1	1	0	0

Notes
(i) Some trials involved more than one defendant.
(ii) 'Conviction' means any case in which the defendant was convicted or had a case found proven on at least one charge.
(iii) Figures for WA include prosecutions conducted by DLS Perth prior to 2 December 1985.

Table 5(c) — Legislation: Matters Dealt with Summarily in 1985–86

State	*Crimes Act*	*Social Security Act*	*Customs Act*	*Health Insurance Act*	*Taxation Act*	*Bankruptcy Act*	*Other*
NSW	225	900	39	4	102	1	120
Vic	304	762	33	1	43	12	1006
Qld	113	120	20	0	59	0	101
WA(i)	167	134	24	2	16	18	137
SA	194	264	26	2	18	10	354
Tas	36	52	0	0	7	1	55
ACT	n.a. (ii)	—	—	—	—	—	—
NT	21	17	0	0	3	1	38

Notes
(i) Figures for WA include prosecutions by DLS Perth prior to 2 December 1985.
(ii) See note (iii) to tables (a).

Table 5(d) — Legislation: Matters Dealt with on Indictment in 1985–86

State	*Crimes Act*	*Social Security Act*	*Customs Act*	*Health Insurance Act*	*Taxation Act*	*Bankruptcy Act*	*Other*
NSW	48	0	78	8	0	1	17
Vic	18	0	20	0	1	0	5
Qld	42	3	8	0	0	0	9
WA(i)	12	10	13	3	0	1	5
SA	35	50	16	3	1	2	8
Tas	2	0	0	0	0	0	1
ACT	0	0	0	0	0	0	97(ii)
NT	3	0	2	0	0	0	1

Notes
(i) Figures for WA include prosecutions conducted by DLS Perth prior to 2 December 1985.
(ii) All matters dealt with on indictment in the ACT arose under ACT legislation, particularly the *Crimes Act 1900* (NSW) in its application to the ACT, the *Poisons and Narcotic Drugs Ordinance 1978*, the *Motor Traffic Ordinance 1936* and the *Motor Traffic (Alcohol & Drugs) Ordinance 1977*.

6. Major Fraud

Administration

In September 1984 a Major Fraud Division was established within the DPP to take carriage of prosecutions commenced by former Special Prosecutor Gyles in relation to 'bottom of the harbour' tax schemes.

The Division was based in the Sydney Office of the DPP and had units in Melbourne, Brisbane and Perth. This mirrored the administrative arrangements within the office of the former Special Prosecutor.

The Division basically took over the work, and staff, of the former Special Prosecutor. This work involved both prosecution and investigation and the Division comprised tax and financial investigators as well as lawyers. The Major Fraud area is unique within the DPP in having an investigative role.

During 1984–85 the Major Fraud units in Melbourne and Brisbane were incorporated into the Melbourne and Brisbane Offices of the DPP. In the course of 1985–86 the Major Fraud unit in Perth was incorporated into the DPP Office there.

The major development during 1985—86 has been that the investigation stage in the 'bottom of the harbour' matters has generally been completed and the litigation stage commenced. Investigation officers seconded from the Australian Federal Police and the Australian Taxation Office are gradually returning to those organisations.

The multi-disciplined approach has proven to be an effective way of dealing with 'bottom of the harbour' matters and will undoubtedly be used again. In future, a task force approach may be used rather than investigators being seconded to the DPP, although much will depend on the nature of each investigation. In the meantime all officers who have been involved in the present exercise have benefited from the skills developed. The agencies concerned have also benefited from the closer relationship that now exists between them.

Resources

The investigation and prosecution of Major Fraud cases requires a substantial expenditure of resources. Each case typically involves several hundred stripped companies. It is usually necessary to select a representative sample of companies for the purpose of the prosecution, but even then the evidence can involve tens of thousands of documents.

In the matter of Brian Maher, for example, the committal proceedings lasted for almost 3 months and the trial for more than 5 months. This is not atypical of the time that can be taken by these matters when fully defended.

The Major Fraud Division took over prosecutions against 51 defendants. In 5 other matters charges were laid shortly after the matter was taken over, bringing the number of prosecutions to 56. In a further 5 matters warrants of arrest had been issued but not executed. In the majority of the 51 prosecutions taken over from the former Special Prosecutor, charges had been laid shortly before his appointment expired and the matter was at an early stage. As at 30 June 1986 the number of matters before the courts stood at 45.

Sydney

As at 1 July 1985 there were 22 defendants before the courts, 2 of whom had been charged in 2 separate matters. In the course of 1985—86 a further defendant was charged and another was extradited from Germany bringing the number of defendants to 24.

In 1985—86 one defendant died and one defendant, Peter Damian Dennis, pleaded guilty to charges of conspiring to defraud the Commonwealth. He was sentenced to 9 months imprisonment which was ordered to be served by periodic detention.

As at 30 June 1986 the number of defendants before the courts was 22. Of these 6 have been committed for trial on all matters against them. Two more have been committed for trial on some matters and committal proceedings are in progress on others. Committal proceedings are in progress against the remainder.

A shortage of court facilities has caused considerable delay in these matters. In one matter, for example, committal proceedings against 5 defendants which commenced in September 1985 had to be adjourned to June 1986 after 10 weeks of evidence because no earlier date was available.

In another matter, the DPP found it necessary to arrange for special court accommodation to enable committal proceedings against 10 defendants to get under way.

Melbourne

As at 1 July 1985 there were 14 defendants before the courts. During the course of the year charges were laid against a further 4 defendants, 2 matters were completed following pleas of guilty, and charges were withdrawn against a defendant who subsequently gave evidence for the prosecution in committal proceedings against other defendants.

As at 30 June 1986 there were 15 defendants before the courts charged in relation to 4 alleged fraudulent schemes. Investigations are still in progress in relation to several other schemes and further persons may be charged. Extradition may also be sought against at least one other person.

On 23 September 1985 Ian Robert Beames was sentenced to 2 years imprisonment on one charge of conspiring to defraud the Commonwealth. Beames pleaded guilty to the charge on 19 June 1985.

On 26 March 1986 Colin Halley Coghill was also sentenced to 2 years imprisonment on a charge of conspiring to defraud the Commonwealth. Coghill had also pleaded guilty to the charge against him.

Five of the remaining defendants have been committed for joint trial, which is listed to commence on 4 August 1986. Committal proceedings are in progress against 8 of the remainder and are due to start against the remaining 2 on 13 October 1986.

As in Sydney, delays have been caused by a shortage of court accommodation. The DPP found it necessary to provide special court premises to allow committal proceedings to proceed in one matter and is now fitting out a court to enable that matter to proceed to trial. The committal proceedings lasted for 5 months.

Brisbane

In the course of the year proceedings were finalised against 6 defendants, of whom 5 were convicted on one or more charges and one was acquitted. Three defendants remain before the courts.

The trial of Brian James Maher and John Patrick Donnelly commenced on 7 May 1985 and ended on 14 October 1985. Both defendants had been committed on 15 counts of conspiring to defraud the Commonwealth and 6 counts under Queensland law of conspiring to defraud named companies. At the trial, the judge directed that the 15 Commonwealth counts be heard as one general conspiracy charge. Three of the State counts were also subsumed into one general charge.

The accused were both convicted on one count of conspiring to defraud the Commonwealth and one count of conspiring to defraud a named company. Maher was sentenced to 2 years 9 months imprisonment on the first charge and 5 years on the second. Donnelly was sentenced to 2 years 3 months imprisonment on the first charge and 2 years 9 months on the second.

On 28 April 1986 the Queensland Court of Criminal Appeal dismissed an appeal by Maher against conviction and sentence.

The trial of Lionel Myer Freedman and Eric James Young commenced on 11 November and ended on 4 December 1985. Both accused were charged with one count of conspiring to defraud the Commonwealth. Both accused were convicted. Freedman was sentenced to 15 months imprisonment and Young to 12 months.

The trial of Robin David Huston commenced on 4 February 1986 and ended on 18 February 1986, again with a verdict of guilty. The accused was charged with one count of conspiring to defraud the Commonwealth. He was sentenced to 12 months imprisonment.

On 30 April 1986 Alan Roy Palmer was found not guilty on a charge of conspiring to defraud the Commonwealth. The trial commenced on 21 April 1986.

Charges against the 3 remaining defendants are listed for trial on 21 July 1986, 22 September 1986 and 27 October 1986.

Perth

As at 1 July 1985 charges were pending against 9 defendants. During the course of 1985—86 one defendant committed suicide and charges against a further 3 were withdrawn on the basis that the alleged offences were less serious than some committed by persons who had not be charged.

Of the remaining 5 defendants, 3 have been committed for trial, one in 2 separate matters. Trials are expected to take place between late 1986 and mid-1987. Committal proceedings are currently in progress against the remaining 2 defendants.

7. Civil Remedies

The statutory basis for the DPP's Civil Remedies function is described in Chapter 3. This chapter explains how the function is presently exercised.

It is important to note that the function extended to the DPP does not create new liabilities and involves no new powers of recovery or forfeiture. It merely enables the DPP to act in relation to existing debts and liabilities owed to the Commonwealth.

Background

Persons who engage in criminal activities that lead to the accumulation of substantial assets often incur considerable financial liabilities to the Commonwealth. If they improperly obtain money from the Commonwealth they may be liable to repay it. It is also unusual for criminals to declare their income and pay income tax on it and they often have a substantial actual or potential tax liability. It is often possible to take action to deprive criminals of their ill-gotten gains, in whole or in part, relying on existing avenues of civil recovery.

Experience has shown that recourse to civil remedies can be an effective adjunct to combating crime. It effectively renders criminal enterprise profitless, thus creating a disincentive for like minded persons to engage in similar activity. It also reduces the funds which may be available for further criminal activity.

Civil action against a person in this situation also helps dispel the notion that after a possibly short period of incarceration he or she will be free to enjoy the proceeds of the criminal activity. It displays to the majority who meet their obligations that action will be taken against those who engage in criminal activity to evade their liabilities.

In exercising its prosecution functions the DPP has access to information from a number of different sources. Very often that information will show that civil recovery proceedings are available against the alleged offender. The DPP is in a unique position to assemble this information and co-ordinate and supervise the activities of the relevant Commonwealth agencies to ensure that any liabilities to the Commonwealth are met.

Legislation

Under the DPP Act, as originally enacted, the Director's civil remedy function was dependent upon:

a) the institution of a related prosecution; and
b) the Attorney-General having published an instrument in respect of a matter or class of matters.

These prerequisites, particularly the first, limited the ability of the Director to take civil remedies.

It is crucial to the success of civil remedies actions that assets be frozen before they can be dissipated. This will often require the pursuit of civil remedies before criminal charges have been laid. Both Special Prosecutors Gyles and Redlich recommended that the Director's powers in relation to civil remedies be extended.

There was no requirement in the *Special Prosecutor's Act 1982* that there had to be a related prosecution before a Special Prosecutor could institute civil remedies. In his Annual Report for 1983—84, Special Prosecutor Redlich estimated that less than 30 percent of the civil remedies taken or under consideration by his office would have satisfied this requirement.

Following consultation between the DPP and the Attorney-General's Department, the *Director of Public Prosecutions Amendment Act 1985* was passed. The amendments, which came into effect on 1 July 1985, removed the requirement that a prosecution be commenced before the Director could exercise his civil remedies function. The function can now be exercised in relation to a 'relevant matter', which is defined as a matter connected with or arising out of an actual or proposed prosecution or a course of activity being considered for the purpose of deciding whether to institute a prosecution.

The amendments also removed the need for an instrument from the Attorney-General before the Director can act in tax matters. In non-tax matters, however, an instrument is still required.

The DPP is required to report to Parliament after 2 years on the performance of the extended civil remedies functions.

The legislation prescribes no criteria for evaulation of performance. The most obvious indicator would be to compare amounts received with the cost of the initiative. However, it must be remembered that recovery proceedings, particularly against major tax avoidance promoters and their clients, are intrinsically complex and time consuming. In many cases there is a substantial lead time between the institution of civil remedies and recovery. In such major and complex litigation 2 years is not a long reporting period. In this context, judgments entered and amounts secured are also useful indicators of the value of the initiative.

The DPP's Role in Civil Remedies

Under the civil remedies function the Director has power to take civil remedies or to co-ordinate or supervise the taking of them by another agency.

In pursuing civil remedies the DPP almost invariably utilizes the services of the Australian Government Solicitor to conduct the civil litigation. The DPP's power to *take* civil remedies will only be used in limited circumstances, for example, where immediate action is required to prevent the imminent sale of a debtor's assets and there is insufficient time to instruct the AGS.

Accordingly, the co-ordinating and supervising role is the primary component of the civil remedies function. This involves identifying matters with civil remedies potential, liaising with relevant Commonwealth agencies on the defendant's assessed or potential liabilities, deciding which recovery avenues to pursue, and then co-ordinating and supervising the civil procedure leading to recovery.

The DPP must also co-ordinate the civil process with any related criminal prosecution. By definition, matters being considered for civil remedies are matters which the DPP became seized of because of their actual or suspected criminality. Criminal charges are normally laid at some stage. In many cases witnesses and documents are common to both the criminal and civil proceedings and preliminary steps in the civil proceedings may necessitate the use of material collected and prepared for the criminal prosecution. Care is needed to ensure that the criminal and civil proceedings both proceed without prejudice to either. If that cannot happen the former must take priority.

The Pursuit of Civil Remedies

Prior to 1 July 1985, and the extension of the DPP's civil remedies function, the only civil remedies work undertaken by the DPP was a continuation of the work commenced by former Special Prosecutor Redlich. This work was confined to Melbourne and primarily concerned the recovery of unpaid income tax.

After 1 July 1985 there was not only an increase in the DPP's civil remedies function but also an increase in funding for both the DPP and the Attorney-General's Department. The funding approved for the initiative is shown in table (i).

Table (i): Funding Approved for the Civil Remedies Initiative.

	DPP	*Attorney-General's Department*	*Total*
	$	*$*	*$*
1985–86	1 853 350	1 750 580	3 603 930
1986–87	1 189 250	1 015 280	2 204 530

Civil Remedies Branches have now been set up in the DPP Offices in Sydney, Brisbane and Perth in addition to the section already established in Melbourne. The growth in personnel, knowledge and experience has led to increasing activity throughout the year. This is shown in tables (ii) and (iii).

Table (ii): Court Orders 1985–86

	Injunctions Obtained	*Judgments Entered*
Sydney	9	15
Melbourne	4	4
Brisbane	4	5
Perth	2	6
	19	30

Table (iii): Amounts Secured and Judgments entered up until 30 June 1986

	Judgments Entered or Leave to Enter Judgments	*Amounts Secured by Injunction or Otherwise*	*Amounts Received*
	$	*$*	*$*
Sydney	*26 404 393*	*9 932 332*	*5 394 260*
Melbourne	*4 798 955*	*5 722 179*	*4 926 184*
Brisbane	*10 218 698*	*5 948 000*	*655 681*
Perth	*4 584 467*	*4 279 975*	*435 288*
	46 006 513	*25 882 486*	*11 411 413*

It should be noted that the categories in table (iii) are not mutually exclusive. The figures also reflect the efforts of a number of agencies, not just the DPP.

It is unlikely that all judgments obtained will be paid in full. Some defendants simply do not have the assets to do so. However, it is usual to

investigate the assets of potential defendants before taking action against them and a significant proportion of judgments will be enforced eventually.

Income tax has remained the major area of activity, although there has been significant growth in the recovery of sales tax. Other areas include the recovery of monies improperly obtained under the *Social Security Act 1947* and from Medicare. In addition, the Civil Remedies Branches have responsibility for proceedings to recover pecuniary penalties in relation to prescribed narcotics dealings under Division 3 of Part XIII of the *Customs Act 1901*.

Some examples of actions during the past year are as follows:

- A Mareva injunction was obtained against a taxpayer and associated entities to secure assets to an estimated value of $2.2 million. Judgments were obtained against the associated entities totalling $5.6 million and the Mareva injunction was extended as an aid in execution.
- Judgments totalling $3 million were entered against a corporate and trustee taxpayer. Mareva injunctions were obtained in aid of execution.
- Mareva injunctions were obtained in a Social Security matter securing assets to an estimated value of $355 000.
- Action was taken under Division 3 of Part XIII of the *Customs Act 1901* and property valued at approximately $330 000 was secured.

Much of the work in the civil remedies area involves relatively new developments in the law. Extensive use has been made of Mareva injunctions to freeze assets of defendants to prevent dissipation. One of the problems in the area is that major criminals often use trusts and companies to avoid personal liability. Much of the work involves finding ways to go behind trusts and lift the corporate veil to ensure that liabilities are met. This is a challenging and difficult area of the law.

Success in the civil remedies field depends to a large extent on the level of co-operation between the Commonwealth agencies concerned. In particular, the Australian Government Solicitor and the Australian Tax Office have been heavily involved in matters to date. The increased activity has involved a learning process on the part of all those involved. Understandably there have been and will continue to be some difficulties in this process. However, the task has been approached with goodwill by the agencies concerned and the generally high level of co-operation achieved has been instrumental in the good results to date.

Civil Remedies and Criminal Prosecution

Civil action against a person accused of crime has a potential to prejudice the defendant in a number of ways. It could, for example, lead to the publication of prejudicial material prior to or during a trial. The defendant may also be required to answer interrogatories in the civil proceedings or give evidence which might incriminate him.

The first consideration must be to ensure that the defendant has a fair trial on the criminal charges. In some instances it is necessary to stay the civil proceedings until completion of the prosecution.

It is not the case, however, that civil proceedings must automatically be stayed whenever criminal action is pending or proceeding. This would be against the spirit and intent of the legislation extending the DPP's civil remedies function. In some cases the issues and evidence in the civil action are sufficiently divorced from the prosecution to allow both to proceed. Where this is possible, both actions are pursued concurrently.

If civil proceedings are stayed pending prosecution, action is taken to secure the Commonwealth's position as far as possible, usually by way of Mareva injunction.

Civil action may also affect the accused in that he or she may be denied access to assets secured by Mareva injunction which are required to meet the cost of the defence. Clearly an accused person is entitled to be properly represented. However, to permit unlimited access to secured assets may lead to them being dissipated in legal costs. A defendant may have little to lose by bringing a series of technical, and expensive, challenges to the proceedings. If on the other hand the defendant is required to apply for legal aid, there is some measure of control on the amount that can be spent on legal costs, although this then has resource implications for agencies charged with funding impecunious defendants.

In one matter in 1985–86 the DPP opposed an application for the release of secured assets because there was a strong prima facie case that the defendant had obtained by fraud from the Commonwealth significantly more than the assets which could be traced to him. The court declined to release any assets and the defendant was required to apply for legal aid. The case against the defendant in this matter was particularly strong.

In another matter there was evidence that the taxpayer had recently arranged for a large sum of money to be sent overseas. The court declined to release any assets, but indicated that it would be prepared to entertain a further application if the taxpayer was prepared to return the funds to Australia.

In a third matter a Mareva injunction was obtained at a time when the defendant was facing committal proceedings. The injunction was varied by consent to allow payment of legal costs for the committal proceedings up to a specified limit.

Because circumstances vary, the most appropriate way to deal with matters is on a case by case basis seeking to strike a balance between the competing interests involved. The factors to be considered include the strength of the prosecution's case, the circumstances of the particular alleged fraud and whether the defendant has access to other assets either within or outside the jurisdiction.

Section 260 Test Cases

The DPP has also been involved in 27 matters in which the Commissioner of Taxation has issued assessments to former shareholders of companies stripped in 'bottom of the harbour' schemes. The assessments relate to profits derived by the shareholders in selling shares to scheme promoters.

The assessments rely upon section 260 of the *Income Tax Assessment Act 1936* which provides, in effect, that contracts and agreements entered into prior to 27 May 1981 for the purpose of avoiding tax are ineffective as against the Commissioner. The matters are being vigorously defended.

All litigation is being conducted on behalf of the Commissioner by the Australian Government Solicitor. However, the DPP is able to provide substantial assistance based on its knowledge and experience gained in the prosecution of the major scheme promoters. In particular, we have assisted in the preparation of documents required by the Commissioner to pursue recovery and the preparation of particulars requested by vendor shareholders in proceedings brought to challenge the assessments.

The Commissioner originally proposed to pursue the current 27 matters to completion, to test the applicability of section 260, before deciding what action to take in relation to other vendor shareholders. However, following the interpretation given to section 260 by the High Court in *FC of T v. Gulland, Watson v. FC of T* and *FC of T v. Pincus* (all (1985) 62 ALR 545) the DPP, together with the AGS, advised that it is now proper to issue assessments in all remaining matters. The Commissioner has accepted that advice.

It is estimated that up to 10 000 assessments may now be issued. In many cases action has already been taken against the vendor shareholders under the *Taxation (Unpaid Company Tax) Assessment Act 1982* in respect of income tax which the stripped companies were unable to pay and the Commissioner has announced that there will be no 'doubling up' of recovery. Even so, the potential revenue involved is estimated to be $230 million.

There will be a great deal of work for the DPP, and the other agencies involved, when the assessments are issued.

While the Director has formally decided to exercise his civil remedies function in relation to the 27 matters in progress, this work is not included in the tables that appear elsewhere in this chapter.

8. Law Reform

The DPP has a substantial interest and involvement in the process of criminal law reform.

The Director's functions and powers incorporate most of those traditionally exercised by the Attorney-General. In some respects they are wider. They carry with them a responsibility for ensuring that Commonwealth criminal law is enforced as efficiently and effectively as possible and that deficiencies in the legislation or the procedures for its enforcement are drawn to the attention of the appropriate agencies for action.

The DPP is also the Commonwealth agency best placed to assess whether proposed legislation can be enforced by prosecution and, if not, to suggest alternative models.

In May 1986 a Policy Branch was established within DPP Head Office. One of its responsibilities is to co-ordinate the DPP's activities in relation to law reform. This chapter outlines some of the areas in which the DPP has been active in 1985–86.

Criminal Code of the Commonwealth

During the latter part of the year the DPP was involved together with a number of other Commonwealth agencies in providing comments on a draft Criminal Code for the Commonwealth prepared by Mr Justice Watson.

While there are areas of Commonwealth criminal law ripe for reform, we have some reservations about the feasibility of attempting to simultaneously redraft and codify Commonwealth criminal law. We have nonetheless provided as much assistance as possible within our resource constraints.

One regrettable side-effect of the work being undertaken by Mr Justice Watson is that action has been deferred in a number of areas where a need for reform has been clearly demonstrated.

No action has been taken, for example, to overcome the deficiencies in the *Crimes (Foreign Incursions and Recruitment) Act 1978* highlighted in the Annual Report for 1984—85. Similarly, no action has been taken on the proposal, also referred to in last year's Annual Report, that section 12A of the *Crimes Act 1914* be amended to apply to all offences against Commonwealth law.

Fortunately the process of reform has not come to a complete halt. Legislation is before Parliament to increase the penalties applying to the offences of defrauding the Commonwealth and conspiring to defraud the Commonwealth. The new penalties will be $100 000 or 10 years imprisonment and $200 000 or 20 years imprisonment respectively. This is a measure which the DPP has sought for some time.

Contempt of Court

There are three main areas in which the law of contempt operates in relation to criminal trials. One concerns conduct which may be termed 'scandalising', for example extreme rudeness to a judge or refusal to answer questions. The second is where something is done which may prejudice the fair trial of a

pending prosecution. The third is a contempt which prejudices the administration of justice generally.

Recent events have focused considerable attention upon the third category and the possible effects of media conduct upon the jury system. The DPP's views on these matters appear elsewhere in this Report. However, all three types of contempt are of concern to this office as they can all adversely affect the proper administration of criminal justice. The law in relation to each type is unsatisfactory.

The law of contempt is imprecise. It is often difficult to state what is, and is not, a contempt. It often depends upon an analysis of case law, much of it ancient, and conflicting academic opinions. The debate in these matters is often not concerned with whether alleged misconduct occurred but whether, if it did, it was contempt.

There are also uncertainties in the procedures for enforcement of contempt. Difficulties arise particularly in respect of contempt of State courts exercising federal jurisdiction. State Attorneys-General clearly have standing to institute proceedings for contempt of their courts irrespective of whether those courts were exercising State or federal jurisdiction. The Commonwealth Attorney-General can also move the Supreme Court of the State where the contempt occurs. However, it is less certain when the Director can take action in these matters.

The Director can clearly bring proceedings for a contempt of court which prejudices the fair trial of a pending Commonwealth prosecution being conducted, or to be conducted, by the Office. It is doubtful whether he can do so in respect of other types of contempt. He has no specific function under the DPP Act to bring proceedings for contempt and it is questionable whether it is part of his 'incidental' function under section 6(1)(n) to take action where a contempt is not directly related to an actual or pending prosecution.

The law relating to punishment for contempt is also unsatisfactory. The range of possible punishment for contempt is open. A contemnor who is a natural person may be committed to prison for an indeterminate period or fined (or both), be required to give a security for good behaviour, or simply censured. A contemnor may also be ordered to pay costs.

Generally those who commit offences are entitled to know whether their conduct is an offence, what penalties they face and who may prosecute them. The laws of contempt are of considerable importance to the public generally and there is a clear need for greater certainty.

The United Kingdom and Victorian legislatures have recently legislated in this area. The Australian and NSW Law Reform Commissions are considering similar legislation. Such moves are overdue.

The DPP recently provided comments to the Australian Law Reform Commission on a discussion paper on Contempt and the Media. Our comments addressed a number of matters. Whatever reforms are made, however, the overwhelming need in this area is for greater certainty in the law.

Interstate Extradition

The Annual Report for 1984–85 referred to the difficulties that can arise under the *Service and Execution of Process Act 1901* when it is proposed to proceed in one state against a defendant located in another. The difficulties were also referred to by Special Prosecutor Gyles in his report for the year ended 30June 1984.

By virtue of section 80 of the Constitution, a trial on indictment for an offence against a law of the Commonwealth must take place in the State where the offence was committed. If the defendant is in another State when charges are laid, it is necessary to seek a warrant for arrest endorsed for service in that State, bring the defendant before a magistrate in that State and seek an order that the defendant return to face trial where the alleged offence was committed. The magistrate has a discretion whether to order the return of the defendant. If the magistrate makes an order, the defendant may seek review before the Supreme Court of the State where he or she has been arrested, which has its own independent discretion whether to make an extradition order.

The procedure may have been sensible in 1901 when it could cause grave difficulty to a resident of, for example, Western Australia to be compelled to travel to defend charges in Queensland. In these days of rapid travel, and even more rapid communications, it is an anachronism that a person charged with an offence against federal law can bring proceedings before a court in one State to prevent or delay being brought before the court of another State which, under our Constitution, is the proper court to deal with the charges.

The present procedure can cause expense and delay in quite serious matters for no apparent gain. The DPP does not proceed against interstate defendants unless there is a proper basis for putting the defendant to the inconvenience involved. There have been no recent matters in which an application by the DPP for an interstate extradition order has not ultimately been successful.

The Australian Law Reform Commission currently has a reference on the service and execution of process. The DPP has suggested to the Commission that amendments be made to the Service and Execution of Process Act to provide that the function of the court in the State where an offender is arrested should be limited to ensuring that the arrest warrant has been properly issued and enforced. The rights of the defendant could be properly protected by providing a power of review in the courts of the State where charges have been laid. Those courts could have power, in appropriate cases, to order that the proceedings be struck out and the defendant returned to the State of arrest at the prosecution's expense.

Banking and Financial Controls

In 1984 the Costigan Royal Commission made seven recommendations designed to reduce the potential for participants in organised crime to misuse financial accounts with banks and other institutions.

The recommendations covered the following matters:

(i) the requirements that should apply when a new account is opened with a financial institution, including processes to validate information provided by new customers;

(ii) penalties to apply to financial institutions which fail to comply with the requirements in (i) or knowingly permit accounts to be operated for improper purposes;

(iii) the retention of records by financial institutions;

(iv) the vesting of paid cheques in the financial institution upon which they are drawn;

(v) requirements for financial institutions to keep copies of documents leaving their possession;

(vi) the remittance of funds overseas; and
(vii) reporting requirements for cash transactions.

As far as the DPP is concerned, the most important matters raised by the recommendations relate to the retention of records by financial institutions and the remittance of funds overseas.

On the first point, some financial institutions presently destroy records after 4 years. This can present great difficulties in a fraud case dependent upon banking records. Such matters often come to light some time after the fraud was perpetrated and the course of criminal conduct may extend back several years. In our view it is essential that the relevant records of financial institutions be retained for at least 7 years.

Combined with this, we see a need for the police to be able to gain ready access to the records of financial institutions and for statutory protection to be given to financial institutions which report cases where they suspect that accounts are being operated for illegal purposes.

On the second point, the recent easing of restrictions on foreign exchange transactions has meant that there is greater scope for laundering the profits of crime off-shore. At the same time, foreign transactions are often not recorded as fully as in the past. In our view, financial institutions should be required to record full details of all foreign exchange transactions and retain the relevant documents for at least 7 years.

The DPP participated in a Working Group set up by the Government to report on the recommendations by the Costigan Commission. The Working Group presented its report in June 1985. No action has yet been taken.

A major question facing the Government is whether there should be legislative controls on financial institutions or whether voluntary controls will suffice. In the past banks have generally adopted a co-operative attitude to law enforcement, although there may be limits to how far they are prepared to go.

The DPP has pressed the view that priority should be given to getting some controls in place. If this is best done by agreement with the financial institutions, then we would support that course.

Prosecutions in Commonwealth Places

Under section 6 of the *Director of Public Prosecutions (Consequential Amendments) Act 1983* a number of provisions of the DPP Act have been included in the Schedule of 'inapplicable Commonwealth laws' in the *Commonwealth Places (Application of Laws) Act 1970*. The practical effect is that the Director is precluded from carrying on prosecutions for offences committed under laws which apply in Commonwealth places by virtue of that Act.

This represented a significant change to the practice which prevailed prior to the DPP Act. The Crown Solicitor frequently acted for Commonwealth informants in proceedings for 'applied' State offences. The present state of affairs has presented difficulties.

The DPP has proposed amendments to enable the Director to carry on such proceedings when instituted by an officer of the Australian Federal Police or other Commonwealth agency. Such a change would restore the position to that which prevailed prior to 1983. The amendment would also do no more than give the Director the same function in respect of 'applied' State offences as he now has under the DPP Regulations in respect of summary and committal proceedings commenced by Commonwealth officers for purely State offences. At the time of writing it is understood that amending legislation will be introduced into Parliament in the Budget session.

Unsworn Statements

The right of the defendant in criminal proceedings to make an unsworn statement has recently attracted considerable public attention.

At present, an accused may make an unsworn statement in NSW, Victoria, South Australia, Tasmania and the ACT, although in NSW, South Australia and the ACT, an unsworn statement may not be made before a magistrate in summary proceedings. The right to make an unsworn statement was abolished in Queensland in 1975, Western Australia in 1976 and the Northern Territory in 1984.

It would appear that an unsworn statement has status as evidence in the proceedings. The jury will normally be directed to give it whatever weight they consider appropriate. All other evidence in criminal proceedings must be given under oath or affirmation by witnesses who are subject to cross-examination. Generally the jury cannot be told that the accused had the right to give sworn evidence or that the prosecution was not entitled to cross-examine him on the unsworn statement.

The unsworn statement dates back to a time when accused persons were not competent to give sworn evidence in criminal proceedings. In all Australian jurisdictions defendants may now give evidence under oath or affirmation. Indeed it would seem that in those places where the unsworn statement survives, a defendant can give sworn evidence and make an unsworn statement in the same proceedings should he wish to do so.

The risks inherent in the unsworn statement are self-evident. As the defendant's story cannot be tested under cross-examination there may be deficiencies in it which cannot be exposed. The defendant does not make his statement until the prosecution case has closed and he can tailor the statement to fit the prosecution evidence. While it is theoretically open to the prosecution to call rebutting evidence, the limitations are such that this is rarely done. There is also a risk in a jury trial that the jury will misinterpret the prosecution's failure to cross-examine the accused. They may believe that it was because the prosecution accepted the accused's veracity or had no questions to ask.

The main argument in favour of retaining the unsworn statement is that some defendants are said to be culturally or psychologically inhibited in properly expressing themselves under the formal procedure of examination and cross-examination. Some witnesses may agree with matters put in cross-examination, whether true or not, because they are too polite or too intimidated to disagree.

There is an increasing trend, however, for defendants in major matters to be educated and articulate. It is doubtful whether such defendants are culturally or psychologically unable to cope with examination and cross-examination.

There may well be defendants who are unable to withstand the rigours of cross-examination and the law must develop procedures to protect them. The question is whether the need to protect these defendants requires that all defendants be able to make an unsworn statement, regardless of background and ability. The solution may lie in giving the trial judge discretionary power to impose limits on cross-examination, or even exclude it completely, if he considers that the defendant may be prejudiced by unrestricted cross-examination

It is also said in favour of the unsworn statement that there is a risk that innocent defendants may choose to remain silent rather than face cross-

examination, especially if there are matters unrelated to the alleged offence which they would prefer not to be forced to disclose.

It is not clear how real this risk is, at least in serious matters. It seems unlikely that an innocent person charged with a serious offence, and facing the possibility of a term of imprisonment, would choose to stand mute because cross-examination may prove unpleasant or embarrassing.

It is the view of the DPP that retention of the unsworn statement cannot be justified. It is sometimes overlooked that the public has an interest in seeing that the guilty are convicted as well as in ensuring that the innocent go free. If the jury is to properly perform its task, all evidence before it should be in the same form and subject to the same checks and controls. There is no obligation on an accused to give evidence. If he or she chooses to do so, however, it should as far as possible be given in the same form as other evidence in the proceedings.

Indemnities in Extradition Proceedings

The Director has the function under section 6(1)(k) of the DPP Act to appear in proceedings under the *Extradition (Commonwealth Countries) Act 1966* and the *Extradition (Foreign States) Act 1966*.

There is some doubt whether the Director has power to give an undertaking to a witness in such proceedings that evidence given will not be used in subsequent proceedings in Australia. This is notwithstanding that it may be intended to indemnify the witness in the event that the defendant is returned to stand trial in Australia.

In such circumstances an indemnity must be sought from the Attorney-General, which is an unnecessarily cumbersome process given the Director's generally wide powers to give indemnities in criminal proceedings.

This situation appears to have arisen through oversight and an amendment will be sought to the DPP Act to overcome the problem.

Other Matters

In 1985–86 the DPP was also involved in the development of proposed legislation to enable Australia to enter into treaties with other countries for the purpose of mutual assistance in criminal investigation and enforcement.

This as an important project. It is becoming increasingly common for criminal activity in Australia to have an international connection. The successful prosecution of major offenders is likely to depend increasingly upon international co-operation.

The form of the proposed legislation has not been finalised, and is still the subject of discussion between the Commonwealth and the States.

Some other major matters in which the DPP was involved include:

- proposals by the Australian Law Reform Commission for the codification of the laws of evidence;
- the development of Commonwealth legislation dealing with the confiscation by Court order of the profits of crime;
- the development of possible amendments to the *Telecommunications (Interception) Act 1979* following the Report by the Royal Commission of Inquiry into Alleged Telephone Interceptions; and
- proposals for the expungement of stale criminal records.

At the time of writing legislation has not been enacted in any of these areas.

There were also a number of matters affecting the enforcement of Commonwealth criminal law on which the DPP's view was not sought until amending legislation was before Parliament or had reached a stage where major changes could not be made. In most cases the lack of consultation was not significant. However, that was not always the case. A notable example involved amendments to the *Copyright Act 1968* providing for proof of certain matters by affidavit in proceedings for offences against that Act. We have reservations about the efficacy of the amendments that have been enacted. We have had discussions with the Attorney-General's Department to ensure that there is proper consultation in future.

9. Some Issues

This Chapter deals with some of the policy and other issues presently facing the DPP which are not dealt with elsewhere.

ADJR Act

The Annual Report for 1984–85 dealt at some length with the problems being caused by the use of proceedings under the *Administrative Decisions (Judicial Review) Act 1977* to prevent or delay the prosecution of Commonwealth offences.

The Administrative Review Council has recommended that the ADJR Act be amended to remove from its ambit decisions made in the course of committal proceedings. The Council has accepted our argument that, while there should clearly be an avenue for review of such decisions, the proper forum for that review is the State courts which have traditionally performed that role.

Regrettably, it appears unlikely that the recommendation will be accepted. The Administrative Review Council is now considering the feasibility of changing the procedures under the Act to reduce the potential for delay. The DPP has provided comments on various changes that have been proposed. We do not consider that any of them would achieve a satisfactory result. In our view, the only viable way of ensuring that the ADJR Act cannot be used to cause delay in the criminal process is to exclude decisions made in that process from its operation.

In view of the present unsatisfactory position, it is appropriate to again outline the difficulties we face in this area.

The problem is that many decisions made in the criminal process are subject to review under the ADJR Act. These include, in particular, decisions by magistrates whether to admit or reject evidence tendered in committal proceedings and whether to commit the defendant to stand trial. The effect of an application under the ADJR Act in these circumstances is that a question before the courts of a State or Territory, where most Commonwealth offences are prosecuted, is removed for review by the Federal Court. This can cause extensive delay and increases the cost of the criminal process. It also raises the potential for the Federal Court to decide questions in a way which conflicts with decisions of the State courts in which Commonwealth prosecutions must be brought. In many cases it appears that proceedings have been taken solely to cause delay.

Historically, the power to review a decision by a magistrate in committal proceedings has rested with the superior courts of the relevant State or Territory. Those courts have developed procedures to deal with these matters. There is no reason to believe that those procedures have caused injustice or that there is any need to provide an alternative forum for review before another court.

The Federal Court has made it clear that it will interfere in committal proceedings only in exceptional circumstances. However, once an application has been made under the Act, the Federal Court must entertain it (see *Lamb v. Moss* (1983) 49 ALR 533). While the Federal Court has attempted to list these

matters quickly, and to deal with them expeditiously, some delay is unavoidable. Delays of over a year are not unknown and the impact on the administration of criminal justice can be serious. The trials of co-accused can also be split or endlessly delayed.

It has been recognised from the inception of the ADJR Act that some decisions must be exempted from its operation. The Administrative Review Council recommended as long ago as 1978 that the exemptions be extended to include decisions made in the criminal process. It is regrettable that the recommendation was not accepted.

The Prosecutor and the Sentencing Process

Traditionally the prosecution has played only a minor role in the sentencing process. Despite the clear community interest in ensuring that appropriate penalties are imposed, prosecutors have traditionally done no more than outline the facts, present an antecedent report and ensure that the court does not make identifiable errors of fact or law.

This practice dates from a time when the Crown had no right to appeal against sentence. It is now the case in every Australian State and Territory that the Crown has a statutory right to appeal against penalty. Whatever justification there may have been for the traditional practice it is incompatible with the Crown's right to appeal against a penalty it considers inadequate.

In *R v. Jones* [1984] WAR 175 the Court of Criminal Appeal of Western Australia dismissed a Crown appeal against sentence on the ground that the prosecutor had declined an invitation from the sentencing judge to make submissions upon the possibility of a non-custodial sentence. The court found that the Crown had failed in its duty to assist the trial judge avoid appealable error.

The traditional view of sentencing still generally prevails in the eastern seaboard States. Elsewhere, that is to say South Australia, Western Australia, the ACT and the Northern Territory, the prosecution plays a more positive role in sentencing and is encouraged by the courts to do so.

While the DPP prosecutes in State courts, and must take those courts as it finds them, it is desirable that Commonwealth prosecutors follow a consistent practice throughout the country.

Clearly there are limits on the matters that can properly be raised by the DPP on sentence. It should not be the role of the prosecutor to press for the highest possible penalty or seek to sway the court by passion or rhetoric. His role throughout the trial process is to ensure that all relevant admissible material is before the court and that the significance of each part of the material is drawn to the court's attention. This applies as much to sentencing as to any other stage of the proceedings.

Depending upon the circumstances of the case, the prosecutor may draw the court's attention to any aggravating circumstances or the absence of extenuating circumstances; he may canvass the various sentencing options available and may, in appropriate cases, suggest a particular option to the court; he may refer to the mischief which the legislation addresses, its effects on the community and any legislative history which might assist the court; and he may inform the court of penalties imposed by other courts in similar matters. A prosecutor should generally not urge the imposition of a particular sentence on the court, and should ensure that matters beneficial to the defendant are also drawn to the court's attention. The overwhelming obligation on the prosecutor is one of fairness.

There is no reason in principle why the prosecutor should not address on penalty where a defendant is not represented, although special care must be taken to ensure that all relevant matters are before the court, including those beneficial to the defendant.

The prosecution should also continue to ensure that the court does not fall into error of fact or law in the sentencing process. The prosecutor remains at all times an officer of the court.

Juries

There has recently been much discussion concerning the role of juries. It has been suggested that the jury should be replaced by an expert panel in complex cases. It has also been suggested that juries are an anachronism no longer necessary to the attainment of justice. The discussion has been fueled by the recent reporting of jury deliberations and public criticism of some jury decisions.

Juries date back at least to the thirteenth century and they continue to deal with the majority of serious matters in which the defendant contests his or her guilt. The rules of evidence and the procedures of the criminal law have developed predominantely to serve the jury system. While the antiquity of the institution does not place it beyond challenge, we should be slow to replace it with new and untried procedures.

Ultimately the onus is on those who criticise the jury to suggest a workable alternative. They are yet to do so.

There are clearly ways that the jury system can be improved. Jury members cannot be expected to have perfect memory recall and they should be permitted access to transcripts of the evidence. There is also a strong case for provisions in Australia, as there are in the United Kingdom, allowing for majority verdicts in jury trials. There is a risk under the present system of a trial miscarrying because of the aberrant views of one juror. A re-trial may not always be feasible, especially in complex matters where the original trial may have run for several months.

In the meantime, it is essential that nothing be done to make it more difficult for juries to properly perform their function.

Some commentators have asserted a public interest in studying the jury process. It is said that until more is known about the jury system it cannot be said whether it should be retained or replaced. This may be so, but any study must proceed in a way that does not interfere with the system under analysis.

Victoria has legislated to preserve the confidentiality of jury deliberations. There is a strong case for similar legislation elsewhere unless those in the media, and those whose utterances are likely to be published by them, are able to show greater restraint than they have over the past year.

Kingswell and Meaton

The section might well be entitled 'The Claytons element in Narcotics Offences under the *Customs Act 1901*'.

At the time of the last annual report, the High Court had reserved its decision in *Kingswell v. R.* The matter essentially raised the question whether the 'tiered' sentencing structure provided for offences relating to the importation of narcotics under section 233B(1) of the Customs Act was invalid as contravening section 80 of the Constitution. Under section 235(2) of that Act the maximum penalty applicable for offences against section 233B(1) varies

depending on the nature or quantity of drug involved and whether the defendant has any prior convictions for relevant narcotic offences. The relevant matters must be proved to the satisfaction of 'the Court', which has traditionally been taken to mean the sentencing judge alone. The High Court delivered judgment on 18 November 1985. By a majority (Gibbs CJ, Mason, Wilson and Dawson JJ; Brennan and Deane JJ contra) the Court rejected the Constitutional argument advanced by the applicant.

Four of the justices (Gibbs CJ, Mason, Wilson and Dawson JJ) also considered an additional argument put by the applicant that section 235(2), read with each of the paragraphs of section 233B(1), had the effect of creating a number of distinct offences. All four justices who considered the argument rejected it. However, three of them (Gibbs CJ, Wilson and Dawson JJ; Mason J contra) went on to hold that the matters in section 235(2) are circumstances of statutory aggravation which, as a matter of common law practice, should be pleaded in the indictment and found by the jury if they are to be relied on at sentence. Although the practice had not been followed in the instant case, their Honours considered that there had been no miscarriage of justice and the appeal was dismissed.

While Brennan and Deane JJ essentially confined themselves to the Constitutional question, both justices were of the opinion that Parliament had intended that a finding on matters under section 235(2) was for the judge sitting without a jury.

Accordingly, there was effectively a 3/3 split between the justices in *Kingswell* on the proper construction of section 235(2) and it was necessary for the DPP to determine the practice to be followed in future prosecutions. It was decided that the prudent course was to proceed in accordance with the joint judgment of Gibbs CJ, Wilson and Dawson JJ and to plead in the indictment the relevant matters under section 235(2). We anticipated that doing this would cause difficulty in some cases.

The question of procedure under section 233B(1) again came before the High Court in *R v. Meaton*. Meaton had been sentenced, following a plea of guilty, before the High Court delivered judgment in *Kingswell*. The relevant matter under section 235(2) had not been pleaded in the indictment. Meaton was sentenced to 6 years imprisonment and he thereupon appealed to the NSW Court of Criminal Appeal arguing that as the relevant section 235(2) matter had not been pleaded he could only have been sentenced to a maximum of 2 years imprisonment.

Although it did not appear that the omission to plead the matter under section 235(2) had resulted in any miscarriage of justice, the Court of Criminal Appeal interpreted the joint judgment in *Kingswell* as stating that the failure to do so had the consequence that Meaton could not be sentenced to any more than 2 years imprisonment. An application for special leave to appeal came on for hearing on 16 April 1986 before Gibbs CJ, Wilson, Dawson, Brennan and Deane JJ. Judgment was delivered on 22 May 1986.

In a joint judgment a majority of the High Court (Gibbs C.J, Wilson and Dawson JJ) affirmed their earlier joint judgment in *Kingswell* but stated that any failure to observe the supposed rule of practice 'does not necessarily mean that the conviction (sic) should be set aside ... In any case in which there is a failure to observe the practice which we have laid down, it will become necessary to consider whether a miscarriage of justice has resulted. Only if that question is answered in the affirmative should the sentence be set aside'.

In a further joint judgment Brennan and Deane JJ, approaching the question as one of construction of the relevant provisions, set out a number of

reasons which, in their view, demonstrated that the application of the common law practice which commended itself to the majority justices in *Kingswell* was incompatible with the decision in that case that the matters in section 235(2) are not elements of distinct offences. It is hard to resist the force of their logic.

Bearing in mind the judgment of Mason J in *Kingswell*, it remains the case that there is essentially a 3/3 split between those of the present members of the High Court who have considered the question on whether matters under section 235(2) must be pleaded in the indictment. The DPP decided that it was prudent to continue with the practice adopted following *Kingswell.*

There are potential difficulties with the application of this practice. For example, what is to be done if an accused pleads guilty to an offence under section 233B(1) but disputes the section 235(2) matter alleged in the indictment? As Brennan and Dean JJ observed in *Meaton,* to empanel a jury merely to determine a section 235(2) matter would be a 'novel course'.

The situation will be kept under review. If the application of our present practice presents real difficulties the appropriate course will be for the legislation to be amended.

Court Facilities

Traditionally Commonwealth offences committed in the States have been prosecuted in State courts vested with federal jurisdiction. The same practice now applies in the Northern Territory. Commonwealth matters have been given no special priority in State courts or treated differently from State matters except that in some places, notably Sydney, summary and committal proceedings have tended to be dealt with in one or two courts where the magistrates are familiar with Commonwealth legislation.

The system has proved convenient and efficient in the past. It has saved the expense that would have been involved in the Commonwealth replicating State facilities.

The past few years have seen a general increase in the number of matters prosecuted under both Commonwealth and State law and a trend towards longer trials. Both of these trends have placed pressure on the court system with the result that there can be considerable delay in bringing matters to finality.

While some delay in the court process is unavoidable if both prosecution and defence are to be able to properly prepare and present their case, it is not unknown for there to be delays of up to a year in matters being listed for trial following committal. It is a truism that justice delayed is justice denied.

As reported in Chapter 6, it has been necessary in both Sydney and Melbourne for the DPP to provide court facilities for committal proceedings in Major Fraud prosecutions. We are currently in the process of fitting out a special Supreme Court in Melbourne to enable one of the matters to proceed to trial. This is the first time the Commonwealth has found it necessary to provide accommodation for a State Supreme Court.

The traditional solution to problems in this area has been to increase the number of courts available to deal with criminal matters. This is, however, an increasingly expensive option. It costs a great deal to establish and maintain court facilities and pay the salaries of the judges, magistrates, clerks, ushers, court reporters and others required to staff them. While some increased expenditure is probably unavoidable, there may be limits to how much the community is prepared to spend on the administration of justice.

In 1985 the Victorian Shorter Trials Committee made a total of 105 recommendations on ways to shorten criminal trials in Victoria, many of which have application beyond Victoria. Major changes are needed in the criminal process if the courts are not to be swamped and the report by the Shorter Trials Committee provides a useful starting point for considering what form those changes should take.

The Execution of Search Warrants on Lawyers' Premises

In *Baker v. Campbell* (1983) 153 C.L.R. 52 the High Court held by majority that a search warrant issued under section 10 of the *Crimes Act 1914* does not authorise the seizure of documents to which legal professional privilege attaches. It was previously thought that legal professional privilege was a rule of evidence only and that there was nothing to prevent a warrant holder from inspecting documents for which privilege was claimed. If the claim proved well-founded, it meant no more than that the document could not be used in any subsequent proceedings.

The extension of the privilege to search warrants has caused considerable difficulties for the police in executing search warrants on documents in the possession of lawyers. Such documents are often highly relevant evidence of criminal offences. Many such documents are not covered by legal professional privilege, although it is common when a search warrant is executed on a lawyer's office for the lawyer concerned to claim that all documents covered by the warrant are privileged.

Before a warrant holder can seize a document he must form the belief that the document will afford evidence of the commission of a criminal offence. He can normally only do this by inspecting the document. However, where a claim of legal professional privilege has been made in respect of a document the warrant holder inspects the document at his peril. If the claim for privilege proves well founded he could be liable to pay damages for breaching the privilege. On the other hand, if the warrant holder decides not to inspect a document solely because privilege has been claimed he runs the risk of losing admissible evidence if the claim is not well founded.

The problems in this area can only be properly resolved by remedial legislation. Unfortunately the Attorney-General's Department has advised that this matter will be considered in the context of the Criminal Investigation Bill. The checkered history of that Bill does not inspire confidence that remedial legislation will be enacted in the near future.

Accordingly, with the agreement of the Australian Federal Police, the DPP convened discussions with the Law Council of Australia with a view to formulating guidelines for the resolution of privilege claims made during the execution of search warrants. The LCA through its constituent bodies, the Bar Associations and the Law Societies in each State and Territory, represents nearly all of Australia's practising lawyers. Both the AFP and the LCA recognise the need for procedures whereby privilege claims can be resolved in a manner that does not result in the police acquiring privileged information, but which ensures that any claim which is wrongly based will not prevent or unduly delay police access to admissible evidence.

In June 1986 representatives of the AFP and the LCA agreed on draft guidelines. At the time of writing the draft is with those bodies for final settling.

Sentencing of Commonwealth Offenders

The last Annual Report referred to the delay in proclaiming section 8 of the *Crimes (Amendment) Act 1982*. Section 8 was the centre-piece of that Act. Amongst other things it empowered a court sentencing a Commonwealth offender to impose one or other of the 'half-way' sentences or orders now available in most States, such as community service orders and work orders.

The difficulty was that the 1982 Act was so drafted that section 8 could not be proclaimed until *all* States and Territories had entered into arrangements with the Commonwealth under which the non-custodial sentencing options could apply to Commonwealth offenders. Delay by one State could totally defeat the legislation. That deficiency was remedied by the *Statute Law (Miscellaneous Provisions) Act 1985* which enabled the provisions for non-custodial sentences in section 8 to come into operation progressively in relation to each State or Territory as arrangements are entered into.

Arrangements with Victoria and South Australia came into force on 22 May 1986. An arrangement with Western Australia came into force on 18 June 1986 and arrangements with the Northern Territory and Norfolk Island came into force on 17 July 1986.

At the time of writing it is understood that negotiations with the remaining States, namely NSW, Queensland and Tasmania, remain stalled and there seems little prospect in the forseeable future of non-custodial sentencing options becoming available for federal offenders in those States. What was said last year, with some force, about the unsatisfactory position in this area still applies to half the nation.

Joint Commonwealth/State Trials

At the time of the last Annual Report the only place where there were standing arrangements for joint trials on State and Commonwealth counts was NSW. It was noted that negotiations were under way with authorities elsewhere. There has been some progress since the last Report, although progress has been slower than hoped.

On 20 March 1986 the Governor-General appointed the Victorian Director of Public Prosecutions, John Coldrey QC, and two Victorian Prosecutors for the Queen as persons in whose name indictable offences against the laws of the Commonwealth may be prosecuted by indictment. Joint trials are now possible in Victoria on indictments signed by any of these three. While it is intended that there will be a reciprocal appointment of senior Commonwealth DPP officers to indict in respect of Victorian offences, it is understood that changes to Victorian law are required before that will be possible.

Agreement has now been reached with the Attorney-General for South Australia for joint trials in that State. It is expected that reciprocal appointments will be made in the near future.

Negotiations with Western Australia are well advanced. There have been discussions between the Solicitor-General for Western Australia and the Deputy Director, Perth. At the time of writing the Attorney-General for Western Australia is considering a proposal for joint trials in that State.

While there are no permanent arrangements in place in Queensland, two joint indictments have been filed in that State. Special arrangements were made for the indictments to be signed by a person with authority to indict under both State and Commonwealth law. It is hoped that permanent arrangements can be agreed.

Little has yet been achieved in Tasmania and the Northern Territory.

The joint trials which have been held to date have illustrated the eminent sense in dealing with related State and Commonwealth matters at the same trial. The community and the defendant are spared the cost of two trials and there is no reason to believe that defendants have suffered any prejudice. The DPP will continue to pursue arrangements to enable joint trials in all States and the Northern Territory.

10. Education

Legal Training

Until recently, the energies of the Office were consumed by the task of establishing a nation wide operation and it was not possible to give much attention to staff training. However, it has long been recognized that there is a need for greater activity in this area.

The difficulties we face in attracting and retaining experienced lawyers are noted elsewhere in this report. The long term solution probably lies in employing graduates who wish to pursue a career in the DPP and providing them with practical training in the skills we require.

The DPP faces a number of difficulties in developing a training programme. We are a small organization with a limited training capacity. However, our work is such that there are few external courses which are relevant. There are also substantial regional variations which make the development of a national programme difficult.

In late 1985 the DPP retained a firm of consultants to develop a legal training programme. In early 1986 they provided a Report outlining a proposed programme. While there is much that is useful in the Report, further work is required before a programme can be put in place.

In the meantime, work is in hand to develop and disseminate practice manuals covering those areas where our operations are unique. There are, for example, no text books on how to exercise the DPP's civil remedies function or to conduct a major fraud prosecution. It is important that the experience developed in these areas be committed to writing for the benefit of future officers.

The DPP has also attempted, with limited success, to institute a staff rotation scheme and has, with greater success, participated in the ANU Legal Workshop Placement Scheme in Canberra.

Other Training

The need for training is not limited to lawyers or to legal skills. However, because of its relatively small size the DPP cannot undertake its own administrative and other non-legal training. We have worked over the last twelve months towards developing a training programme utilising outside agencies, professional bodies and other Commonwealth authorities.

This programme will cover a wide range of topics including management, supervision and general office skills. It is hoped that the programme will be in place shortly. In the meantime, officers have attended a number of external courses which have come to our attention.

Major Addresses

The following major speeches were given by the Director in 1985—86:

- 30 July 1985 : Sydney University Law Graduates Association : 'Decisions Made in the Course of Prosecution'
- 2 August 1985 : Commercial Law Association of Queensland : 'The DPP and Civil Remedies'

- 7 August 1985 : Victorian Council of Civil Liberties : 'Prosecutors and Citizens' Rights'
- 8 August 1985 : 23rd Australian Legal Convention, Melbourne : 'Immunity from Prosecution and the Provision of Witness Indemnities'
- 19 October 1985 : Law Society of South Australia : 'The Role of the DPP'
- 7 November 1985 : AFP Commissioned Officer Qualifying Course, Canberra : 'The AFP and the DPP : Charges and the Prosecution of Them'
- 12 February 1986 : Media Law Association of Australia, Canberra : 'Journalists and Jurors : Contempt of Court'
- 18 March 1986 : Australian Institute of Criminology, Canberra : 'The Role of the Prosecutor in the Sentencing Process'

Copies of the above speeches are available on request.

11. Administration

Establishment and Staffing

As reported elsewhere, the DPP opened a further two offices in 1985–86. The Townsville sub-office was opened with a staff of two. The Perth Office opened with a staff of 25.

The staffing of both offices was achieved by a combination of transfers from the Attorney-General's Department and recruitment from the legal profession.

The overall allocation of Average Operative Staffing Levels across the DPP for 1985–86 was as follows:

Head Office	38
Canberra Office	26
Sydney Office	130
Melbourne Office	107
Brisbane Office	36
Perth Office	25
Total	362

Throughout the year the DPP experienced problems in recruiting specialist staff, particularly legal staff. This is a consequence of the depressed pay rates offered by the Commonwealth compared with those offered by the private sector for comparable work.

This difficulty was apparent throughout all DPP offices and was reflected by a high turnover of legal staff and relatively low staff numbers compared with staffing allocations. Average staffing levels for the year ending 30 June 1986 were:

	Average Month by Usage
Head Office	35.37
Canberra Office	25.25
Sydney Office	127.93
Melbourne Office	114.34
Brisbane Office	38.13
Perth Office	24.75
Total	365.77

The DPP gained only a very small increase to its average staffing levels for the 1986–87 financial year. The allocation of AOSL for 1986–87, which takes account of changing work priorities and demands particularly in the Sydney Office, is as follows:

	1986–87
Head Office	35.5
Canberra Office	26.0
Sydney Office	134.0
Melbourne Office	107.0
Brisbane Office	36.0
Perth Office	29.0
Total	367.5

A more rigorous and co-ordinated approach to the recruitment of legal staff has been planned for the 1986–87 financial year. During this time it is hoped that the number of legal staff can be raised to a satisfactory level.

Accommodation

As was foreshadowed in the last Annual Report, the Brisbane and Perth Offices of the DPP were relocated to new premises during 1985–86. The regional office in Townsville is also housed in premises fitted out to DPP specifications.

The Sydney Office is in the process of a major refit which should be completed in the first half of 1986—87.

Accommodation problems persist in Head Office, Melbourne and the Canberra Office, with the last being the worst affected.

Head Office acquired additional premises during the year and now has adequate space. However the building is old and is due for re-furbishment, which will hopefully take place in 1986—87.

The Melbourne Office is also due for re-furbishment which, again, should take place in 1986—87. Additional space was obtained during the year, although the available space is still inadequate. The problem will be addressed in conjunction with the planned refurbishment. New document storage facilities have been acquired to replace those on which the DPP's lease is due to expire. Subject to completion of a security fitout, they should be ready for occupation early in 1986—87.

Accommodation for the Canberra Office is inadequate. It has been necessary to obtain overflow accommodation in another building as an interim measure. The Office is due to move to new premises, although it now appears that a permanent relocation may not be possible until 1987—88.

The DPP recognises that its lawyers, as professional officers, are entitled to separate office accommodation and that administrative support staff are entitled to accommodation appropriate to their status and the nature of the work they are performing. When plans currently in hand have come to fruition, all DPP staff should have suitable accommodation.

Security

The DPP handles a great deal of sensitive information which could cause damage in the wrong hands.

The information includes the names of people against whom it is proposed to lay criminal charges or institute civil recovery proceedings. Publication could lead to the potential defendant leaving the jurisdiction or disposing of assets before proceedings are commenced. It can also include the names of police informers or potential witnesses, whose safety could be at risk if their identity became known.

The DPP is also privy to proposed initiatives in law enforcement, the details of which are often highly confidential.

The first aspect of security concerns the physical security of our premises and the measures taken to prevent unauthorised access.

The Sydney, Melbourne, Brisbane and Perth Offices rate well in this respect. Head Office and the Canberra Office, which shares premises, do not rate as well.

The Canberra Office is due to move to new premises which will incorporate proper security arrangements. In the interim, temporary measures are being implemented.

Head Office is housed in premises inherited from several different agencies. The building has a large number of external doors. Action has been put in train to prevent unathorised access and tighten up security. When all measures are in place Head Office should also be secure.

The other aspect of security involves the employment of personnel.

It is important that the DPP does not employ people with criminal connections or convictions for serious offences. While such people may have no intention of misusing their position with the DPP there is a risk that they can be pressured to do so by present or former associates, especially if they did not disclose prior convictions at the time of employment.

The DPP has utilised standard Public Service procedures to screen new staff, but they have proved inadequate. In a number of cases it has been discovered some time after an individual was appointed that he or she has a criminal record which was not disclosed at the time of employment. Several employees have been dismissed when prior convictions have come to light.

The question of security screening is currently under review.

Automatic Data Processing

Following its establishment the DPP absorbed the ADP resources, systems and data bases of both Special Prosecutors Gyles and Redlich. Fortunately the equipment purchased by the two Special Prosecutors was compatible. The systems they established continue to form the basis of our ADP facilities.

The DPP has carried on the work of the former Special Prosecutors and much of the ADP staff is still engaged on maintaining and extending the systems set up by them. However, the DPP has a wider role than that of the former Special Prosecutors and a wider need for ADP.

In June 1986 the DPP initiated a major planning exercise to review the current use of ADP and develop a strategic plan to meet the long term needs of the organization. The plan should be finalized in 1986–87.

During 1985–86 priority was given to the establishment of a computerized file registry system in each DPP Office. Work on the task is well-advanced. The system currently in use, based on a model developed in the Melbourne Office, will be further developed during 1986—87. The final system will be designed to ensure that all matters dealt with by the DPP are handled with appropriate priority and should also enable a range of statistics to be collected nationally. It should, for example, be possible to collect comparitive sentencing statistics from a central terminal without the vast amount of work that tasks of this nature currently require.

Another area of activity has been the continued development of the litigation support system inherited from Special Prosecutor Gyles. This is designed to support lawyers in the conduct of lengthy litigation by assisting in the organisation of evidentiary material, exhibit lists and witness statements. It also enables transcripts to be recorded on computer to facilitate searching and presentation.

The system has been heavily used in all Major Fraud committal hearings and trials. Computer terminals have been installed in court in some matters and have been used both by counsel and the bench.

The litigation support system has had to be modified for each matter to meet the special needs of the case. It has been a major task to keep it up to date.

The DPP uses Wang and Telex equipment in all its offices. Extensive use is made of mainframe computer facilities provided and operated by the Attorney-General's Department. We thank that Department and its ADP officers for their assistance over the year. All data transmission lines used by the DPP are secured and extensive measures have been put in place to ensure confidentiality of stored data.

The work of the DPP involves the preparation of considerable typed material and extensive use is made of word processing and data processing. The DPP is aware of the need to minimize the risk of repetition strain injury to its keyboard staff. All keyboard staff are required to take regular rest breaks to reduce the risk of injury and are encouraged to participate in regular exercise sessions.

Finance

Financial Statement — Year to 30 June 1986

	Estimated Expenditure	*Actual Expenditure*
	$	*$*
Salaries and Allowances	10 729 000	9 509 457
Overtime	186 000	396 886
Total	**10 915 000**	**9 906 343**
Travel	734 450	890 823
Office Requisites	855 000	563 534
Library	515 100	368 818
Postage	702 500	516 557
Incidentals	419 500	392 875
Office Services	270 150	211 820
Furniture and Fittings	277 550	493 160
Computer and Other Equipment	644 750	973 287
Consultants	100 000	100 357
Total — Administrative Costs	**4 519 000**	**4 511 231**
Compensation and Legal Expenses	6 100 000	5 685 739
Total Expenditure	**21 534 000**	**20 103 313**

During the year the opening of the Perth Office and the strengthening of the civil remedies function resulted in an additional 41 positions and consequent additional salary and administrative expenditure.

Some difficulty was experienced in recruiting suitably qualified staff and this, together with delays in the receipt of salary records for officers transferred from other departments, resulted in an under-expenditure in salaries and allowances of $1.008M.

12. Other Matters

Freedom of Information

The DPP has so far received only a small number of requests under the *Freedom of Information Act 1982*. Because of the nature of its work, however, even a few requests can cause problems.

There are two principal difficulties. First, defendants are attempting to use the Act to obtain discovery of the prosecution case at an early stage. While such documents are usually exempt from production on one or more grounds under the Act, those working on the preparation of the prosecution are diverted from that work to the task of locating, identifying and examining the documents. Secondly, requests in some cases, especially 'bottom of the harbour' prosecutions, have involved enormous numbers of documents. In one case, applications covered 140 files plus approximately 80 boxes and 2 four drawer filing cabinets full of documents. Although invited to narrow the request, the applicant has effectively declined to do so. In this case the applicant has already been given many of the documents.

FOI applications often involve a disproportionate allocation of prosecution resources for apparently little benefit to the community. If this trend continues it could have serious consequences for the workload of the DPP.

Applications Under the Freedom of Information Act

	Granted	*Refused*	*Under Consideration*	*Total*
DPP Office				
Head Office	1	0	2	3
Sydney	0	0	0	0
Melbourne	0	4	0	4
Brisbane	0	1	0	1
Perth	0	2	0	2
Canberra	1	0	0	1
DLS Office				
Adelaide	0	2	0	2
Hobart	2	1	0	3
Darwin	0	0	0	0
Totals	**4**	**10**	**2**	**16**

Of the the applications refused, 3 decisions were subsequently challenged. One refusal was upheld by the Administrative Appeals Tribunal, one is currently awaiting decision by the Full Federal Court and one challenge was withdrawn.

One application which was received in Sydney was found to be more relevant to Telecom Australia and was forwarded to that agency.

Industrial Democracy and EEO

The year has seen the establishment of a National Industrial Democracy Committee and Regional Industrial Democracy Committees in NSW, Victoria, Queensland, Western Australia and the ACT. An Industrial Democracy Plan

has been agreed and all committees are working towards implementation of the major points outlined in it. These include establishment of better communications between management and staff on training, staff development, personnel practices and working conditions; implementation of the Equal Employment Opportunity Programme; and the development of policies on occupational health and safety.

An Equal Employment Opportunity plan has been drafted and approved, in principle, by relevant staff associations. The plan has not yet been formally ratified by any staff association other than the Australian Government Lawyers Association.

The DPP aims for good relations with relevant staff associations and is committed to the principles of co-operation and consultation embodied in the concept of Industrial Democracy.

Appendix I

Reports from Regional Offices

Sydney Office

The Sydney Office has had a difficult but successful year. The cases have been both hard and numerous but the most significant developments in the office arose not in the handling of individual cases but in more general areas. The most notable aspects were:

1. *Consolidation*: The Sydney Office was born of a marriage of convenience between a Special Prosecutor's office and the prosecution section of the Australian Government Solicitor's office. In its early days it suffered something of an identity crisis, its parents being from widely different backgrounds.

   In its second year the office has developed its own personality and a sense of unity and purpose. Such rapid development is largely due to the quality of the staff who have shown an extraordinary commitment to the principles that underlie the existence of the DPP.

2. *Accommodation*: Although the re-organisation and the refurbishing of accommodation forms part of the general consolidation, it has been a major project for the Administrative Division. Thanks to their efforts all officers enjoy completely satisfactory accommodation, or can look forward to it in the immediate future. Although it is difficult to assess future needs, particularly in view of the trend towards task force type investigations and prosecutions, it is likely no major re-organisation of accommodation will be needed for some time.

3. *Civil Remedies*: The civil remedies initiative has been of great benefit to the office. In widening the scope for DPP lawyers the initiative has had a useful educational effect. Even more importantly, being able to assist in proving the old adage that 'crime does not pay' has had a salutary effect on the morale of this office and the law enforcement agencies with which we are associated.

The office has experienced difficulty in obtaining sufficient officers to fill all its available positions. To some extent the short fall was caused by recruiting delays but it is fair to say there is a dearth of suitable legal practitioners at the senior levels who are prepared to work in the DPP for the salaries offered. The growth in staff during the year was approximately 11%. The turnover in legal staff was 17%. The turnover figure was even higher for keyboard and administrative staff, although this was due in part to the termination of temporary appointments at the completion of specific tasks.

During the year a large number of important matters have been referred to this office confirming the trend indicated last year that law enforcement agencies are concentrating on major and complex cases. This trend exacerbates problems generated by inexperienced staff. The average age of lawyers in the Sydney Office is 29 years, and of the staff overall 27 years.

Divisional reports are set out below.

A. General Prosecutions

By its size and the nature of the work the general area has been hardest hit by the lack of experienced staff, and the trend for investigative agencies to concentrate on major matters. This section was designed to deal with high turnover work and a lawyer could expect to control in the vicinity of 50 to 60 matters at any one time. The effect can be dramatic when a matter arrives which requires one or two experienced lawyers fulltime for an extended period.

It is interesting to note that on average the section operated with 23 lawyers throughout the year. Between them those lawyers amassed around 9600 court hours, that is they spent one third of their working time actually in court. The pressure on the section has caused delays. The problem has been addressed by re-structuring the area and successfully completing a recruitment drive. The prospects for 1986—87 are encouraging.

Although the last year has been difficult the results in terms of the number and type of cases properly prosecuted has been extremely good.

The general section is divided functionally into several sub-sections. Comments on the work and some of the more interesting matters in each are set out below:

1. General Crime

The largest number of files are in the general crime area. The more significant work includes narcotics prosecutions under the *Customs Act 1901*, and prosecutions under the *Crimes Act 1914*, the *Trade Practices Act 1974* and the *Health Insurance Act 1973*. The sub-section also deals with extraditions, matters investigated by the National Crime Authority and sales tax cases.

One matter investigated by the AFP involved the trial of 5 accused charged with offences relating to the importation by air freight of 200 kilos of cannabis resin concealed in 5 boxes marked as wrought iron fencing samples. The street value of the drug was approximately $8 million. One of the principals, Lahood, pleaded guilty to this and other offences and was sentenced to 20 years imprisonment with an aggregate minimum term for all sentences of 16 years. The remaining accused were tried during a 10 week hearing which commenced on 24 March 1986 in the Central Criminal Court. On 30 May 1986 the jury returned guilty verdicts in relation to all charges against all accused with the exception of one charge of being knowingly concerned in the importation against one of the accused; the jury being unable to reach a verdict. The accused received sentences ranging from 16 years with a minimum term of 12 years to 6 years with a minimum term of 4 years.

Another major matter was 'Operation Lavender' which was a prosecution for offences relating to the importation and distribution of between 4.8 and 7.2 tonnes of cannabis resin. The drug was brought to Australia from the Middle East by sea, transhipped on to a Darwin fishing trawler and landed in a remote backwater of Darwin Harbour. From there it was transported by truck to Sydney where it was distributed throughout Australia.

The investigation by the AFP continued on a massive scale for nearly 12 months. The investigation resulted in numerous arrests in NSW, Victoria, Queensland, Western Australia and South Australia.

Three principals in the conspiracy, Nicholas George Paltos, Ross John Karp, and Graham George Palmer, pleaded guilty in the NSW Supreme Court and were sentenced to terms of imprisonment of 20 years (minimum term 13 years), 14 years (minimum term 9 years) and 14 years (minimum term 8.5 years) respectively.

The trial of the co-accused in the importation conspiracy commenced on 16 June 1986 and is continuing. The trial of those charged in NSW with supplying the cannabis resin has been adjourned to a date to be fixed.

Two major figures in the former 'MrAsia' drugs syndicate were extradited to Australia following the Royal Commission of Inquiry into Drug Trafficking conducted by Mr Justice Stewart. Choo Cheng Kui was extradited from Singapore on 20 June 1984 on charges of conspiring to import narcotics, and was committed for trial on 11 October 1984. James William Shepherd was arrested in San Francisco on 23 March 1984 and extradited from the USA on 21 July 1985 after numerous unsuccessful appeals by him to prevent his extradition. By this time Choo had already been committed for trial. Because of the exceptional circumstances of the case an ex officio indictment was filed against Shepherd to allow the matters to proceed together. In the event Choo pleaded guilty and was sentenced to 20 years imprisonment with 14 years minimum term. Shepherd, after pleading guilty to a count of conspiracy to supply, stood trial on alternative counts of conspiracy to import heroin. He was found guilty by the jury on 19 April 1986 and sentenced to 25 years imprisonment with no minimum term,

the maximum available. On the evidence the syndicate had imported the largest quantity of heroin yet to have come before a court in Australia.

Other cases of significance included the hearing by the High Court of an appeal in the matter of *R v. Meaton* and the prosecution of Mr. Justice Murphy. Both matters are referred to in the body of this Report.

Since its inception the National Crime Authority has referred 3 matters to this office for prosecution. As all these matters are still before the courts, it would be inappropriate to give details of them.

A major source of new work in the general section has been large scale sales tax frauds.

In some cases the deceptions employed to avoid sales tax involve complex and sophisticated schemes requiring detailed financial and legal analysis to reveal the true picture. Other cases involve more 'traditional' deceptions with goods being acquired (using false names) and sold in taxable circumstances by a related $2 company (itself set up using false names) without any tax being paid. Whatever the deception employed, the investigation and prosecution inevitably requires the marshalling, control and analysis of vast quantities of business records. Schemes are often conducted in more than one State, which adds to the difficulties in investigating them, and legal challenges are also common during the investigation stage. The need for the DPP to provide assistance during the investigation stage is apparent.

At present over 20 cases are in the investigation stage. All are of substantial size, many having organised crime implications. All matters are reviewed monthly by DPP, AFP, Tax, and Customs officers with a view to ensuring that problems are identified and resolved at the earliest opportunity.

Three cases of significance have been before the courts in some form. One matter involves the prosecution of 4 defendants charged with conspiring to defraud the revenue and other offences. It is alleged that the scheme operated to purportedly diminish the sale value of goods to between 2% to 5% of their true value resulting in an estimated loss to the revenue of about $27 million. Committal proceedings commenced on 16 June 1986 and are expected to continue for 13 weeks.

Another alleged promoter was committed for trial on a charge of conspiring to defraud the revenue and other offences involving the evasion of about $3 million. However, the defendant absconded during the hearing of a bail application in the District Court at which the DPP sought the revocation of bail.

Another promoter challenged the issue of search warrants in the High Court. However, just prior to the hearing of that challenge he also disappeared.

2. *Medifraud*

During 1985–86 there were a number of prosecutions under the *Health Insurance Act 1973*. One of interest involved the trial of Dr John Phillip Rolleston who was indicted on 12 counts under section 129(1) of that Act. The Crown case was that the accused had charged for non-existent services and had incorrectly itemised services. The accused was convicted on each count. He was fined $1000 in respect of 7 counts. On each of the remaining 5 counts he was sentenced to 1 years imprisonment but released upon entering into a recognizance in each matter to be of good behaviour for 5 years and the payment of $2000.

Another matter of significance was the trial in the Supreme Court of a medical practitioner on 21 counts under section 129(1) of the Health Insurance Act involving a range of alleged activities including charging on non-existent home, surgery and hospital visits and double billing. The jury returned verdicts of guilty on 12 counts. On the remaining 9 counts, which were all matters involving the interpretation of what constitutes a 'professional attendance', the jury returned verdicts of not guilty. The accused was fined a total of $9100 on 10 counts. In respect of each of the remaining 2 counts he was released on entering a recognizance to be of good behaviour for 4 years and the payment of $4000. The accused has lodged an appeal against both conviction and sentence.

3. *Joint Task Force*

The 1984–85 Annual Report contained a short historical account of the establishment of the Joint Task Force and the role played by the DPP in relation to the Force and its Management Committee. There are currently 8 Joint Task Force prosecutions being handled by the office. A further 4 cases are before the Court of Criminal Appeal.

These prosecutions are invariably lengthy and complex as is demonstrated by the prosecution of Lo Surdo, Wong and others. The trial of the principals was heard in the Supreme Court of NSW from 8 October to 14 December 1985. Lo Surdo was sentenced to 25 years imprisonment with a minimum term of 15 years. Wong, who was earlier extradited from Hong Kong, was sentenced to 15 years with a minimum term of 10 years. The case involved the importation of some 440 grams of heroin concealed in postal articles. In all 11 people were charged, some of whom are to stand trial in late 1986.

In another case 6 persons were charged with conspiring to import heroin into Australia by means of 3 couriers. In all some 11 kilos were imported from Hong Kong during a 6 months period but only traces of the substance were recovered. Of the 6 accused, 3 pleaded guilty and have been sentenced to lengthy terms of imprisonment. The remaining 3 accused, including the principal, have been committed for trial in the Supreme Court of NSW. Their trial is expected to take place later this year.

B. Major Fraud

The investigation and prosecution of 'bottom of the harbour' offences continues to form a substantial part of the work of the office. Details of the current position of matters within the Major Fraud Division appear in Chapter 6.

C. Civil Remedies

The office has now been carrying out the civil remedies function for almost 12 months. Statistical information concerning the initiative appears in Chapter 7. Staffing levels in the Division have gradually increased to the point where there are now 7 lawyers and 2 clerks attending to the work.

Co-operation between the agencies involved in this endeavour has generally been good although some problems have arisen, principally in relation to resources. The office is currently taking civil remedies action, or investigating the potential for such action, in about 150 matters — virtually all of which have taxation implications. Very few of these matters are straightforward and it is often difficult to predict the prospects of success without detailed investigation. Many criminals surround themselves with expert 'advisers' and utilize corporate, trust and overseas structures to conceal their profits. The battle to unravel these mazes and deprive criminals of their gains is labour intensive and prolonged.

The Civil Remedies Branch also has responsibility for the conduct of proceedings under Division 3 of Part XIII of the *Customs Act 1901* and is considering possible action in 28 matters.

It is not appropriate to outline specific cases being undertaken by this office. However some interesting issues and matters that have arisen include:

i) whether an assessment issued against a non-existent person is valid. This may arise where people deposit large amounts in bank accounts in false names and an assessment is raised in the names of the account holders;
ii) whether it will be possible to effectively lift the corporate veil and attack the persons behind the $2 companies that are commonly used to deprive sales tax of millions of dollars;
iii) whether overseas countries will ease the restrictions currently placed in front of those seeking to recoup assets concealed or invested in their countries; and
iv) whether it will be possible to expeditiously conclude civil proceedings whilst criminal proceedings are in court or pending.

The Sydney civil remedies team is dedicated and closely knit. Its lawyers are young and commercially oriented. The job ahead of them is daunting but results are beginning to show.

D. Administrative Division

Mention has already been made of the efforts of the Administrative Division in relation to accommodation. There have been successes in other areas, notably:

Staff Recruitment

The Division was instrumental in 8 major recruitment drives during the year. Eighty-four people were recruited as a result of those and smaller campaigns.

Reporting Procedures

There have been significant developments in formal reporting procedures in staffing and financial matters. The improvement in these procedures will have a continuing beneficial affect. In addition improvements have been implemented in general administrative procedures.

Provision of Court Premises

To overcome severe local court shortages, noted elsewhere in this Report, the Administrative Division organized a temporary hearing room in DPP premises. The efficient manner in which the hearing room was set up avoided expensive delays in the conduct of a Major Fraud committal hearing.

Word Processing

There were major changes in the nature of the work during the year. The problems created by the shift in emphasis away from Major Fraud mass data entry was exacerbated by the massive staff turnover in the word processing area. Nevertheless the level of service in the area was always acceptable.

Melbourne Office

The Melbourne Office has now been in operation for 2 full years. The office is fully staffed and most staff are permanent.

The Melbourne Office is organised into 3 legal branches; Major Fraud, Fraud and Prosecutions; and an Administrative Support Branch which is responsible for administering the office. The legal branches are divided into 5 sections; Major Fraud, Civil Remedies, Fraud, Summary Prosecutions and Trials.

The merger into the office of the Melbourne office of Special Prosecutor Gyles, referred to in last year's Report, went smoothly and the office of the Former Special Prosecutor now forms the Major Fraud Branch. There has been some interchange of legal staff between that branch and other parts of the office.

During the year the Deputy Director, Mark Le Grand, left the DPP to take a position as General Counsel assisting the National Crime Authority in Melbourne. Mr Le Grand was largely responsible for the establishment of the office and his presence will be missed. He has been replaced on an acting basis by Tony Wadick, until recently a Senior Assistant Director in Sydney. The changeover has proceeded smoothly.

Major Fraud Section

The work of the Major Fraud Section is recorded in Chapter 6. There are still 15 defendants before the courts in relation to 4 alleged schemes. A number of other matters are in the final stages of investigation.

Civil Remedies Section

The work of this Section is also recorded in the body of the Report.

The section has enjoyed good relations with the Australian Taxation Office, the Australian Government Solicitor and other relevant Departments and agencies. During the year there was a transfer of responsibility for some civil remedies matters to newly formed branches in the DPP offices in Sydney, Brisbane and Perth. Prior to that, the civil remedies function had been discharged on a national basis from the Melbourne Office.

Fraud Section

This section deals with the prosecution of revenue fraud matters, including prosecutions under the *Taxation Administration Act 1953*.

The year saw significant progress in relation to a major prosecution arising out of an investigation inherited from Special Prosecutor Redlich. The matter concerns an alleged commodities futures trading fraud.

The year was also marked by the receipt of voluminous and complex briefs of evidence from the Australian Federal Police in relation to alleged offences concerning sales tax. The modus operandi employed to avoid sales tax varied in matters of detail but retained the essential characteristic that goods were initially purchased upon quotation of a sales tax number and thereby were purchased free of tax. The goods were then sold, again without the levying of sales tax, either for cash with no documentation or under cover of false invoices quoting the sales tax number of some person other than the real purchaser. The 'cash economy scheme', if it be a scheme, features a minimum of records relating to the purchase and sale of the goods and, as such, presents obvious evidentiary difficulties to the prosecution.

Two such matters were brought on for committal during the year. Both were of considerable complexity and involved many weeks of preparation, the calling of numerous witnesses and the introduction of a considerable amount of documentary evidence. By way of illustration, one matter involved 180 witnesses and almost 7000 exhibits. Both matters were concluded when the defendants pleaded guilty to conspiracy charges which were dealt with summarily.

Summary Prosecutions Section

In the course of the year, a total of 8413 charges against 2161 defendants were dealt with summarily. A total of 2109 defendants were convicted, or had a case found proven, on one or more charges. Thirty-two defendants were acquitted on all charges.

The Section also had responsibility for the conduct of appeals brought by the Director to the County Court from sentences imposed at first instance.

In the course of the year 16 such appeals were brought, all but one for social security offences. Of the 8 appeals decided to date, 7 have been successful. In 4 cases a term of imprisonment was substituted for a bond or fine.

Trials Section

Although only a relatively small number of trials were conducted during the year a considerable amount of work was done on matters which did not proceed.

The main reason for trials not proceeding was that applications for adjournment were made by the defence, usually because the accused had failed to obtain legal representation in adequate time before the hearing date. There were also a number of cases in which ill-timed media reports could have prejudiced the fair trial of the accused and the matter could not proceed.

A further factor which delayed the orderly listing of trials was the tendency for accused persons to notify their intention to plead guilty at a stage too late to permit the listing of another trial. The use of pre-trial conferences and early mentions of trial should assist in this area.

During the year the section handled 9 trials. Six defendants were convicted on one or more charges and 3 were acquitted. A further 31 defendants pleaded guilty to the charges against them.

The following were some of the more notable matters dealt with in 1985–86:

Forsyth, Blair James : The defendant, a barrister and solicitor, was convicted for offences relating to the forgery of $50 notes. The trial took 12 weeks and was strongly contested. The case depended almost entirely on circumstantial evidence. The Judge, in sentencing Forsyth to an effective sentence of 5 years, commented upon the fact that he had effectively ruined his life and career by engaging in the offences. An interesting sidelight is that Forsyth's 4 co-accused had already been dealt with and were called as witnesses by the prosecution. They were reluctant to give evidence as the DPP had appealed against the sentences that had been imposed on them. However, this had an

advantage in that the prosecutor was able to counter an argument put by counsel for Forsyth based on the fact that the co-accused had been sentenced very lightly. The sentences imposed on 2 of the co-accused were subsequently increased on appeal.

Patterson, Wayne Thomas (aka Jansenberger) : Between April 1984 and July 1985 Patterson obtained approximately $380 000 using his own and 53 fictitious names to claim unemployment benefits in Victoria and Queensland. He pleaded guilty to 34 counts relating to offences in Victoria and had 20 charges relating to Queensland offences taken into account. The scheme was implemented using relatively simple artifices. Patterson was very skilful in investing on the stock exchange and in fact made a substantial profit from the amounts which he had defrauded from the Commonwealth. Work is in progress to recover both the money improperly obtained and Patterson's profit. On 26 June 1986 he was sentenced to 8 years imprisonment.

Teh, He Kaw : In this matter the defendant appealed to the High Court against his conviction on charges of importing and possessing narcotic goods contrary to sections 233B(1)(b) and (c) of the *Customs Act 1901*. On 11 July 1985 the High Court set aside the conviction. One of the issues was whether the prosecution or the defence bore the onus of proving, or disproving, that the defendant knew that the goods in his possession were narcotics. The High Court held, overruling earlier authority, that the onus rested on the prosecution. The case has great significance for all prosecutions under section 233B(1)(c) of the Customs Act. At Teh's retrial he was acquitted after the trial judge ruled that incriminating evidence which he had given on his first trial ought not be admitted into evidence because it was given solely on the basis that Teh had then believed that he was under an obligation to explain his control of the relevant goods.

Brisbane Office

This office has had a very successful year. In relation to all components which contribute to the functioning of this office it is in a far better position now than at this time last year. The following are some examples of improvements which have taken place.

Accommodation: In January the office took possession of new accommodation which is excellent for present purposes. The move from the old accommodation was conducted without causing any delays in the conduct of our work.

Establishment: During the year a great amount of time was spent in filling staff positions on a permanent basis and most positions have now been filled. It has been the experience of this office that some aspects of the recruitment, promotion and appeal processes hinder the efficient operation of a law office.

Statistical information on the number of matters completed during the year is provided elsewhere in this Report. While the statistical information gives some indication of the number and type of matters completed during the year, it does not show the amount of time spent on each matter. Accordingly, some examples are given below of the type of matter completed during the year. To properly complete such work a great amount of time and effort has been contributed by those responsible.

Doueihi, Fakhry and Moawad

George Doueihi, Alec Fakhry and Fifi Elizabeth Moawad were charged in relation to 105kg of cannabis resin brought in suitcases from Lebanon. The prosecution followed intensive investigation and surveillance by officers of the Australian Federal Police. In this case the defendants were charged with attempting to obtain possession of the full amount of cannabis resin as well as with possession of the small amount actually obtained (1.5kg). This is the first time that course has been taken in Queensland. The street value of the drug of which the accused were seeking to get possession was conservatively estimated to be $1 200 000.

During the course of a 2 week trial in the Supreme Court of Queensland, Doueihi pleaded guilty to the charge against him, and the jury found the two remaining accused

guilty of attempting to obtain possession and of possessing cannabis resin. Doueihi and Moawad were each sentenced to 10 years imprisonment in respect of the charge of attempting to obtain possession and Fakhry to 8years on the same charge. Moawad and Fakhry were sentenced to a further 5 years and 4 years respectively on the possession charge, to be served concurrently with the longer sentences.

P.H. & D. Stephens Investments Pty Ltd

On 19 September 1985 P.H. & D. Stephens Investments Pty Ltd pleaded guilty in the Federal Court to a charge under the *Trade Practices Act 1974* of making a false representation in connection with the possible supply of a motor vehicle. The charge related to the display by the company, trading as Brisbane Discount Motor Market, of a motor vehicle with a false odometer reading. The company had previously been convicted of 2 similar offences. The company was fined $5000 and ordered to pay the costs of the prosecution.

Tardrew

William Bruce Tardrew was an Australian citizen who had been employed in the computer centre of the P.N.G. Public Service at Port Moresby. Warrants were issued in P.N.G. for his arrest on fraud charges and he was arrested in Queensland pursuant to a provisional warrant issued under the *Extradition (Commonwealth Countries) Act 1956*.

The DPP successfully conducted extradition proceedings in the Brisbane Magistrate's Court on 30 October 1985.

Tardrew was subsequently convicted of fraud in P.N.G. and sentenced to a term of imprisonment.

Jenkins

On 24 October 1985 Christine May Jenkins pleaded guilty in the Brisbane District Court to offences against sections 18(1)(c) and 19(1) of the *Crimes (Aircraft) Act 1963*. She had carried a knife on board a P.N.G. aircraft travelling to Australia and passed a threatening note to a member of the flight crew. She was convicted and placed upon a bond of $1000 on each count to be of good behaviour for 3 years.

On 22 April 1986 Jenkins pleaded guilty in the Brisbane District Court to an offence against section 20C(1)(a) of the *Crimes (Aircraft) Act 1963* which occurred on 1 November 1985 and to 2 breaches of her earlier recognizances.

On this occassion Jenkins had placed a dummy bomb in the female public toilets at the Brisbane International Airport and made a number of threatening phone calls and written a number of threatening notes. She was sentenced to 6 months imprisonment on each count and her two $1000 recognizances were estreated.

Lambert

On 4 June 1985 David Harry Lambert was convicted in Townsville on 50 counts of imposition upon the Department of Social Security. He was released upon his own recognizance in the sum of $500 to be of good behaviour for 4 years, upon conditions which included that he pay reparation or perform unpaid community service in lieu of reparation at his own option. The DPP appealed to the Court of Criminal Appeal on the grounds that the sentence was inadequate, that community service cannot constitute a condition of release under section 20 of the *Crimes Act 1914*, and that unpaid community service cannot be performed in lieu of an order for reparation under section 21B of the Crimes Act.

On 2 September 1985 the Court of Criminal Appeal allowed the appeal, set aside the order of the District Court and substituted a sentence of 18 months imprisonment with hard labour.

Loh

On 29 October 1985 Anna Loh pleaded guilty in the Supreme Court of Queensland to one count of importing and one count of possessing approximately 2kg of heroin with a

purity of 80% (a commercial quantity) which, cut to 10% strength, would be worth approximately $6 000 000. She had brought the heroin into the country in packages strapped to her thighs. She was sentenced to imprisonment for 12 years.

Major Fraud

The trials of Maher, Donnelly, Huston, Freedman and Young, which are described in Chapter 6 of this Report, also made up a major part of the work of the office.

Townsville Sub-office

On 2 December 1985 a sub-office was opened in Townsville under the control and supervision of the Brisbane Office. All prosecution work in North Queensland has since that date been conducted by the Townsville sub-office with some assistance from the Brisbane Office. The statistical information elsewhere in this report for the Brisbane Office includes matters conducted from the Townsville sub-office. The sub-office has a staff of 2, being a Principal Legal Officer and a Legal Assistant. The sub-office has a heavy workload and has carried out its functions in an exemplary manner.

Perth Office

The Perth Office was officially opened on 2 December 1985. Since September 1984 there had been a Perth DPP Office exercising Major Fraud functions but on 2 December 1985 it assumed responsibility for general prosecutions and civil remedies.

Staffing

A small number of staff were transferred from the Perth office of the Australian Government Solicitor but the majority were recruited from elsewhere, the recruitment processes taking until June 1986. The office now has 14 lawyers and 15 support staff. In addition, 3 Australian Taxation Office investigators are attached to the office to assist with Major Fraud prosecutions.

General Prosecutions

The office is responsible for the prosecution of Commonwealth offences throughout Western Australia and Christmas Island. During the year prosecutions were conducted in Perth, Geraldton, Albany, Midland, Kalgoorlie, Fremantle, Mandurah, Carnarvon, Port Hedland, Broome, Esperance and Christmas Island.

Lawyers in the office are encouraged to act as advocates and have appeared in summary hearings, trials, sentences and appeals against conviction and sentence. Prosecutions have been instituted under a large number of Commonwealth Acts with the most common being the *Crimes Act 1914*, the *Social Security Act 1947*, the *Health Insurance Act 1973*, and the *Customs Act 1901*.

Narcotics prosecutions provide the major trial and appeal work and the period has seen increased activity by (or at least detection of) large scale drug importers. Since the opening of the office there have been three instances of boats owned by foreign nationals sailing to W.A. from Asia with large loads of cannabis resin or cannabis. The long desolate northern W.A. coastline affords ample opportunity for this manner of importation.

The assumption of responsibility for general prosecutions has seen an increase in the number of Commonwealth matters being prosecuted summarily in W.A. courts. From July to November 1985 inclusive a total of 503 charges were laid against 133 defendants. From December 1985 to June 1986 inclusive, however, 2091 charges were laid against 365 defendants. On 2 December 1985 the office took over 310 matters from the Australian Government Solicitor's Office. Since that time 434 matters have been completed and as at 30 June 1986 there were 239 matters on hand.

During the year 44 persons were dealt with on indictment. There were 32 pleas of guilty and 7 trials involving 12 defendants of whom 6 were convicted and 6 acquitted.

Seven appeals by defendants, including 3 against both conviction and sentence, were heard by the Court of Criminal Appeal and one appeal was heard by a Single Judge of the Supreme Court. An application for special leave to appeal to the High Court was also heard and determined.

Matters of interest during the period included the first prosecution under the *Export Market Development Grants Act 1974* and the first life sentence handed down for the importation of drugs.

Fraud

In the Major Fraud area two lengthy committal hearings were concluded. Another started in May 1986. Trials, where relevant, are expected to be held within the next 2 years. Another major committal, involving an alleged sales tax fraud, is listed to start in October 1986.

Civil Remedies

Civil remedies functions have been assumed in respect of 34 matters. Most are concerned with persons and entities who were involved in 'bottom of the harbour' activities. Other matters arise principally from the sales tax and social security fraud areas. In one case judgments were obtained in respect of one person, and his associated entities, for a total amount in excess of $4 000 000, a substantial proportion of which was secured by Mareva injunctions.

Canberra Office

The Canberra Office was opened on 1 November 1984 and since that time has carried out the functions formerly performed by the Prosecutions Branch of the Deputy Crown Solicitor's Office (now the office of the Director of Legal Services) for the ACT. Our practice is unique in the DPP in that we are responsible for the conduct of virtually all criminal prosecutions in the ACT. The practice consists of a wide range of prosecutions for offences against the laws of the Commonwealth and the Australian Capital Territory from minor traffic offences to serious crimes such as murder.

Staffing and Organisation

Legal Staff

In February 1986 the Deputy Director, Bob Greenwood QC, was appointed as a member of the National Crime Authority for a period of 12 months. In his absence the Assistant Director, Ian Bermingham, has held the position of Acting Deputy Director.

The Canberra Office has a legal staff of 15. The office also participates in the ANU Legal Workshop Placement Scheme which enables law graduates to help in the work of the office.

Administrative Staff

The administrative section consists of 10 officers who discharge keyboard, clerical, stenographic and managerial duties. The workload in the keyboard and clerical area has been heavy throughout the year and there has been a considerable turnover in staff, necessitating the employment of temporary staff. This situation is expected to stabilise in the near future with the appointment of permanent officers.

Accommodation

At present the office shares accommodation with the ACT office of the Director of Legal Services. The library and conference room are also shared. The different functions of the two offices makes this a totally unsatisfactory situation. The cramped conditions make life particularly difficult for the administrative staff of the DPP office. Additional office space has been acquired in a nearby building which has alleviated some of the

pressure and it is hoped that new permanent accommodation will become available in early 1987. In the meantime, staff continue to discharge their duties with equanimity and competence despite the conditions.

ADP

In 1985 a Wang Computer System VS(15) was installed in the office. Members of the keyboard and clerical staff have undertaken training in both the word and data processing functions of the system. With further training the system will be operating more efficiently thereby facilitating the operations of the office, particularly with respect to word processing functions and the storage and retrieval of data.

Industrial Democracy

A regional Industrial Democracy Committee has been formed and has representation of officers from both Head Office and this office. The Committee convenes every four months and reports to the National Committee. The Committee covers a wide variety of topics affecting all staff members of the office including training and development of staff, occupational health and safety, repetitive strain injury and equal opportunity matters.

Prosecutions

Summary Prosecutions

All prosecutions in the ACT, other than the occasional matter commenced by a private informant, are conducted by this office. The majority of prosecutions are heard and determined summarily in the Magistrate's Court and Children's Court. In addition, officers appear to assist the Coroner in inquiries into the cause of deaths and fires in the ACT.

During the year a total of 27 771 prosecution matters were registered in the Magistrate's Court which included 10 069 charge matters, 6771 summons matters and 10 931 matters dealt with as pleas by post and parking summonses. The total number of summons, charges and plea by post for the same year in the Children's Court totalled 2868. In addition, coronial inquiries were conducted in respect of 105 deaths and 3 fires. As at 30 June 1986 there were 526 matters on hand for hearing as prosecutions which may ultimately be disposed of at the summary level or by committal for trial or sentence in the Supreme Court.

The range of prosecutions dealt with in the summary jurisdiction is very wide and extends from straightforward pleas of guilty to complex defended matters. The range has recently broadened with the increase in the summary jurisdiction of the Magistrate's Court permitting the summary disposal of criminal offences punishable by terms of imprisonment up to 10 years and, in the case of offences relating to money or property, 14 years. Unlike most of the States, there is no intermediate criminal jurisdiction in the ACT.

Included in these summary matters are 'municipal prosecutions' brought under a wide variety of ACT legislation. During the last year there were 1721 such prosecutions.

Appeals

The office handles all criminal appeals in the ACT.

Nineteen appeals were dealt with by the Federal Court over the last year. Seven were brought by defendants against conviction. One was allowed and the other 6 dismissed. There were 6 appeals against sentence by the Crown, of which 5 were allowed and one dismissed, and 5 appeals against sentence by prisoners of which 3 were successful.

A total of 25 appeals were dealt with by the Supreme Court. Fourteen were appeals against conviction, 8 appeals were against severity of sentence and 3 were ultimately withdrawn. In addition, there was one order to review and one prerogative writ obtained during the year.

Pursuant to an arrangement with the Sydney Office, this office conduct appeals in the NSW District Court in areas close to Canberra. This is an area of work which is increasing and last year 9 appeals against severity of sentence were heard.

Trials and Sentences

The improvement in the reduction of the Supreme Court Criminal List that was reported in the last Annual Report continued during the year due to the generous allocation of time to criminal matters by the Supreme Court and the constant review by this office of all criminal cases. At present, the average time lag is 2.26 months for persons in custody and 5.87 months for persons on bail. This is the shortest time lag for some years.

During the year 51 trials were listed for hearing. Of these, 40 proceeded to trial, one matter did not proceed and 10 were the subject of a change of plea. In 4 of these cases the jury was unable to reach a verdict and in another 2 the jury was discharged. Of the remaining 34 trials, involving 37 defendants, 23 accused were found guilty on at least one count and 14 defendants were acquitted.

Over the same year, 36 matters were listed for sentence involving 43 persons. In 4 of those matters the accused did not adhere to his plea and the matter was remitted back to the Magistrate's Court.

Ninety eight matters were the subject of committal for trial or sentence, a slight drop on previous years. It is believed that this is a result of the increase in the summary jurisdiction of the Magistrate's Court.

The marked rise reported last year in the number of trials conducted in the ACT has continued. The practice of most trials being conducted by members of the office has also continued.

Thirty seven trials were prosecuted by staff counsel and 2 were briefed out to the private bar. In the remaining matter, junior counsel from the private bar was led by the Director.

Consultation and Liaison

The office continues to provide a permanent source of legal advice to the Australian Federal Police and various Commonwealth Departments and instrumentalities.

The office also continues to be represented on the ACT Consultative Committee for Criminal Law Reform and plays an important part in its activities.

DLS Adelaide

Prosecution work in Adelaide is handled by the Prosecutions Legal Work Unit which is made up of one Principal Legal Officer, 3 Senior Legal Officers, 5 Legal Officers and 3 Legal Assistants. At the time of writing staff levels in the unit are under review.

Approximately 95% of all prosecutions in Magistrate's Courts are handled 'in house' by members of the Unit and approximately 50% of all superior court matters are handled 'in house'. This includes appeals to the Court of Criminal Appeal and the Federal Court.

In the course of the year the unit conducted 12 trials, involving 14 defendants. Nine of the 12 trials resulted in convictions.

The unit also dealt with a number of matters in which a defendant pleaded guilty to a narcotic offence against the *Customs Act 1901* involving drugs in excess of a traffickable quantity but denied that the offence was committed for the purpose of sale or other commercial dealing. In one case the sentencing proceedings lasted for 5 days.

The unit also had carriage of one Crown appeal against sentence, which was successful, and 16 appeals by defendants of which 6 were upheld and 10 dismissed. Two of these matters went to the High Court, namely *R v. Brown* and *Manley v. Tucs*.

The issue in *R v. Brown* was whether South Australian legislation providing for trial by judge alone where the defendant so elects can apply to trials for Commonwealth offences in the face of section 80 of the Constitution. The High Court held that it cannot.

Manley v. Tucs involved the interpretation of section 233B(1)(ca) of the *Customs Act 1901*, which creates an offence of possessing narcotic goods without reasonable excuse

which are reasonably suspected of having been imported in contravention of that Act.

Major matters currently with the unit include two alleged tax conspiracies, in one of which one defendant has been convicted and 3 others committed for trial; an alleged sales tax conspiracy in which warrants have been executed in NSW, Queensland, and South Australia; an income tax evasion case involving the alleged retention of substantial sums of money in bank accounts in false names; and alleged conspiracies to defeat the operation of the *Excise Act 1901* and the *Export Marketing Development Grants Act 1974*. The Unit also has carriage of a number of medifraud matters, including matters involving alleged offences by operators of nursing homes and alleged offences by pharmacists against the *National Health Act 1953*.

DLS Hobart

The Office of the Director of Legal Services, Hobart has a staff of 7 lawyers, all of whom have a general practice involving both civil and criminal work. The officers involved have appreciated the opportunity to work in both areas.

The majority of the criminal work involves prosecutions under the *Social Security Act 1947* and the *Crimes Act 1914*. There were 6 trials on indictment during the year and 8 appeals by defendants against sentence. The prosecution work has been handled in an efficient, competent and timely manner.

The office maintains close liaison with the Australian Federal Police and receives utmost co-operation from that force. The Director and his officers also maintain regular liaison meetings with client Departments.

In a recent case a member of the office appeared as counsel assisting the State Crown Prosecutor in a murder trial. This was at the invitation of the State Crown and enabled the officer concerned to gain trial experience in a major prosecution. It is intended that other officers will assist the State by appearing as counsel from time to time in order to gain trial experience.

DLS Darwin

The Director of Legal Services for the Northern Territory of Australia performs the functions and exercises the powers of the DPP in his name and under his direction.

The office of the Director is situated in Darwin. The office is not divided into branches and does not have a specific prosecution section but does include officers who specialize in this field. Four officers, including the Director, regularly perform some criminal work.

The office is responsible for the summary prosecution of Commonwealth offences committed in the Northern Territory, including offences against the *Social Security Act 1947*, the *Customs Act 1901*, the *Crimes Act 1914*, the *Migration Act 1958*, the *Fisheries Act 1952* and the National Parks and Wildlife Regulations; committal proceedings in relation to Commonwealth offences; the prosecution of Commonwealth offences heard on indictment in the Supreme Court; appeals to the Supreme Court upon summary conviction; appeals from decisions of the Supreme Court, which were formerly to the Federal Court of Australia and are now to the Court of Criminal Appeal; and appeals to the High Court.

Of particular significance during 1985—86 were the prosecutions of 3 masters of Taiwanese fishing boats for offences against the *Fisheries Act 1952* which resulted in the conviction of all three. In two instances orders were made for forfeiture of boats, fishing equipment and catch and in the remaining case an order for forfeiture of the catch and fishing equipment only was secured. All 3 matters are the subject of appeals.

Statistics on the criminal work of the office appear in the body of this Report.

Appendix II

Guidelines for 'Civil Disobedience' Prosecutions

These guidelines are issued under Section 11 of the *Director of Public Prosecutions Act 1983* and are directed to the Commissioner of Police of the Australian Federal Police, the Deputy Directors of Public Prosecutions in Melbourne, Sydney, Canberra, Brisbane and Perth and the Directors of Legal Services in Adelaide, Hobart and Darwin. They have been prepared following consultation with the Australian Federal Police and the Attorney-General's Department, and are for the use and guidance of AFP officers and all persons involved in the prosecution of offences against Commonwealth law.

2. The Bill for the *Public Order (Protection of Persons and Property) Act 1971* ('the Act') was introduced into the House of Representatives by the then Attorney-General, Mr.T.E.F.Hughes QC, on 16 March 1971. The objects of the Bill were stated to be '....to clarify, to simplify and, in important respects, to mitigate the severity of, the law concerning assemblies of persons in areas of Commonwealth legislative responsibility'. See H.R. Deb., Vol. 71, 926.

3. The Act requires that proceedings for the commitment of a person for trial on indictment or summary prosecution for an offence against the Act are only to be instituted with the written consent of the DPP or persons authorised by the DPP: see section 23(2) of the Act. Furthermore, any prosecution for a federal offence can be terminated by the DPP — *Director of Public Prosecutions Act 1983*, section 9. The purpose of these guidelines is to address the issues that should be considered when deciding whether to commence or continue with prosecutions under the Act, or otherwise for offences involving civil disobedience, including without limitation those arising out of demonstrations, street marches, pickets and sit-ins.

4. It has never been the law that whenever an offence is committed a prosecution must be brought with respect to it. Police officers often exercise a discretion in deciding whether to lay charges against persons who may have committed an offence. Similarly prosecutors may, on occasions, form the view that it would not be in the public interest for a matter to be pursued, notwithstanding the probability that if the prosecution was continued the offender would be convicted by the court. This idea of selective law enforcement has not escaped judicial notice and comment. In *Wright v McQualter* (1970) 17 F.L.R. 305 it was said:

> 'Such a selective approach to law-enforcement is a well-known phenomenon, and not only in the field of demonstrations. It is sometimes criticized on the ground that the police, especially junior police, should not substitute their view of policy for that of the legislature. It is argued that the police should arrest and prosecute all who are believed by them to be wrongdoers. It is common knowledge, however, that this does not happen and that in many kinds of situations, for various reasons, the police, including constables, elect not to proceed against persons they believe to be wrongdoers. In the United States, where this subject has received much attention, there is a strongly held view that if the police are to exercise discretion of this kind it should be pursuant to rules laid down as a matter of policy at senior levels in the police force. whatever may be the advantages and disadvantages of the top-level police formulation of policy, in this field of selective law-enforcement, for general application the fact is that selective law-enforcement does occur and the present case is an example of its operation in a prudent manner.'

5. The law in relation to the matters referred to in paragraph 3 has in the past been enforced in a selective manner. It appears that this practice is based upon police experience and the likelihood that to do otherwise would have an exacerbating effect. History indicates that to prosecute people for relatively minor offences that arise from the expression of strongly held moral convictions or ideological beliefs may be fruitless. Indeed such action may well result in endemic bitterness and the 'martyrdom' of those prosecuted. Reference is made to Roger Fulford, *Votes for Women* on the English suffragettes, Normal Mailer, *Armies of the Night* on the American experience and Frank Brennan, *Too Much Law, Too Little Order* on the Australia situation and Queensland street marches in particular.

6. In deciding whether to commence, consent to or continue with a prosecution regard should be had to the general prosecution policy statement and also to special factors relating to civil disobedience offences which are referred to in paragraph 5.

7. Occasionally a policeman may consider that there is no alternative to arresting a person even though the person's actions have been essentially non-violent in nature. By way of illustration, in 1984 a large group of protesters gathered at the H.M.A.S. Stirling Base in Western Australia. AFP officers spent a great deal of time pushing back those protesters who wished to breach the perimeter fence. In these circumstances it was understandable that those protesters who did eventually force their entry onto the base were arrested.

8. In some cases the decision to effect an arrest will provide an immediate solution for the problem at hand. It takes the offender away from the scene of confrontation, for at least as long as it takes for bail to be granted and satisfied. During that period there is a deprivation of liberty, and on occasions that may be a sufficient penalty for the conduct in question. In this regard section 22 of the Act entitles a constable to effect an arrest either because proceedings by summons would not be effective or because the arrest is necessary to prevent persistence in, or repetition of, offences against the Act.

9. In all cases arising under the Act the DPP and those officers authorised under section 23(2) of the Act retain a discretion whether to consent to the institution of proceedings for an offence against the Act. The facts that a justified arrest has been effected and there is evidence which, in the opinion of the DPP or the authorised officer, could result in the conviction of the offender are but part of the circumstances to be taken into account: see paragraph 6. In all cases it is desirable for the prosecutor to consult with the arresting officer. If a decision is made not to prosecute the offender the AFP should be notified, orally if time is of the essence, and, in any event, in writing outlining the reasons for the decision.

10. In relation to other prosecutions which fall within the responsibility of the Office of the DPP and which arise out of civil disobedience activities, DPP officers should consider whether the prosecution should be taken over and discontinued pursuant to section 9 of the DPP Act. What are here contemplated are charges such as hindering police, trespasses and infractions of traffic laws, in so far as these matters fall within the responsibility of the Office of the DPP. It is important that the reasons for any decision of this type be fully documented and that there be prior consultation with the AFP.

11. In conclusion, nothing that is said above deals with offences which cause actual and manifest harm or damage to persons or property. In such cases the normal prosecution process should be followed. It would only be in the most exceptional circumstances that in such a case a decision would be made either not to consent to the institution of proceedings or to discontinue such proceedings.

12. Further, there will be some cases where proceedings should be instituted or continued even though the matter is one of civil disobedience and no harm or damage has been caused to persons or property. Each case will need to be examined in light of the circumstances surrounding the offence. Of particular relevance will be the frequency with which the individual concerned has broken the law, either in the course of a particular protest or as a type of 'professional agitator'.

13. In the event that a person who is convicted under the Act or otherwise in respect of a civil disobedience offence fails to pay a fine or costs, the normal procedures concerning the issue and execution of a warrant of commitment should, upon instructions and in the absence of special considerations, be followed. In individual cases it may be undesirable to pursue the enforcement of a court order because of the circumstances of the offender, or more particularly the plight of others who may also be affected e.g. the offender may be the sole parent of a dependent child who would not be able to look after him or herself if the offender were incarcerated. An option which should be considered, where such a course of action is available, is to seek a warrant of distress rather than a warrant of commitment.

Appendix III

Guidelines for the Prosecution of Offences and the Conduct of Committal and Coronial Proceedings in the External Territories

1. Introduction

1.1 Under the *Director of Public Prosecutions Act 1983* the Director of Public Prosecutions (DPP) has the statutory function of prosecuting offences against the laws of the Commonwealth including external territories.

1.2 These guidelines are for the assistance and use of:
(a) members of the police forces of the external territories,
(b) officers of the relevant Department administering the territory, and
(c) the Office of the DPP.
The Guidelines will be reviewed periodically to make any amendments necessary.

1.3 These guidelines apply to the:
- Territory of Ashmore and Cartier Islands
- Territory of Christmas Island
- Territory of Cocos (Keeling) Islands
- Coral Sea Islands Territory
- Territory of Norfolk Island (but only in relation to the prosecution of offences committed under Commonwealth legislation)

2. Australian Antartic Territory (AAT) and the Territory of Heard and McDonald Islands (THM)

2.1 As the AAT and the THM do not have a local police force or judicial officers and as court proceedings are not conducted in those territories these guidelines will have little practical application.

2.2 Where an offence is committed in the AAT or the THM and a prosecution is commenced it would normally be conducted in the Australian Capital Territory by the Canberra Office of the DPP. Accordingly where an offence is suspected to have been committed in the AAT or the THM the officer-in-charge of the base in those territories should prepare a brief report outlining the circumstances and forward it to the relevant contact officers in paragraph 7. The purpose of such a report will be to determine whether prosecution or further investigation is appropriate. In the latter event the matter will be referred to the Australian Federal Police.

3. Conduct of Prosecutions by Police Officers

3.1 The DPP will, where practicable, authorize police officers to conduct prosecutions and to appear at certain mentions.

3.2 Authorized police officers may conduct prosecutions in simple arrest and summary matters where legal questions are not expected to arise, and:
(a) the accused is expected to plead guilty, or
(b) a term of imprisonment is unlikely.

3.3 Authorized police officers may also appear on behalf of the informant at bail applications and pre-trial hearings, remands and other mentions.

3.4 In cases other than the above, where authorized police officers are of the view that urgent action must be taken with respect to a prosecution, the authorized police officer should contact the DPP office with responsibility for prosecutions in the particular external territory which will advise on the course of action to be followed.

3.5 All other matters should be dealt with in accordance with paragraph 4 below.

3.6 Police officers should submit to the DPP quarterly returns of all prosecutions conducted by police officers in the territories. The returns should set out details of the matters which police officers have prosecuted in the following format:

NAME OF CASE:

OFFENCE:

RESULT OF HEARING:

PRESIDING:

OBSERVATIONS: (Any special aspects of the case worthy of comment.)

(The majority of this material will be readily ascertainable from court documents and should not therefore generate unreasonable administrative demands.)

3.7 Copies of these returns are to be provided to:

- The DPP office with responsibility for prosecutions in the particular external territory.
- First Assistant Secretary External Territories and Legislation Division Department of Territories

4. Conduct of Prosecutions by the DPP

4.1 An officer of the DPP will travel to a territory to act as prosecutor where:

(a) the case is of a complex nature;
(b) legal questions are expected to arise;
(c) due to local sensitivity it is undesirable that a member of the local police force conduct the prosecution; or
(d) a term of imprisonment is likely if the accused is convicted of the offence charged.

4.2 A brief to prosecute should be provided to the DPP in respect of such cases —

(a) in summary matters — upon issue of an information; or
(b) in arrest matters — as soon as possible after the arrest.

5. Coronial Proceedings

5.1 Coronial proceedings from which criminal charges may arise should be referred to the DPP as soon as possible (except in the Territory of Norfolk Island where coronial proceedings are conducted under Norfolk Island law).

6. Advice to Police Officers

6.1 The DPP will advise Police Officers, as requested, on any legal matters arising in the course of the investigation and prosecution process. For example, advice may be sought on:

(a) the execution of search warrants,
(b) the framing of charges,
(c) evidence, or
(d) the lodgement of appeals against sentence.

6.2 Requests for advice shall, unless time limits for prosecution render it impracticable, be forwarded through the relevant Department.

6.3 Where a request for advice is made direct to the DPP the relevant Department will be informed as soon as is practicable.

7. Contacts

The appropriate contact officers are as follows:

For Prosecutions in all External Territories other than Cocos and Christmas Islands	Mr. S. McElwaine DPP Head Office, Canberra Phone 062-705666
	Mr. I. Coe Department of Territories Canberra Phone 062 486923 (for the territories of Norfolk Island, Coral Sea island, and Ashmore and Cartier Islands)
	Mr. J. Stanhope Department of Science Canberra Phone 062 644148 (for matters arising under paragraph 2)
For Prosecutions in Cocos and Christmas Islands	Mr. Ivan Brown DPP Branch office, Perth Phone 09 2207200
	Mr. G. Kerr Department of Territories Regional Office, Perth Phone 09 3254488