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DIRECTOR OF PUBLIC PROSECUTIONS

Annual Report

1986-87

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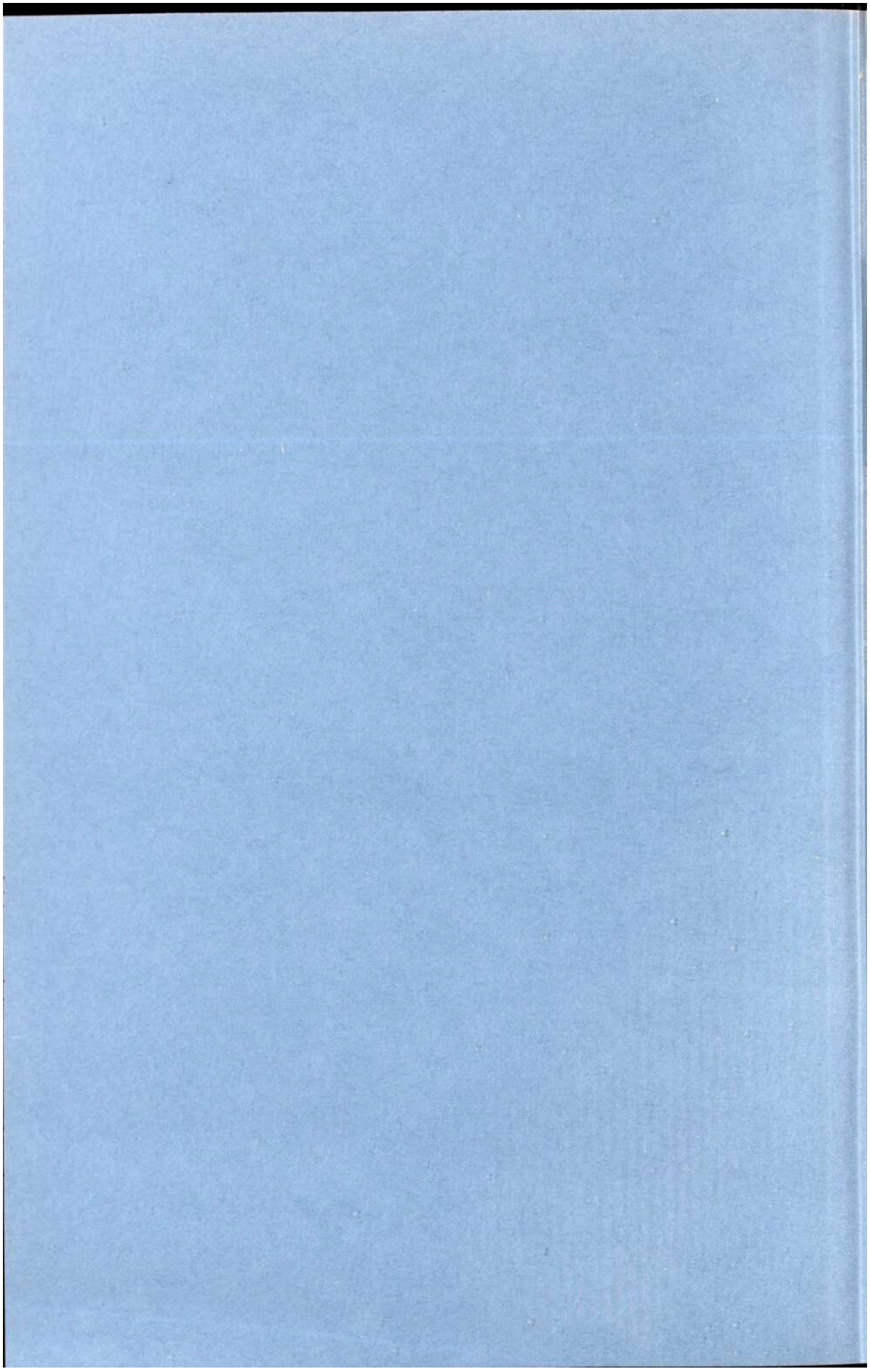

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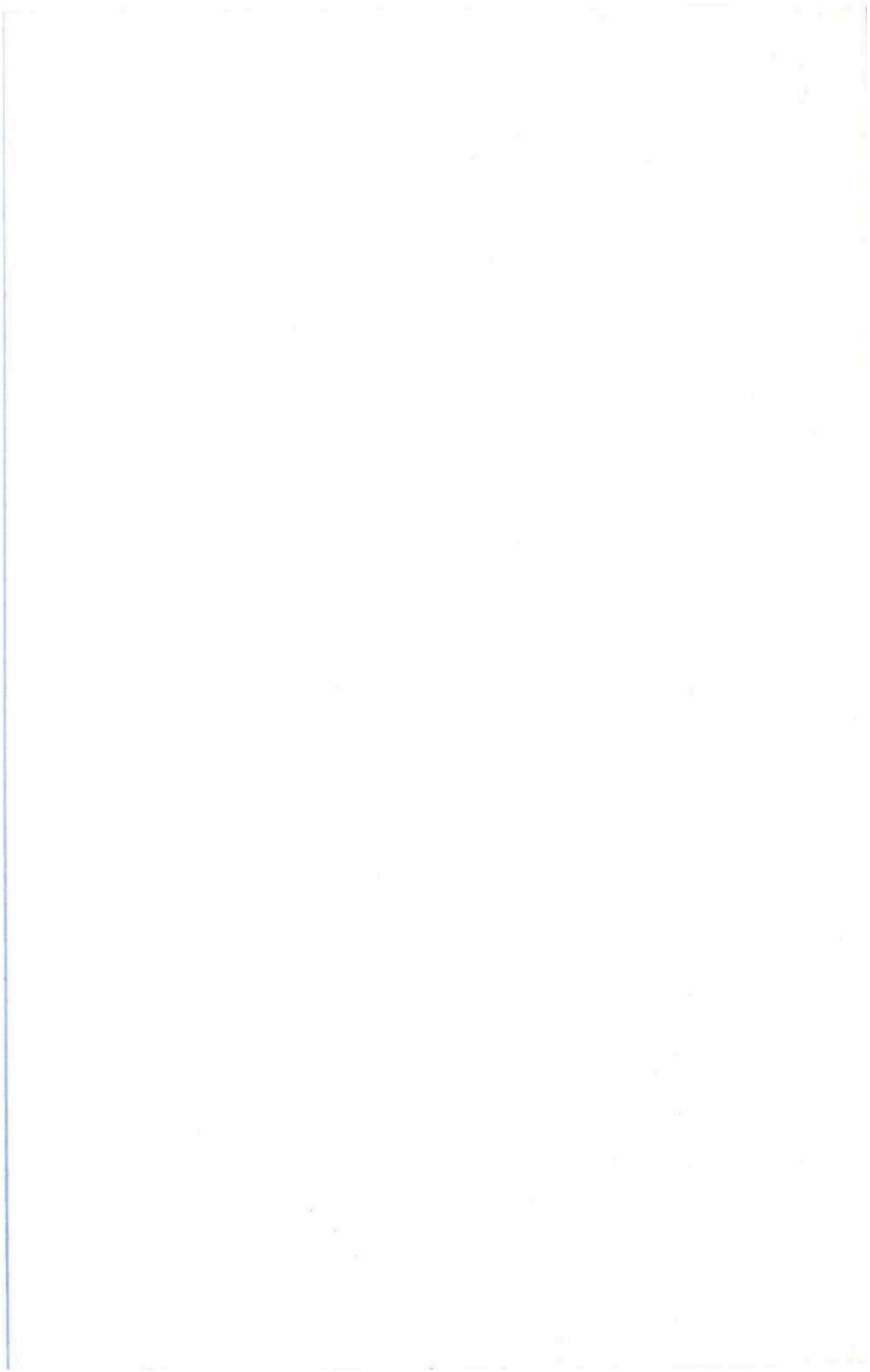

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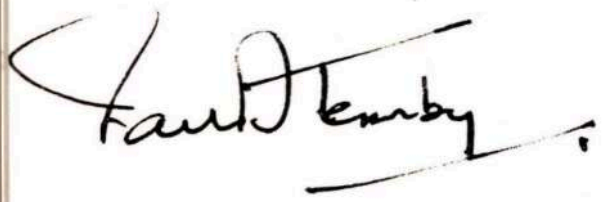
October 1987

The Hon. Lionel Bowen M.P.,
Deputy Prime Minister and
Attorney-General,
Parliament House,
CANBERRA ACT 2600

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 1987, in accordance with section 33(1) of the Director of Public Prosecutions Act 1983.

Yours faithfully,



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CONTENTS

DIRECTOR'S OVERVIEW

During 1986-87 there has been significant progress in most major areas of activity. In some of them notable achievements can be recorded. This Report deals with all these matters. It also sets forth the aims and functions of the Office, contains relevant statistics, identifies law reform and other issues that require attention, and makes mention of challenges that lie ahead.

We are a decentralised and (by Australian standards) large law office. However, although we are also a specialist law office, the areas of law in which DPP lawyers practise are by no means confined to the criminal law in all of its aspects. DPP lawyers also have to deal with administrative and constitutional law, revenue collection, insolvency law, and most aspects of public law.

This work could not be carried on without administrative support at all levels. In this area it is pleasing to note that by the end of the year under review all of the branch offices were housed in accommodation which was relatively new and generally fit for its purpose. The Canberra branch had suffered greatly in this respect during the two and a half years since it was established, but that problem was solved during June. All that remains on the accommodation front is to see the Head Office properly housed. The present rather unsatisfactory premises will be refurbished and upgraded to an appropriate standard during the latter part of 1987.

The DPP is a leader amongst the Australian legal profession in relation to the various applications of computers. In ascending order of difficulty they are word processing, case management, information collation and dispersal, litigation support and major case brief preparation. During 1987 we embarked upon an information needs analysis, which is a major project aimed at rationalising most aspects of our use of computers. This will enable enhancement of the strategic plan in this area. The year under review also saw the design and implementation on a national basis of the Case Matter Management System. This was again a major project. It will enable the DPP not only to monitor the progress of individual cases, but also to accurately identify trends in the work undertaken by the Office.

Lawyers cannot do work of quality without a library system which is of corresponding quality. The collections of books and journals that we have in each branch are extensive, but of course librarians do more than look after books. They provide, in addition, a most useful reference service and it is gratifying that most of our lawyers utilise all these facilities with some frequency. A

significant development in the year under review was for the DPP to join the Australian Bibliographic Network, and each of our libraries now has an extensive searching cabability.

So far as policy is concerned, the DPP has made many suggestions, both practical and principled in nature, for the improvement of the Commonwealth criminal justice system. Those that matter most are detailed in this Report. In this general area there have been three major achievements, namely:

- The guidelines on the execution of search warrants on lawyers' premises. The negotiations between the Australian Federal Police and the Law Council of Australia were convened by the DPP, and after a long gestation period agreement was reached in the latter part of 1986.

- Guidelines which stipulate the DPP's proper role in the sentencing process.

- Similar guidelines relating to the DPP's role in jury selection.

So far as the last two mentioned are concerned, they are made available to the private profession and the general public in this report at Appendixes 1 and 2. There may be aspects of either or both that do not meet with universal approbation. As to that, two comments are made. The first is that if deficiencies become evident, they will be rectified. However, the guidelines are the fruit of much consideration and they were tried in practice for a period before being made public. Secondly, even if their content may have been different had others been responsible for their preparation, these guidelines do have positive virtues. They will go far to achieve consistency in practice in two areas where inconsistency has been a most troubling feature.

Special mention should be made of the current Review of Commonwealth Criminal Law, under the eminent chairmanship of Sir Harry Gibbs, the past Chief Justice of Australia. There is every reason to hope and expect that real and beneficial results will arise from this project, and that it will not be another law reform exercise which is ultimately of academic interest only. The DPP places great importance upon the Review and a senior lawyer within the Office has been tasked to co-ordinate the Office's submissions to the Review.

The most important work the Office does is reflected in its title: to conduct prosecutions in the public interest. These range from the relatively mundane to cases of great difficulty and importance. It is not possible to measure results simply by the number of prosecutions undertaken or conviction rates. To a large extent a prosecutor can be no better than the brief with which he or she is presented.

While it would be troubling if a majority of cases did not result in conviction, it would also be a matter of concern if no cases were ever lost. That might seem paradoxical, but the plain fact is that the prosecutors cannot usurp the proper function of juries and magistrates. Apart from that, there must be a willingness to take on those hard cases in relation to which perfect prognostication is impossible. It is sufficient to say that in the area of general prosecutions a large proportion of our cases result in conviction and productivity is high; there is generally minimal delay other than that which the court system in some parts of Australia forces upon us; and the occasions when the DPP has been subjected to judicial or other criticisms have been rare.

In previous years our revenue fraud cases almost exclusively comprised 'bottom of the harbour' prosecutions. While much major litigation still has to be completed in this area, we are now spreading into other fields of revenue-based fraud. Those which are of greatest significance relate to sales tax frauds, and the abuses, some of them on a large scale, in relation to what is commonly called the cash economy. So far as illicit sales tax schemes are concerned, Commonwealth law enforcement authorities - including but not limited to the DPP - have taken appropriate steps in a co-operative and reasonably timely manner. The result is that a burgeoning industry has been effectively controlled and is in the course of being wiped out. The multi-disciplined approach adopted in relation to 'bottom of the harbour' prosecutions continues to be utilised in relation to other areas of revenue-based fraud, as well as in the pursuit of civil remedies. This has been a major factor in the successes achieved.

The Office's other main operational area is what we call civil remedies: the taking of debt recovery and like actions against actual or suspected criminals so as to make them disgorge the profits of their criminal activity, or at least pay their taxes. The Office's activity in this area is the subject of a separate report but it will be clear from that report that the expanded role given to the DPP in mid 1985 has been discharged in a highly fruitful manner.

In this area, as in most others, DPP lawyers cannot achieve results alone. In relation to civil remedies a considerable debt of gratitude is owed to officers from the other agencies involved, most notably the Australian Tax Office and the Australian Government Solicitor (AGS). We like to think that they are also grateful for our efforts. In the more traditional areas it is essential to work closely with both the Australian Federal Police and the National Crime Authority, as well as investigators from Commonwealth departments and agencies. We work hard to nurture close working relationships with these bodies and their staff, which arise from a mutual interdependence.

During 1986-87 there have been few real disappointments. The most significant is that we seem to be no closer than

at any time previously to actually opening an office in South Australia. The problem is basically one of resources. While the problem cannot be said to be acute, because the prosecution work in South Australia is being done and done well, there are two major problems. One is that it is not practicable to have AGS lawyers perform the DPP's civil remedies function. It is also difficult for people, even of the utmost good sense and goodwill, to work for two masters.

The life blood of any organisation comprises the people who work within it. Special attention was paid during 1986-87 to improving the Office's recruitment practices, with the result that lead times have now been markedly reduced. The DPP is more than ever able to recruit junior lawyers of the highest quality, and indeed in most parts of the country there are very able lawyers at all stages of their careers who are keen to work with us. However, considerable difficulty has been experienced both in recruiting at the senior levels, and also in the retention of staff. The turnover of legal staff in the Sydney Office, to take one example, was 41% this year. This does not reflect dissatisfaction on the part of our lawyers with the Office, but rather the plain fact that our best lawyers learn skills which make them most marketable commodities. The pay rates we can offer at the middle to upper levels are distinctly below the market in the private profession, and this was a prime cause for the departure of the two most senior lawyers from the Sydney Office. It is appropriate to name them because of the enormous contribution each made to Commonwealth prosecutions over an extended period. They are Terry Griffin and Bryan Rowe. While nobody is irreplaceable, and we are fortunate in having a very strong senior management team in Sydney, they will be sorely missed. The question of pay scales for the more senior positions in the DPP continues to be one of grave difficulty and concern.

The major challenge facing the Office in 1986-87 arises from the recently enacted Proceeds of Crime Act. This legislation is as difficult as it is new, and great effort will be necessary to ensure that results are achieved consistently with the will of the Parliament. However, at this stage it is very difficult to see how that can be done, because no resources have been made available for the purpose. That must be rectified if the DPP is to get on with the job.

In conclusion, it is appropriate to record that I have had all necessary access to the Attorney-General, and DPP Head Office has liaised with the Attorney-General's Department on matters of mutual concern. The degree of co-operation at these various levels is reflected in a number of the initiatives referred to in the body of this Report.

I. D. TEMBY Q.C.

1. OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Establishment

The Office of the Director of Public Prosecutions (DPP) was established by the Director of Public Prosecutions Act 1983 (DPP Act) which came into operation on 5 March 1984. It 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.

Objectives

The principal aims of the Office of the Director of Public Prosecutions are to:

- prosecute alleged offences against the criminal law of the Commonwealth in a manner which is fair and just, but also vigorous and skilful, with a view to appropriate punishment of those found guilty;

- make alleged offenders disgorge profits, or pay monetary penalties, or at least pay their taxes, in accordance with law;

- strive to render the law enforcement activities of the Commonwealth and its agencies as effective as is practicable;

- contribute to the improvement of the Commonwealth criminal justice system by providing sound, constructive and timely advice and recommendations; and

- do all of this to the highest standards capable of achievement

and thereby encourage compliance with the law, and discourage breaches of it.

Statutory Functions and Powers

Functions - The main function of the DPP under the DPP Act is to conduct prosecutions for summary and indictable offences against the laws of the Commonwealth, which include the laws of the Australian Capital Territory.

Other functions of the Office under the DPP Act and regulations include:

- to prosecute on indictment offences against State law where, with the consent of the Attorney-General, the Director and DPP lawyers have 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 carry on committal proceedings and summary prosecutions in respect of offences against provisions of State laws which apply in Commonwealth places under the Commonwealth Places (Application of Laws) Act 1970 where the prosecution has been instituted by a Commonwealth officer or employee;

- to take, or co-ordinate or supervise the taking of, civil remedies on behalf of the Commonwealth (see separate section below);

- to institute or carry on, or co-ordinate or supervise the institution or carrying on, of proceedings for the recovery of pecuniary penalties (see separate section below);

- to assist a coroner in inquests and inquiries conducted under Commonwealth law;

- to appear in extradition proceedings;

- to represent a Chief of Staff of the Defence Force in appeals to the Defence Force Discipline Appeal Tribunal; and

- to consent to prosecutions where the Director holds authority to do so.

In addition, the DPP has been given significant new functions under the Proceeds of Crime Act 1987 in relation to the tracing, freezing and confiscation of the proceeds of indictable offences against Commonwealth law.

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 similar powers 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.

The functions under sections 6(1)(fa) and 6(1)(h) form the basis of the civil remedies practice which is covered more fully in Chapter 6.

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 has 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 matters that remain.

The most significant part of the DPP's pecuniary penalty practice is the taking of proceedings under Division 3 of Part XIII of the Customs Act. The pecuniary penalty that is imposed represents the assessed value of benefits derived by a person by reason of the person engaging in a particular prescribed narcotics dealing or in prescribed narcotics dealings during a particular period. For a more detailed exposition of the importance of action under these provisions readers are referred to the Director's recent report to the Attorney-General reviewing the performance of the DPP's expanded civil remedy function. As that report demonstrates, activity in this area has dramatically increased since the DPP assumed responsibility under the 3 July 1985 instrument. Prior to that date only two applications had been made under the Division. Since then fourteen applications have been made, resulting in assets to an estimated value of $6.37 million being frozen.

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

- prosecute by indictment in the Director's official name indictable offences against the laws of the Commonwealth;

- authorise others to sign indictments for and on behalf of the Director;

- decline to proceed further in the prosecution of a person under commitment or who has been indicted;

- take over summary and committal proceedings instituted by another person and either carry the proceedings on with the Director as informant or decline to carry them on further;

- give undertakings to witnesses appearing in Commonwealth prosecutions that their evidence will not be used against them;

- exercise in respect of prosecutions any rights of appeal available to the Commonwealth Attorney-General as well as any other rights of appeal otherwise available to the Director; 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.

Pursuant to section 31(1) of the DPP Act the Director has delegated all of his powers under the Act to the First Deputy Director, other than the power to authorise the signing of indictments and the power of delegation. Pursuant to 9(2)(b) of the DPP Act the Director has also authorised senior officers in all States and the internal Territories to sign indictments for and on his behalf.

In addition, the Director has given a limited delegation to senior DPP officers of the power under section 9(4) of the Act to decline to proceed further in the prosecution of a person who has been committed for trial.

Other authorities have been given by the Director to various persons under the Acts specified in Appendix V.

The Director has been granted the power to consent to certain prosecutions under the Commonwealth Acts and ACT Ordinances specified in Appendix VI.

Section 8 of the DPP Act - 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. These 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 fifteen sitting days. No section 8 directions or guidelines were issued in the past year.

Organisation

As at 30 June 1987 the Office comprised six Divisions, being a Head Office (located in Canberra) and regional offices in Sydney, Melbourne, Brisbane, Perth and Canberra. In South Australia, Tasmania and the Northern Territory Commonwealth prosecutions are conducted for and on behalf of the DPP by the Directors of Legal Services, who are officers of the Attorney-General's Department, pursuant to an arrangement under section 32 of the DPP Act.

The prosecution work-load in the Adelaide Office of the Director of Legal Services continued to be high in 1986/87. The Secretary of the Attorney-General's Department and the Director held discussions concerning the desirability of establishing a separate DPP Office in Adelaide, and a bid for resources to set up an office was included in the new policy proposals for the Portfolio for the 1987-88 Budget. The proposal involved opening an office on 1 March 1988 but was entirely dependent upon allocation of sufficient resources. In the meantime the section 32 arrangement will continue to operate in relation to South Australia. It is not at present proposed to open offices in Hobart or Darwin.

Head Office - The Office 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 Office consists of three branches: Legal, Policy and Administrative Support.

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 primary responsibility of the Policy Branch is to provide assistance to the Director in the development and maintenance of policies and guidelines relating to the performance by the Office throughout Australia of the Director's statutory functions. The Branch is also responsible for making recommendations to other Commonwealth departments and agencies, but principally to the Attorney-General's Department, in relation to the criminal laws and proposed criminal laws of the Commonwealth and the Australian Capital Territory.

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

Sydney Office - The Office comprises five branches: Major Fraud, General Prosecutions, Civil Remedies, Organised Crime 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' cases as well as the prosecution of other revenue fraud matters.

The Organised Crime Branch was created in September 1986 to handle cases referred by the National Crime Authority and the Joint Task Force on Drugs, work that was formerly conducted within the General Prosecutions Branch. The new branch was resourced by redeployment of existing staff.

The General Prosecutions Branch is responsible for all prosecutions not dealt with by the Organised Crime and Major Fraud Branches, 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 Office has four branches: Major Fraud, Prosecutions, Civil Remedies and Administrative Support.

The Major Fraud Branch has absorbed the work of the former Fraud Branch and now does revenue and other fraud work in addition to the work taken over from Special Prosecutor Gyles. In addition, the Civil Remedies Branch has emerged as a branch in its own right. The other branches do the same work as their counterparts in Sydney.

The Prosecutions Branch was reorganised during the year and the previous division into a summary and a trials section has been eliminated. The branch is now organised into three sections and a greater variety of work is now available to those working in the branch. However, it is far larger than the other two legal branches and a further reorganisation during the year will be considered in the light of experience and workloads.

Brisbane Office - The Office comprises five 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. During the year a Senior Legal Officer position was transferred from Brisbane to Townsville to deal with the increasing workload of the Office in Northern Queensland.

Perth Office - The Office comprises four 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 - Unlike the other regional offices the prosecutions conducted by the Canberra Office involve offences throughout the criminal calendar and not just those offences arising under Commonwealth Acts. Indeed, prosecutions for Commonwealth offences represent only a small part of the work undertaken by the Canberra Office. The division of the Office accordingly reflects its unique practice within the DPP.

The Office comprises four branches: Municipal Prosecutions, Magistrates' Court, Superior Courts and Administrative Support. The Municipal Prosecutions Branch, as its name suggests, is responsible for the prosecution of offences of a 'municipal' nature. The Magistrates' Court Branch is responsible for the listing and prosecution of all matters heard and determined in the A.C.T. Magistrates' Court or the Childrens' Court. The Magistrates' Court Branch also is responsible for providing assistance in coronial inquests. The Superior Courts Branch is responsible for all trials on indictment and sentence matters in the Supreme Court of the A.C.T. as well as appeals and proceedings in the nature of an appeal to the superior courts.

For reasons of convenience the Canberra Office conducts prosecutions and appeals in respect of offences against Commonwealth law in N.S.W. courts in areas close to Canberra.

Directors of Legal Services - The prosecution work in the Adelaide DLS Office is handled by the Prosecutions Legal Work Unit. This Unit is made up of one Principal Legal Officer, three Senior Legal Officers, five Legal Officers and three Legal Assistants. At the time of writing the Unit is not fully staffed, with two of the Legal Officer positions being vacant.

Prosecutions in Tasmania and the Northern Territory on behalf of the DPP are conducted as part of the general work of the DLS offices in Hobart and Darwin. Accordingly, each of the lawyers in these offices has a prosecution workload as well as the carriage of a wide range of civil and commercial work. In these two places the prosecution work comprises mainly summary prosecutions.

It is understood that a review of the resource needs of these three DLS offices has been completed but that at the time of writing the recommendations have not been actioned.

Review

Reviews and subsequent re-organisations of the establishment of each DPP branch have been conducted on a regular basis in response to requests from the branches. The aims of the reviews have been to improve DPP profiles, pool resources where appropriate, achieve more flexible organisation structures and provide appropriate classification and communication structures.

Senior Management

The Senior Executive Service of the DPP is set out on page 13.

Fines and Costs

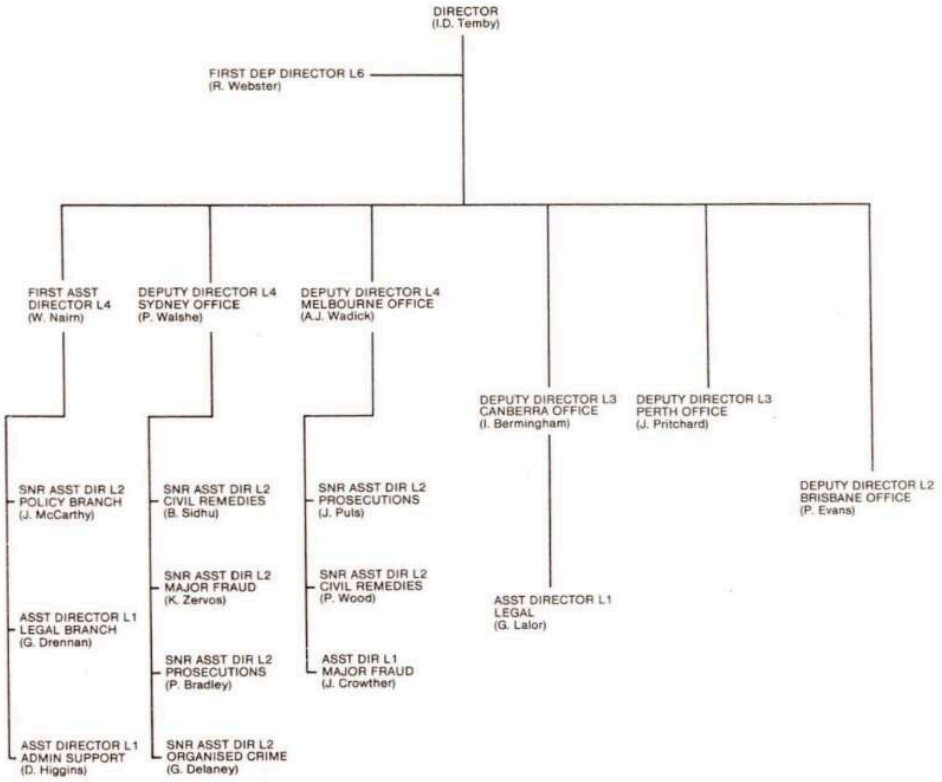
Fines and penalties imposed under Commonwealth legislation by a court in criminal proceedings, and awards of costs, are amounts recoverable by the Commonwealth. The responsibility for ensuring the enforcement of the payment of any amounts due rests with the department that administers the legislation under which the prosecution was instituted. The function of instituting legal proceedings for recovery of unpaid fines and costs did not pass to the DPP when it was set up.

The function has developed into a straightforward debt recovery activity, but for a variety of reasons backlogs have developed and its value as an aspect of law enforcement has been eroded.

Prosecutors could be viewed as having a greater commitment to, and understanding of, the law enforcement aspect of this activity. It has therefore been agreed with the Attorney-General's Department that this Office will assume this role which was previously performed by the Australian Government Solicitor's Offices in those States where the DPP has offices and that appropriate staff levels will be transferred. This will require the setting up of a separate ADP-based recording and accounting system in each Office to accommodate the differences in the court administration in each State. It is expected that the transfer of this function including backlogs will be completed by 31 December 1987.

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

TOP STRUCTURE : OPERATING ARRANGEMENTS
(as at 30 June 1987)



2. SOME RECENT DEVELOPMENTS

This chapter is concerned with developments on a number of issues raised in earlier Annual Reports.

Prosecutions in Commonwealth Places

At page 33 of the last Annual Report reference was made to the difficulties that have arisen in the Director being precluded from carrying out prosecutions for offences committed against provisions of State laws which apply in Commonwealth places under the Commonwealth Places (Application of Laws) Act 1970. On 18 December 1986 amendments to that Act came into operation. The amendments enable the Director to carry on prosecutions in the summary courts that have been instituted by Commonwealth officials in respect of applied provisions of State laws.

Indemnities

At page 35 of the last Annual Report reference was made to the question of whether the Director had the power to give an undertaking under section 9(6) of the DPP Act to a witness in proceedings under the Extradition (Commonwealth Countries) Act 1966 and the Extradition (Foreign States) Act 1966. An undertaking under that section could only be given to a person who was a witness in proceedings for an offence against a law of the Commonwealth. It was tolerably clear that proceedings under the abovementioned Acts, whether in relation to the extradition of a person to or from Australia, were not proceedings for an offence, but rather proceedings for an extradition.

This matter was raised formally with the Attorney-General's Department in January 1987 along with a number of other matters that were considered to require minor amendment to the DPP Act. For reasons similar to those outlined above it was also considered that a section 9(6) undertaking could not be given to a witness in proceedings by way of a coronial inquest or inquiry. The necessary amendment to the DPP Act extending section 9(6) to extradition proceedings and coronial inquests and inquiries was included in the Statute Law (Miscellaneous Provisions) (No 1) Bill 1987, which was introduced into the Parliament in April 1987. However, that Bill lapsed with the double dissolution of the Parliament. It is expected it will be re-introduced into the new Parliament.

Search Warrants on Lawyers' Premises

The last Annual Report referred at page 42 to the discussions between the Australian Federal Police and the Law Council of Australia convened by the DPP with a view to formulating guidelines for the resolution of claims of legal professional privilege made during the execution of search warrants on lawyers' premises.

The terms of the guidelines were agreed to by the Australian Federal Police and the Law Council in October 1986. The guidelines, in summary, provide a procedure for documents which are the subject of a privilege claim to be placed in a sealed container without having been inspected by the police search team. That container is placed in the custody of an agreed third party. The lawyer is then given three clear working days within which to obtain instructions whether proceedings are to be instituted to establish the claim. If such instructions are received the lawyer is given a further one clear working day in which to institute the proceedings. Once such proceedings have been instituted the documents are to be removed into the possession of the registrar of the court in which the proceedings have been commenced. However, the procedures set out in the guidelines are dependent on the co-operation of the lawyer. They acknowledge that if the lawyer refuses to co-operate then in many instances it will not be practicable for the police search team to avoid the inspection of documents which may in fact be privileged - although, of course, if considered to be privileged they will not be seized.

In announcing the guidelines the President of the Law Council, Daryl Williams QC, expressed the Council's appreciation of the assistance given by the Director and his officers in facilitating and helping with the negotiation of the guidelines. The terms of the guidelines are set out in a lift out supplement to Australian Law News, December 1986.

Summary Disposition of Indictable Offences

In the 1984-85 Annual Report reference was made at page 38 to the Office's recommendation that provisions of the Crimes Act 1914, enabling certain indictable offences against that Act to be dealt with summarily, should be extended to all indictable offences against Commonwealth law. At present no provision is made for summary disposition in respect of a number of non-Crimes Act offences which, pursuant to section 42 of the Acts Interpretation Act 1901, are indictable. Where the breach of such an offence is a minor one the question whether a prosecution should proceed may ultimately depend on whether the time and expense involved in a trial on indictment can be justified. The offence which perhaps has caused this Office the most difficulty in determining whether a prosecution should proceed is bigamy under section 94 of the Marriage Act. In many cases the offence will have been

committed many years before it is detected. The defendant may not have misled or defrauded any person. Indeed, it is sometimes the case that the defendant has obtained a divorce from his or her first spouse and legitimised the bigamous marriage before the matter comes on for trial. It can also be the case that the defendant no longer resides in the State where the offence was committed.

It is understood that consideration is being given to introducing legislation into the Parliament later this year which will substantially meet the DPP's concerns at the number of non-Crimes Act offences that at present can only be determined on indictment.

However, of equal importance is how the mode of trial is to be determined when an indictable offence is capable of summary disposition. At present a number of indictable offences require the consent of both the prosecution and the defence to summary disposition. Occasionally this Office is forced to proceed with a trial on indictment because the defendant has withheld consent although the matter is quite minor and more appropriately dealt with in the summary courts. In one recent matter consent was withheld and immediately after the defendant was committed for trial the defence legal representatives applied for a 'no bill' on the ground that the matter was trivial!

Joint Commonwealth-State Trials

During 1986-87 agreement was reached with Western Australia for joint trials in that State. Permanent reciprocal arrangements are now in place with New South Wales, South Australia and Western Australia. In addition, agreement was reached recently with the Northern Territory authorities on the arrangements for joint trials in that Territory, and at the time of writing arrangements are in hand for the cross authorisation of officers.

While no permanent arrangements are in place in Queensland, special arrangements have been made as the need arises and a senior officer within the Brisbane Office of the DPP has held a State commission for a fixed period. This limited arrangement has worked well enough, but it is not entirely satisfactory. It is hoped that permanent reciprocal arrangements can be established with Queensland in the near future.

The lawfulness of a joint indictment in Victoria was recently considered by the Victorian Court of Criminal Appeal in **Nicola v. R** (see Chapter Four). The appellant had been convicted in respect of Commonwealth and State drug offences on an indictment signed by a Victorian Prosecutor for the Queen who had also been appointed pursuant to section 69 of the Judiciary Act 1903. It was argued on behalf of the prisoner that Commonwealth and State counts could not be tried simultaneously.

In the earlier case of **R v. Maher and Donnelly** (unreported, ruling delivered 10.05.85) Carter J in the Supreme Court of Queensland had ruled that a State court, when exercising federal jurisdiction in respect of a Commonwealth count or counts in an indictment, was not precluded from simultaneously exercising its State jurisdiction in respect of State counts which were properly joined in the indictment. Argument before the Victorian Court of Criminal Appeal turned on whether what was described as an 'indictment' for the purposes of Commonwealth law was the same as a 'presentment' under Victorian law. In its judgment delivered on 14 May 1987 the Court held that it was, and the validity of the indictment was accordingly upheld.

In the light of the decision in **Nicola** it is to be hoped that the Victorian authorities will move quickly to appoint Commonwealth DPP officers to indict in respect of offences against Victorian law. At present all Commonwealth-State indictments in Victoria must be signed by the Victorian DPP or certain Victorian Prosecutors for the Queen who have been appointed pursuant to section 69 of the Judiciary Act. Again, this is less than satisfactory.

3. EXERCISE OF STATUTORY FUNCTIONS AND POWERS

No Bill Applications

Section 9(4) of the DPP Act empowers the Director to decline to proceed further in the prosecution of a person who is under commitment or has been indicted on a charge of an indictable offence against Commonwealth law. During the year the Director delegated this power to certain senior DPP lawyers in regional offices.

This was part of a rationalisation of the respective roles of the Director and the First Deputy Director on the one hand, and senior officers in the regional offices on the other, in the determination of questions as to the content of an indictment and no bill matters. As to the former subject, generally all questions relative to the content of indictments are to be determined at regional office level. This includes decisions as to whether an accused person should be indicted on charges different in number and/or nature to those upon which a committal was obtained. However, the matter is to be referred to the Director if the course of action the regional office proposes to adopt represents a substantial change to the number and/or nature of the charges for which a committal was obtained, or is otherwise potentially contentious. A potentially contentious proposal would include a proposal to indict in respect of what might be regarded in all the circumstances as an oppressively large number of counts, or to include a count for which committal was refused.

In relation to 'no bill' matters, until recently it was the practice for all questions relative to whether a prosecution on indictment should proceed, whether raised at the instance of the defence or on the initiative of the regional office concerned, to be referred to the Director for his determination. While it continues to be the case that most 'no bill' matters require the Director's decision or, in the event of his non-availability, that of the First Deputy Director, this practice had sometimes occasioned practical difficulties. For example, the application may be made at the court door, with the defence then seeking an adjournment of the trial on the ground that a 'no bill' application had been made which had not been determined. Under the new arrangements DPP lawyers who have been authorised to sign indictments have been given a limited delegation of the power under section 9(4) to be exercised in the circumstances where, having regard to the exigencies of the situation, it is not practicable to consult with either the Director or the First Deputy Director and the officer considers that the application should be refused.

The limited delegation of the power under section 9(4) may also be used in the situation where a person has been committed for trial on Commonwealth and State charges which substantially cover the same factual situation. Where a separate trial on the State charges has proceeded first, the decision to discontinue the prosecution on the Commonwealth charges may be made at regional office level if it is clear that the continued prosecution of those charges cannot be justified having regard to the disposition of the State charges, including any penalty imposed.

During 1986-87 there were fifty eight matters in which the DPP was formally requested by a defendant or his or her legal representatives to discontinue the prosecution following a committal for trial. In thirty of those cases it was decided that the matter should not proceed to trial. In the remaining twenty eight cases the prosecution proceeded on at least one count.

In a further forty 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 or proceeded with. In thirteen of these cases the defendant had been tried on related State charges and it was considered that the continued prosecution of the Commonwealth charges was not warranted having regard to the disposition of the State charges. In a further three of the cases the defendant was dealt with on related summary charges.

Of the twenty eight matters that proceeded despite formal representations from the defence, seven defendants were convicted on one or more charges, seven were acquitted and thirteen matters are unresolved at the time of writing. On one matter the jury was unable to agree on a verdict and the Director subsequently decided not to proceed with a re-trial.

Witness Indemnities

Section 9(6) of the DPP Act provides, in effect, that where the Director considers it appropriate to do so he may give a person an undertaking that the evidence the person gives in specified proceedings for an offence against Commonwealth law will not be used in evidence against the person. Where the Director gives such an undertaking the person's evidence, by force of sub-section 9(6), is not admissible against the person, in any civil or criminal proceedings in a federal court or in a court of a State or Territory other than proceedings in respect of the falsity of evidence given by the person. The Director has only delegated this power to the First Deputy Director.

During the year a total of twenty five instruments under section 9(6) were issued in respect of thirteen prosecutions. As has been mentioned in earlier Annual

Reports, it remains an unusual step for the DPP to secure the evidence of an accomplice pursuant to a section 9(6) undertaking. In each case the decision is made in accordance with the criteria set out in paragraph 4.16 of the Prosecution Policy.

'Taking over' Prosecutions

Pursuant to section 9(5) of the Act the Director may take over a proceeding instituted by another person for commitment or for summary conviction in respect of an offence against Commonwealth law. Having taken over the proceeding the Director may continue it with himself as informant, or he may decline to carry it on further.

Prior to the DPP Act an AFP or other Commonwealth officer who instituted a proceeding for summary conviction or committal for trial was usually represented by the Crown Solicitor. Contrary to the practice which still generally applies in the States (where the conduct of most prosecutions in the summary courts are in the hands of the police) the Commonwealth had long recognised that the investigation and prosecution functions should be separate and distinct. However, in the final analysis the relationship between the Crown Solicitor and the police officer or other official who had commenced the prosecution was one of solicitor and client. While the Crown Solicitor could advise the informant as to how or whether the prosecution should proceed, as a matter of strict law so long as he represented that person in the prosecution he was bound to act in accordance with the instructions he received - provided, of course, that they were consistent with his duty to the court.

Sub-section 9(5) represented a most significant development in Commonwealth criminal justice system for it provided a proper basis for the separation of the investigation and prosecution functions, giving to the Director a supervisory role in respect of all prosecutions for Commonwealth offences.

The practice that had previously prevailed in the Commonwealth no doubt assisted in the acceptance by the AFP of the DPP's supervisory role over prosecutions instituted by the police. Indeed, although the laying of a charge is still the function of the police, it has been agreed that there should be consultation between the two organisations prior to charges being laid should the exigencies of the particular case permit. As a result it is very unusual for differences as to whether or how a prosecution should proceed to be so irreconcilable that it is necessary for the Director to exercise the power under section 9(5) of the Act to take over a prosecution that has been instituted by a police officer. There was only one such case in the year under review. This step is taken only after full consultation with the AFP. In a number of other instances agreement was reached during the consultation process where

initially there had been opposition to the course that either the Office or the AFP wished to follow.

The taking over of a private prosecution : C.J.L. v. Gisela Bernet - The right of a private citizen to institute a prosecution for a breach of the law has long been regarded as a valuable constitutional safeguard against inertia or partiality on the part of authority. It is recognised by section 13 of the Crimes Act 1914 and is expressly preserved by sub-section 10(2) of the DPP Act. However, that right may be employed to bring groundless, oppressive or frivolous prosecutions. In determining whether the power under section 9(5) should be exercised to bring to an end a prosecution brought at the instance of a private citizen, a balance must be struck between, on the one hand, the private citizen's rights under section 13, and on the other hand, the Director's statutory duty implicit in section 9(5) to ensure that inappropriate prosecutions do not proceed.

In October 1986 the power under section 9(5) was exercised to take over and terminate a private prosecution that had been instituted in the A.C.T. against a Family Court counsellor on charges under section 43 of the Crimes Act 1914. This was the first occasion that the power under section 9(5) had been exercised in respect of a private prosecution. Because of that, and because it illustrates the competing considerations that can arise in such cases, the reasons for deciding not to proceed that were prepared at the time are reproduced in Appendix IV. An additional reason is that the reasons were selectively quoted in court by counsel for the private prosecutor, and have since been the subject of public comment based upon the portions quoted.

The award of costs where a private prosecution is taken over - Following the dismissal of the charges against Ms Bernet on 23 October 1986 the Chief Magistrate, in response to a submission from counsel for the original informant, raised the question whether an ex gratia payment to the informant might be considered by the DPP to compensate him for the legal costs he had incurred in prosecuting the matter. It was apparently recognised by the Chief Magistrate that the original informant had no legal entitlement to such compensation. It was not within the capacity of the DPP to make any such payment, assuming it would otherwise have been appropriate to do so, but there was a possibility that the informant might be eligible for a special grant of Commonwealth financial assistance. Accordingly, this aspect was referred to the Attorney-General's Department for its attention.

The law and practice relating to the awarding of costs by the summary courts when charges are dismissed has developed against the conventional background of the parties to the proceedings remaining unchanged throughout. They make no provision for the special considerations that arise where

the Director exercises the power under section 9(5) to take over a prosecution with a view to its discontinuance. Where the Director takes over a prosecution he is deemed for all purposes to be the informant in the proceedings (section 14(2), DPP Act). If it is otherwise appropriate that the discharged defendant should have his or her costs, the only person against whom a costs order can be made is the Director. Even if the private prosecution was demonstrably without merit there is no power for the court to order the original informant to pay the defendant's costs. However, it is clearly undesirable that the Director (and in practice the public purse) should be expected to bear those costs in such a case.

On the other hand, a citizen may have exercised his or her right to institute a private prosecution in circumstances where the charge had factual substance but some wider public interest consideration required that it be taken over and discontinued. Again, the discharged defendant may have a justified claim to be compensated for the legal costs incurred in defending the charge up until its dismissal. However, in such a case the private prosecutor also may be able to justifiably claim that his or her costs in prosecuting the matter were properly incurred but have now been wasted.

The award of costs in relation to a prosecution for a Commonwealth offence is regulated pursuant to section 68(1) of the Judiciary Act 1903 by the relevant State or Territory law. As indicated above, those laws make no allowance for the special considerations that arise when a prosecution instituted by another is taken over and discontinued. It would therefore seem appropriate for the Commonwealth to make some special provision to enable justice to be done in the circumstances of the particular case when the power under section 9(5) is exercised to discontinue a prosecution instituted by a private citizen.

Ex Officio Indictments

Pursuant to section 71A of the Judiciary Act 1903 the Attorney-General is authorised to file an indictment although the defendant had not been committed for trial on any charge. As a result of amendments to the DPP Act in 1985 the Director may only file an indictment in similar circumstances with the consent of the person concerned.

The only occasion during the year under review where it was necessary to recommend to the Attorney-General that he sign an ex officio indictment pursuant to section 71A concerned the prosecution of General and Railway Supplies Pty Ltd. (See chapter 4). At the conclusion of committal proceedings that were conducted before the Adelaide Magistrates Court in February 1987 the learned magistrate formally found that the defendant company had a case to answer on a number of charges of forgery and uttering under the Crimes Act 1914. However, the magistrate was unable to

make a formal committal order. At common law a company cannot be committed for trial on an indictable offence for that presupposes a physical accused who can be either committed into custody pending trial or granted bail. The common law rule remains in force in South Australia, although it has been replaced in some, but not all, jurisdictions. As there had been no formal committal order as required by section 6(2B) of the DPP Act, the Director was precluded from signing the indictment.

The case prompted a review by the Office of the law applying in the various State jurisdictions relating to the prosecution of corporations. The results of that review are dealt with in Chapter 7.

In the past year there were a number of instances where an 'ex officio' indictment was filed pursuant to section 6(2A) of the DPP Act with the consent of the defendant although the defendant had not been committed for trial. This usually happens where the person concerned wishes to plead guilty and have the matter dealt with as quickly as possible but the offence involved is not appropriate for summary disposition, or the option of summary disposition is not available.

4. THE CONDUCT OF COMMONWEALTH PROSECUTIONS

This chapter seeks to give an overview of the prosecutions conducted by the Office. It should be read in conjunction with Chapter 5, which deals with the work of the Office in major fraud matters.

Apart from the descriptions below of some of the more important or otherwise interesting prosecutions conducted by or on behalf of the DPP during the year, the tables at the end of this chapter provide some indication of the range and type of prosecutions conducted by the Office. The tables do not include those prosecutions conducted by other Commonwealth agencies, State police or private individuals.

The introduction in all DPP Offices towards the end of 1986-87 of the Case Matter Management System (outlined in Chapter 10) will enable future Annual Reports to contain more comprehensive statistics concerning prosecutions conducted by the Office.

A relatively large number of the cases described below involved narcotic prosecutions. While most of these cases were attended by considerable complexity, it is noteworthy that convictions were achieved in a number of cases involving the importation of quite large quantities of illegal narcotics, and that the sentences imposed (whether at first instance or following a Crown appeal) represented what the community would regard as condign punishment.

Sydney Office

Extradition of Narain - The extradition of Amrit Lal Narain was sought by the New Zealand Government early in 1986. After a lengthy hearing it was ordered that Narain be surrendered to New Zealand. Following unsuccessful appeals to a single judge of the Federal Court and then to the Full Federal Court, Narain finally applied for special leave to appeal to the High Court. That application was heard by the High Court in Melbourne on 13 March 1987 with the Director appearing for the respondents to the application. The High Court refused special leave to appeal.

The principal question considered in the appeals was the extent to which a party seeking extradition to New Zealand should provide particulars or evidence of the relevant offences. It was decided that under the terms of Part III of the Extradition (Commonwealth Countries) Act 1966, and

particularly in view of the similarity of that Part to the provisions of the Service and Execution of Process Act 1901, there is no obligation on the party seeking extradition to provide evidence of guilt, evidence which amounts to a prima facie case, or indeed any material relating to the facts of the alleged offences. It was held that production of an authenticated warrant is sufficient. Nevertheless, there remained an obligation on the party seeking extradition to provide adequate particulars of the alleged offences to ensure that the person whose extradition is sought understands the nature of the charge against him. The failure to provide such particulars might in some circumstances be a sufficient reason for concluding that it would be unjust and oppressive to order surrender.

United Telecasters - The Director decided to carry on a prosecution commenced by a private citizen following the committal for trial of United Telecasters (Sydney) Ltd, the licence holder of television station Channel 10, on a charge involving a breach of the Broadcasting and Television Act 1942. It is alleged that contrary to s.100(5A) of the Act United Telecasters broadcast an advertisement for cigarettes during the televising of the 1984 Sydney Rugby League Grand Final. The trial, which is the first such prosecution of its kind under the Act, is listed to commence on 30 August 1987 at the Sydney District Court.

DPP v. ABC and DPP v. Wran and another - On 8 December 1986 the New South Wales Court of Appeal, comprising Street CJ, Hope, Glass, Samuels and Priestly JJA, delivered judgment in the above matters. Each case related to proceedings for contempt of court arising out of the trial and re-trial of the late Mr Justice Murphy.

The first case concerned a television broadcast on 21 March 1985 by the ABC program 'The National'. The substance of the charge was that, at a time when proceedings were current against the late Judge, it was reported that he was associated with the Age tapes which exposed a network of organised crime and corruption, and that he had made 'improper overtures' on behalf of another person. The program editor Mr Carroll was also charged on the basis that he was the person responsible for the production and broadcast of the statements. The contempts alleged were likely to prejudice the accused in his other forthcoming trial.

The charge against the then Premier of New South Wales, Mr Wran, and Nationwide News Pty Ltd, the publishers of the Daily Telegraph, concerned a statement which Mr Wran made on 28 November 1985, and which was subsequently published in that newspaper, to the effect that he (Mr Wran) had 'a very deep conviction that Mr Justice Murphy is innocent of any wrong doing'. That was reported by the newspaper in a front page article on 29 November 1985 which was entitled: 'Murphy Innocent - Wran'.

Each defendant sought to strike out the proceedings for want of standing or power in the DPP to institute or carry them on. It was common ground that the proceedings were for offences against the laws of New South Wales and were an exercise of State, and not Federal, jurisdiction. It was said by each defendant that the Director lacked the statutory power because what was done was not incidental to the statutory functions in section 6 of the Act 1983. This was because section 6(1)(m) of the DPP Act specifically authorised the Director to institute and carry on proceedings for State offences where he had been appointed to do so under State law. In the present case the Director's commission extended only to indictable offences before the Supreme and District Court and not to summary proceedings before the Supreme Court. On that basis it was said that the incidental function in section 6(1)(n) could not be construed as authorising something which was additional to that specified in section 6(1)(m).

The submission was rejected. The judgment is authority for the proposition that the DPP has a power (or function or both) to initiate proceedings for alleged contempts of court which prejudice the administration of justice in a particular case to which the DPP is a party, this notwithstanding that the case was being prosecuted in a State court exercising Federal jurisdiction. In particular, the provisions of section 6(1)(m) did not limit the incidental function conferred by section 6(1)(n), or any implied power to do things which are incidental to the carrying out of the functions of the Director.

As to the substance of the charges, the Court found in each case that a contempt had been established. As against the Australian Broadcasting Corporation and Mr Carroll, the Court was satisfied beyond reasonable doubt that the broadcast tended both to interfere with and prejudice the due course of justice in the hearing of the charges upon which Mr Justice Murphy was committed for trial, and to influence potential jurors hearing those charges.

In respect of Mr Wran, the Court found that he had made the relevant statements with the intention that they should influence members of the public who might hear them broadcast, and in the hope they might help to persuade any member of the public hearing the statements to form a view favourable to Mr Justice Murphy, and that he acted recklessly and with indifference as to what the effect of the statements might be upon the due administration of justice. However, the Court was not satisfied beyond reasonable doubt that when Mr Wran made the statements he had consciously in his mind the possibility that members of the public whom the publication reached might include potential jury members. As to the publishers of the Daily Telegraph, the Court found that there was an intention to publish in a way to attract the attention of a large section of the public to Mr Wran's statement, and that this was done with an appreciation that the publication might help influence members of the public to form a favourable view of Mr Justice Murphy. That was done recklessly and

with indifference as to what its effect might be upon the due administration of justice in relation to the re-trial.

After hearing submissions the Court imposed sentence on each defendant on 12 March 1987. A fine of $100 000 was imposed on the Australian Broadcasting Corporation and Mr Carroll was fined $2000. In addition, an order for the payment of costs was made. Mr Wran was fined $25 000 and the publishers of the Daily Telegraph were fined $200 000. An order for costs was also made.

The last Annual Report (at page 31) briefly discussed whether the Director may institute proceedings for alleged contempts of court which prejudice the administration of justice more generally, as opposed to the administration of justice in a particular case. In its judgment the Court did not specifically address this issue. However, the Court appears to have made a conscious choice to associate the Director's power to initiate proceedings to contempts in respect of particular cases. By definition contempts which affect the administration of justice generally are not concerned with the protection of any one particular proceeding. It is therefore doubtful that, as a matter of construction, section 6 of the DPP Act provides the necessary authority to initiate a proceeding which is an incident of - but not incidental to - the prosecution of an offence. In the absence of a change in the law it is considered that it is for the Attorney-General, to the exclusion of the Director, to initiate proceedings for alleged contempts which prejudice the administration of justice generally.

Cornwell and Bull - Bruce Cornwell and Barry Bull were extradited from the United Kingdom and Austria respectively in relation to drug and passport offences. Some of the charges laid arise out of the alleged importation of cannabis aboard the foreign vessel Raukawa in May 1985.

The alleged skipper of the Raukawa, Douglas Tiffany, an American citizen, was located in the U.S.A. where he was arrested and then returned to Australia. Another five alleged co-conspirators in the Raukawa importation, including two American citizens, are due to stand trial in November 1987. In addition, Cornwell, Bull and Tiffany have been charged with a further alleged conspiracy to import cannabis. Arising out of the investigations into Cornwell and Bull, another person was charged with conspiring with Cornwell to import 300 kilograms of cannabis resin and with the illegal procurement of a false passport.

Adams v. Anthony Bryant & Co. Pty Limited - On 14 April 1987 Mr Justice Wilcox in the Federal Court imposed substantial fines under the Trade Practices Act 1974 on Anthony Bryant and Co. Pty limited and on two directors of the company, Brian Ahearne and Venn Williams. The company

had pleaded guilty to two offences of making misleading statements concerning the terms of insurance contracts, and each director had pleaded guilty to being knowingly concerned in one of those offences by the company. The company was fined a total of $80 000, and the directors $8000 each. In each case the fine was 80% of the available maximum penalty. An appeal against the severity of sentence has been lodged by each defendant.

Scott - Gary Roy Scott was arrested on 25 September 1984 and charged with an offence under section 7(1)(e) of the Crimes (Foreign Incursions and Recruitment) Act 1978 of performing services for an association (O.P.M.) for the purpose of supporting hostile activity in Irian Jaya against the Government of Indonesia. The alleged services concerned a report on training persons to engage in guerilla warfare against Indonesian troops. Scott was also charged with two offences of recruiting a person to serve with an armed force in a foreign country, contrary to section 9 of the Act. One person was an expert in counter-insurgency operations and the other was attached to a commando unit. Scott was committed for trial in June 1985 but fled the jurisdiction. He was eventually extradited from Darwin and his trial took place in March 1987. The jury found Scott guilty on one count of recruiting under section 9. He was sentenced to twelve months imprisonment with a minimum term of six months. He was found not guilty on the remaining counts.

Operation Lavender - Mention was made in last year's Report at page 54 of the conviction and sentence in the Supreme Court of New South Wales of three persons who had been involved as principals in a conspiracy to import and distribute between 4.8 and 7.2 tonnes of cannabis resin.

The trial of the remaining accused who had been charged to N.S.W. with conspiracy to supply the cannabis commenced in the Supreme Court of New South Wales on 25 May 1987, with Shane Anthony Hearn pleading guilty at the commencement of the trial to that charge as well as one of possession of a trafficable quantity of cannabis resin. On 6 June 1987 the remaining accused, George Condos and Con Kapeliotis, were found guilty and on 3 July 1987 each was sentenced to a term of five years imprisonment with a non-parole period of three years. Hearn was sentenced to six and a half years imprisonment with a non-parole period of four and a half years.

Ng and Wong - Chi Yip Wong and one Leung (now deceased) arrived in Australia on 13 July 1986 and from that time until their arrest they were under surveillance by members of the Australian Federal Police. On 24 July 1986 Wong and Leung travelled to Gladstone in Queensland where they met Sai Chuen Ng. Ng later left Wong and Leung and boarded a vessel, which he left a short time later carrying what

appeared to be a heavy sports bag. He then joined Wong and Leung at a hotel.

Wong and Leung were arrested the next day, with the equivalent of 5.6 kilos of pure heroin being seized at the time of their arrest. The heroin had a street value of approximately $23 million. Ng was arrested on 26 July 1986 and found to be in possession of $20 000 in Australian bank notes.

Both Wong and Ng subsequently pleaded guilty to charges under section 233B(1) of the Customs Act 1901 relating to their involvement in this matter and were sentenced on 19 June 1987. Wong received a term of twenty four years imprisonment with a non-parole period of eighteen years, with Ng being sentenced to twenty years imprisonment with a non-parole period of fifteen years.

Operation Toggle Bravo - The trial of Chenkovit, Piyathabthim, Tangmahasuk, Ho and Ng on charges of conspiracy to import approximately fifteen kilos of pure heroin had been held in 1985 with each defendant being sentenced in the District Court to fourteen years imprisonment with a non-parole period of six and a half years. This is believed to have been one of the largest single importations of heroin into Australia yet detected.

The Director appealed against the sentence imposed on each offender and those appeals came on for hearing on 29 August 1986. The Court of Criminal Appeal allowed the appeal in each case and substituted sentences of twenty years imprisonment with a non-parole period of fourteen years being fixed in respect of each sentence.

Rajan and Suppiah - Suppiah, a Singaporean spice exporter, and his brother-in-law Rajan, were arrested on 9 July 1985 in connection with the importation of 517 kilos of cannabis resin. The cannabis resin had been secreted in approximately 1200 rubberised engine mounts which it is understood are mass produced on the Indian sub-continent.

Each of the accused were convicted after a three-week trial before the Supreme Court of New South Wales at Wollongong on single counts of possessing cannabis resin reasonably suspected of having been imported contrary to section 233B(1)(ca) of the Customs Act 1901. Rajan was sentenced on 22 July 1987 to nine years imprisonment with a non-parole period of five years. At the time of writing Suppiah had still to be sentenced.

Heyward : Mistrial due to prejudicial publicity - There were a number of instances during the last twelve months where the due hearing of trials being prosecuted were put in jeopardy by pre-trial publication of material relating to the issues.

Perhaps the most serious case occurred in proceedings against one John Stephen Heyward, who had been committed for trial on a charge of conspiracy to import a trafficable quantity of heroin. On the morning of 11 August 1986, the day Heyward's trial had been fixed to commence, the Sydney Morning Herald published an article entitled 'How a Drug Conspiracy was Hatched and Broken'. The article was based on evidence given at the trial of Cartwright and Gilligan that had recently concluded with their sentence on 8 August 1986 on charges of conspiring to import heroin. In that trial a man had featured prominently and in an adverse light. This person was also to feature prominently in the evidence to be led by the prosecution at Heyward's trial. At the commencement of the Heyward trial the trial judge accepted a defence submission that the article constituted a real potential for prejudice to the accused, and he adjourned the trial to a date to be fixed. As the journalist had refrained from allowing his article to go forward for publication until after both Cartwright and Gilligan had been sentenced, the Judge made no adverse comment concerning its publication. However, the adjournment was a particularly expensive one as four witnesses had been brought from Thailand to give evidence. The journalist who had written the article said that he was aware that Heyward's trial was listed to commence on the day of publication and because of that he had removed any reference to Heyward from the article. The DPP wrote to the Sydney Morning Herald requesting that the newspaper refrain from publishing further articles that might put at risk Heyward's trial, which was re-fixed to commence on 17 November 1986. The journalist concerned was also personally requested to ensure that no such article was published.

Notwithstanding these events, another article appeared in the Sydney Morning Herald during Heyward's trial, which had duly commenced on 19 November 1986. This article referred to the Crown witness, Cartwright, who was a prisoner at Parklea. The article was brought to the attention of the Judge in chambers by counsel for the accused, and an application was subsequently made to discharge the jury on the basis of the article. The application was opposed by the Crown and ultimately refused by the trial judge. However, apart from the question of the risk of prejudice to the fair trial of Heyward, the publication of the article also placed in jeopardy the safety of the prisoner Cartwright.

McGill - In this matter the defendant has been committed for trial on a charge of being knowingly concerned in the breach by another of section 124A(1) of the Broadcasting and Television Act 1942. The charge arises out of the defendant's alleged involvement in the interference in the live simulcast from the Sydney Opera House on 17 August 1985 of the opera 'A Masked Ball'.

Melbourne Office

McDonald - Ernest Arthur McDonald organised two consignments of heroin through connections in Thailand. The drugs were secreted in carved wooden elephants which were then consigned to Australia in parcels containing general Thai artifacts. The first consignment was addressed to a false name at McDonald's address and was collected by McDonald. McDonald took the parcel to premises which he had leased as a 'safe' house. The second consignment was addressed to premises occupied by an acquaintance whom McDonald had persuaded to accept delivery of a parcel on his behalf. McDonald subsequently collected this parcel and was intercepted by police when he still had the parcel in the boot of his vehicle. He made no admissions, and stated that he was returning the parcel to the post office as it had been delivered to him by mistake.

The scheme involved the sending of coded messages either by telephone or telegram. It is noteworthy that the success of the investigation was largely aided by the use of listening devices and telecommunication intercepts. Without this evidence it would have been difficult to convict McDonald. In the event McDonald pleaded guilty.

At the date of sentence McDonald was sixty four years old. Taking into account that he had pleaded guilty McDonald was sentenced to a total of ten years imprisonment with a minimum term of eight years. The street value of the total importation was in excess of $1 million.

Nicola - On 13 August 1985 Peter Nicola's house was searched and he was found to be in possession (on his person) of 13.9 grams of impure heroin. Later analysis showed this to be 10.4 grams of pure heroin. At his trial Nicola was indicted on both Commonwealth and State counts in the one indictment. Nicola was convicted and on 6 November 1986 he was sentenced to a total of eight years imprisonment with a minimum term of six years. As mentioned in Chapter 2, it was argued on behalf of Nicola on appeal that Commonwealth and State counts could not be tried simultaneously. The validity of the indictment was upheld by the Victorian Court of Criminal Appeal on 14 May 1987, and Nicola's appeal was accordingly dismissed.

Alpogut - In this case it was common ground between the prosecution and the defence that the evidence adduced by the prosecution could support a finding that Mehmet Alpogut believed that the substance in his suitcase when he was intercepted at Melbourne International Airport upon arrival in Australia was cannabis. However, upon analysis the substance was in fact found to be procaine hydrochloride, a synthetic cocaine substitute. This substance is not a prohibited import to which section 233B of the Customs Act 1901 applies.

Although the actual importation of the procaine hydrocholoride did not constitute an offence against Commonwealth law, Alpogut was charged with an offence of attempting to import cannabis with a view to determining whether the law as laid down in **Haughton v. Smith** [1975] AC 495 still represented the law in Australia. In **Haughton v. Smith** the House of Lords had held that conduct was not criminal where the objective the person had in mind would not amount to a crime if achieved because of so called 'legal impossibility' (e.g. where a man believes he is having carnal knowledge of a girl under sixteen years of age when she is in fact sixteen years of age or over, or where a person receives property believing it to be stolen property but in fact the property has ceased to be stolen property for the purposes of a charge of handling stolen property as it had previously been placed in the possession of the police). Further, in what were strictly 'obiter' statements their Lordships had also held that a charge of attempt will also fail if the offence is physically impossible, unless the 'impossibility' is merely the result of ineptitude, or inefficient or insufficient means. It was therefore not an offence to attempt to pick a pocket that was in fact empty. The decision has been much criticised throughout the common law world, and was eventually nullified in England by the Criminal Attempts Act 1981.

Although the Magistrate at first instance considered himself bound by **Haughton v. Smith** and dismissed the charge, on appeal by the Director against that decision the Full Court of the Supreme Court of Victoria held that **Haughton v. Smith** did not represent the common law in Victoria. The Full Court considered that the 'heresy' in **Haughton v. Smith** was that their Lordships had ignored the central issue in the crime of attempt of whether the accused had a guilty mind. Attempt is punishable 'not because of any harm that he has actually done by his conduct, but because of his evil mind accompanied by acts manifesting that intent'. Provided there is a sufficiently proximate act which accompanies the requisite mens rea it is irrelevant that that act could be characterised as objectively innocent in that the crime in contemplation could not have succeeded. Further, whether the defendant has committed a sufficiently proximate act is to be determined by reference to the facts as he or she believed them to be - not as they in fact were.

The Full Court's decision has far reaching implications for law enforcement. For example, if it is followed in other jurisdictions it will put beyond doubt that a person may be convicted of an offence under section 233B(1) of the Customs Act in respect of the total quantity of illegal narcotics either imported or that the person intended to secure possession of, where the police have previously removed all or most of the narcotic substance from the container in which it was held prior to its delivery. However, having said that there are a number of decisions in other Australian jurisdictions which have followed

Haughton v. Smith and the preferable course is surely to overturn that decision by legislation as occurred in England in 1981 and more recently in Victoria.

Peacock/Kennett Car Phone Case - Considerable publicity attended the publication by a Melbourne newspaper of a transcript of a telephone conversation between two prominent politicians. The telephone call (made from a car phone) had been illegally intercepted by means of a scanner. The broadcast was taped and passed on to the newspaper. As the law stood at that time the publication of the information was not illegal. As it was not possible to strike at the real harm done by prosecuting the publisher, it was not considered appropriate to prosecute the person who had intercepted the call.

Operation Lollipop - In 1983 the Department of Social Security brought to the attention of the Australian Federal Police some fourteen files on which they detected fraud had been committed. This resulted in the establishment of an Australian Federal Police Task Force to investigate what proved to be a major fraud perpetrated on the Department of Social Security by certain Romanian and Yugoslav nationals.

The offences were committed over the period 1980 to 1983 and involved a number of people engaging in a systematic course of conduct designed to obtain wrongfully various benefits from the Department of Social Security. These persons had immigrated to Australia at various dates between 1965 and 1982. Many of them had been accorded refugee status by the United Nations High Commissioner for Refugees.

The offences involved extensive planning and preparation which included the creation of identities, the arranging of addresses where cheques could be sent, and the forging and uttering of formal documents. The documents used in the fraud included :

(a) certificates issued by the branch office in Yugoslavia of the United Nations High Commissioner for Refugees;

(b) Certificates of Evidence of Resident Status issued by the Department of Immigration and Ethnic Affairs to persons who require proof of permission to enter and remain in Australia;

(c) Yugoslav marriage certificates;

(d) Yugoslav birth certificates

(e) Romanian drivers licences;

(f) translations in Australia of the above documents.

In January 1986 a joint trial of six accused commenced in the County Court at Melbourne. However, several weeks into the trial the judge ordered that each accused be granted a separate trial. This ruling was primarily based on the complexity of the joint trial and the fear of a mis-trial.

Between February 1986 and May 1987 the six accused and one additional conspirator were presented in turn before the County Court. Two of the accused pleaded not guilty but were each convicted by a jury after a lengthy trial. They received sentences of imprisonment of three years nine months with a minimum term of two years three months and four years with a minimum term of three years respectively. The remaining five accused all pleaded guilty (one of them after eight days of trial) and received sentences ranging from good behaviour bonds and community based orders to two terms of imprisonment of three years with a minimum term of two years. The variation in the sentences depended on what view the court took of the particular accused's part in the conspiracy.

Due to the nature of the fraudulent scheme employed it is impossible to attribute to each accused the precise amount of money that he or she obtained. However, the total amount defrauded has been estimated at upwards of $100 000.

Shahid & Talat - On 30 July 1986 Abdullah Khan arrived in Sydney with a suitcase containing 1109 grams of impure heroin. Customs officers located the substance inside the false top and bottom of the case. Khan was then arrested by the AFP and agreed to assist them by carrying out the pre-arranged plan to meet Shahid and Talat in a motel room which was placed under electronic surveillance. On 1 August 1986 Talat and Shahid went to the room where all actions and conversations were recorded. Search warrants were then executed on several premises later that day.

Both Shahid and Talat pleaded guilty. On 18 February 1987 Shahid was sentenced to fourteen years imprisonment with a minimum term of eight years and was fined $20 000. Talat was sentenced to twelve years imprisonment with a minimum term of seven years. He was also fined $10 000.

Public Interest Immunity - In three prosecutions conducted by the Office on behalf of the National Crime Authority, public interest immunity became relevant when the defendants' legal representatives sought access to material obtained by the Authority in its investigation into the defendants' activities. Much of this material had been obtained by telephone intercepts installed pursuant to the Telecommunications (Interception) Act 1979. To relieve prosecuting counsel of responsibility for the task of dealing with the summonses, separate counsel were briefed by this Office to represent those upon whom the summonses had been served. Counsel were instructed to object to the production of material where a claim of public interest

immunity could be maintained, and to avoid as far as possible a repetition of the occurrence in **R v. Harris and Ors** (Victorian Supreme Court). In that case the trial had been delayed for well over a year when the defendants were given access to intercept material of no relevance to the charges laid against them. In the event all defendants in those NCA matters were successfully committed to stand trial without the disclosure of sensitive material.

Operation Lavender - Reference is made above to the conviction and sentence of the remaining persons charged in N.S.W. with offences relating to their involvement in the distribution of between 4.8 and 7.2 tonnes of cannabis resin that had been imported into Australia through Darwin. Six persons were also charged in Victoria with offences relating to their alleged involvement in the distribution in Victoria of part of that cannabis resin. All six were committed for trial between 23 June 1986 and 30 July 1986 on charges of conspiracy to traffic in a drug of dependence contrary to section 79(1) of the Drugs, Poisons and Controlled Substances Act 1981 (Vic.) and possession of cannabis resin contrary to section 233B(1)(ca) of the Customs Act 1901.

As the principal charge against all six defendants arose under State law it was agreed that the further prosecution of the matters be transferred to the DPP for Victoria with officers from the Melbourne Office assisting. On 6 November 1986 and 14 April 1987 respectively Steven Nittes and Joan Christian pleaded guilty to the State charge that had been laid against them. Nittes was sentenced to seven years imprisonment with a minimum term of five and a half years with Christian being placed on a good behaviour bond. Following their sentence the prosecution of the Commonwealth charges against them was formally discontinued.

Presentments against the remaining four defendants were filed in the Supreme Court of Victoria on 16 March 1987 by the Victorian DPP, but at the time of writing no trial date has been fixed.

Brisbane Office

Anderson - On 3 May 1985 Anderson was arrested and charged with eighty eight counts of imposition. It was alleged that he had lodged numerous false claims for old age pensions using false identities and had received payment of those pensions in the various names over a number of years. The false identities were established using Australian Military Forces discharge certificates issued on 16 May 1946. He was also receiving a sickness benefit under his correct name throughout the period. As a result of this fraud $83 000 was paid to Anderson by the Department of Social Security.

He appeared in the Brisbane Magistrates Court on 10 July 1986 and was committed for trial. He had been remanded in custody since his arrest and bail pending the trial was again refused.

The trial commenced on 20 November 1986 but was adjourned after two days when the Judge indicated that it was not in the interests of justice to allow the prosecution to continue without the assistance of defence counsel. Public Defence was granted on 5 January 1987, but was withdrawn on 16 January 1987.

The Government Medical Officer was then contacted by the DPP with a request that Anderson be psychiatrically examined to determine his fitness to stand trial. The psychiatric report revealed that he was suffering from a condition known as hypomania and a jury subsequently found that he was not capable of understanding the proceedings due to unsoundness of mind. The Judge then ordered that Anderson be kept in strict custody until the pleasure of the Governor-General was known.

Cheung - On 6 April 1983 Cheung and an accomplice arrived in Brisbane from Singapore. They each had a suitcase which was carried in the hull of the aircraft. The suitcases were not claimed after the flight landed at Brisbane and they were subsequently inspected by Customs officers who found that the suitcases contained, amongst other things, a number of Chinese-style picture scrolls. The suitcases were held in the bond store for a number of days and were subsequently seized by Australian Federal Police officers. The scrolls in each suitcase were found to contain a grey/white powder which, upon analysis, was shown to be an impure heroin mixture containing approximately 19% pure heroin. The pure heroin content of the powder in Cheung's suitcase was approximately 2.26 kg. Cheung was located in Western Australia and extradited to Queensland to stand trial in connection with the importation of the heroin found in his suitcase. After a trial, which lasted nine days, he was convicted on one count of being knowingly concerned in the importation of heroin, and on one count of being in possession of imported heroin. He was sentenced to seventeen years imprisonment in respect of each count, the terms of imprisonment to be served concurrently.

Holynski - After an investigation by both State and Commonwealth authorities into a series of telephone bomb threats made to airlines over a two-year period Holynski was prosecuted. He had been arrested by officers of the Australian Federal Police Bomb Squad on charges under the Crimes (Aircraft) Act 1963, and by officers of the State C.I.B. on charges of extortion. The committal proceedings were complicated by an argument that tape recordings of the bomb threats were inadmissible as they contravened the Telecommunications (Interception) Act 1979. The indictment charging both Commonwealth and State counts was signed,

presented and prosecuted by a lawyer from the Brisbane Office. This led to one trial instead of two, with the consequent savings in costs and valuable court time, as well as the whole of the facts being put before the one jury. Holynski was eventually convicted of seven offences against section 20C(2)(b) and nine offences against section 19(2)(b) of the Crimes (Aircraft) Act. He was sentenced to three years imprisonment but the Court ordered pursuant to section 20 of the Crimes Act that he be released after serving six months. At the date of sentence Holynski had already spent nine months in custody on remand.

Ryan - Customs officers intercepted a parcel containing a carved wooden elephant. It was found that the elephant had been hollowed out and a heroin mixture containing 210.5 grams of pure heroin placed inside. Australian Federal Police made a controlled delivery of the parcel, with only 9.5 grams of heroin left in the parcel, to the Wynnum Post Office where it was collected by an accomplice of Ryan's. Police maintained surveillance of the accomplice until both he and Ryan were found in possession of the elephant containing the 9.5 grams of heroin. Ryan admitted having borrowed money from a finance company to finance the importation of heroin and that this was not his first importation. He was convicted on charges of being knowingly concerned in the importation of heroin and possession of heroin and sentenced to twelve years imprisonment on each count.

Perth Office

Shand-Smith and Skelton - The abovenamed were charged with being knowingly concerned in the importation of a trafficable quantity of heroin and importing a trafficable quantity of heroin respectively. On 3 May 1986 Skelton was apprehended by AFP and Customs Officers at Perth Airport upon his arrival from Thailand and was found to have hidden in his underpants 237.9 grams of impure heroin (187.9 grams pure). He was then seventy six. Also arrested was his accomplice Julie Shand-Smith. They admitted having travelled to Bangkok where they purchased the heroin with Skelton's money for the purpose of Shand-Smith selling it upon their return to Australia. They also admitted to having successfully imported about 170 grams of heroin into Australia in February 1986 under similar circumstances. Shand-Smith intended to sell the heroin imported in March for about $150 000. She was a heroin addict and Skelton was infatuated with her. He did not seek any financial gain other than the return of the moneys outlaid by him, nor was he a user of drugs. He was sentenced to six years imprisonment with a minimum term of two years five months. Shand-Smith, who was considered to be more culpable by the court, was sentenced to eleven years and six months imprisonment with a minimum term of five years and six months (taking into account the time she had already spent in custody).

El-Asmar - On 31 January 1986 Abdul Kader El-Asmar was arrested at Perth Airport attempting to smuggle 1.82 kilos of heroin into Australia concealed in plastic bags secreted in the plywood lining of three sides of a specially constructed suitcase. The heroin was 476 grams pure and had a street value between $1.3 million and $1.7 million.

El-Asmar denied knowledge of the heroin and pleaded not guilty to charges of importing and possessing heroin. After a three-day trial in the District Court in October 1986 he was found guilty of those charges and was sentenced to fourteen years and three months imprisonment without a minimum term. As he had already spent approximately nine months in custody, his effective sentence was fifteen years gaol. The sentencing judge commented that severe punishment was called for and that justice required that no minimum term be set.

Breuer, Peter, Steck, Chaney and Logan - These five foreign nationals were involved in the importation of 1775 kilos of cannabis into Australia in March 1986. Breuer, Peter and Steck were recruited in Thailand to fly to Western Australia to meet a yacht, sailed by Chaney and Logan, carrying the cannabis for the purpose of off-loading it and hiding it on a remote beach location for collection by other persons.

As a result of a joint surveillance operation by the AFP and the Australian Customs Service, Breuer, Peter and Steck were arrested and the cannabis was recovered from the locations where it had been hidden after being off-loaded from the yacht.

Chaney and Logan sailed for Fremantle after off-loading the cannabis and were subsequently arrested. All five persons pleaded guilty in the Supreme Court to various offences relating to the importation of the cannabis and were sentenced to terms of imprisonment ranging from an effective five years to ten years without minimum terms. Four of the five appealed against their sentences. The appeals were dismissed by the Court of Criminal Appeal.

A man alleged to have been at the Australian end of the importation, who was to have arranged for the transport of the cannabis to New South Wales and its distribution in that State, has been arrested in Hong Kong and an order made for his extradition to Australia to face a number of charges in relation to the importation of the cannabis. At present he is mounting a legal challenge against the extradition order.

Munn, Epiha and Oxby - These three men were involved in the successful importation of about 1000 kilos of cannabis resin into Australia in early 1986. The captain and three crewmen of the yacht involved in the importation had earlier been convicted of offences relating to that importation and had been sentenced to terms of imprisonment

ranging from life imprisonment in the case of the captain to twelve years each in the case of the crewmen.

During the year, after a diligent and high quality police investigation, the AFP arrested Munn and Epiha who had been involved in the off-loading of the cannabis resin from the yacht at a beach location just south of Perth and its subsequent removal to a farm in the south-west of the State owned by Oxby, who was also arrested in respect of his involvement. The cannabis resin was successfully transported to New South Wales where approximately 620 kilograms was sold and $3.5 million of the proceeds smuggled out of the country by European couriers. However, the AFP were able to recover 380 kilograms of the cannabis resin in New South Wales and arrest a number of other persons involved in the matter.

Munn and Epiha pleaded guilty to a number of charges in relation to their possession of the cannabis resin and their being knowingly concerned in its importation and were sentenced to terms of imprisonment. Oxby was given a suspended term of imprisonment, and was ordered to pay a pecuniary penalty to the Commonwealth. The men arrested in New South Wales also pleaded guilty to a number of charges relating to their possession of the imported cannabis and were sentenced to terms of imprisonment.

Hempel and Etheredge - One extradition matter which generated a considerable amount of litigation concerned two United States citizens. Warrants were issued in Israel for their arrest on charges of stealing a vessel known as the Orionia in which they and eleven others had arrived at Albany on 22 January 1986 from Israel. A request for their extradition was made by the State of Israel and a Magistrate determined, pursuant to the Extradition (Foreign States) Act 1966, that they were liable to be surrendered to Israel, that decision being upheld by both the Federal Court and the Full Federal Court. The DPP successfully sought an order for an expedited hearing of the Full Federal Court appeal, as well as successfully opposing a number of applications for bail in the Federal Court made pursuant to the Administrative Decisions (Judicial Review) Act 1977.

Applications for writs of habeas corpus challenging the constitutionality of the extradition legislation were made in the original jurisdiction of both the Supreme Court of Western Australia and the High Court, and subsequently adjourned sine die. The same constitutional argument was incorporated in the Full Federal Court grounds of appeal but was subsequently abandoned.

Two requests for access to documents held by the DPP and the review of the decisions in relation to those requests were made in relation to this matter pursuant to the Freedom of Information Act 1982. An appeal was also instituted in the Administrative Appeals Tribunal (but

subsequently withdrawn) in relation to a review of one of those decisions.

A further challenge in the Federal Court pursuant to the Administrative Decisions (Judicial Review) Act 1977 has been made against the Attorney-General's decision to sign the warrants of surrender.

In another matter, evidence was taken at short notice from various financial institutions, a company official and a solicitor in Perth for use in a trial in Malaysia concerning the misappropriation of Malaysian dollars 3.1 million by a public figure who was the chairman of a co-operative society. Malaysian investigators had followed the money trail to Perth where shares had been purchased in an Australian company in the name of the public figure, thereby constituting a criminal breach of trust under Malaysian law in respect of which he was ultimately convicted following a trial in that country.

Gawley - Phillip Leslie Gawley was a former Product Manager with the Australian National Airlines Commission in Western Australia. Between late 1984 and mid 1986 he defrauded the airline of approximately $101 000 (actually received by him) although in total the airline had lost approximately $360 000 as a result of Gawley's fraudulent activities. These primarily related to selling air tickets and siphoning off the proceeds into his own private bank accounts.

Gawley had operated for fraudulent purposes an account in the name of another man. When discovery of the fraud was imminent, Gawley lured this man to a meeting where he attacked him with an axe handle. Gawley was charged with attempted murder by the State police and in September 1986 he was convicted of unlawful wounding with intent to cause grievous bodily harm. He was sentenced to four years imprisonment with a minimum term of eighteen months.

He subsequently pleaded guilty to fifty Commonwealth counts of defrauding the airline and was sentenced to a further three years imprisonment, without a minimum term, cumulative upon the expiration of the minimum term fixed in respect of his State sentence.

Chedzey - This man was charged under the Crimes (Aircraft) Act 1963 with conveying information from which it could reasonably be inferred that there had been a plan to endanger the safety of an aircraft. The facts alleged against him were that in May 1986 he had telephoned the police and had alleged that there was a bomb on board an aircraft about to depart Perth for the U.K. As a result, the aircraft was searched but no bomb was found.

The call was traced to premises occupied by Chedzey who, when interviewed by the Australian Federal Police, denied

having made the hoax call. He was subsequently charged and appeared in the District Court for trial in March 1987. The prosecution evidence included quite technical evidence given in relation to the tracing of the telephone call. After four hours deliberation, the jury was unable to reach a verdict and was discharged.

Chedzey's re-trial commenced on 26 July 1987 and on 29 July the jury returned a verdict of guilty. At the time of writing Chedzey had not been sentenced.

McNamee - This man was also charged under the Crimes (Aircraft) Act 1963 with an unrelated bomb hoax call made to the Department of Aviation in Perth in March 1986. He claimed that there were three sticks of gelignite in a Qantas aircraft which had just departed Perth Airport. As a result, the aircraft was forced to return to the airport and disembark all passengers to enable a bomb search to be carried out. The direct cost of the bomb hoax was calculated at about $75 000, bearing in mind the costs associated with the return of the aircraft, staff overtime, the cost of accommodating and transporting passengers both in Perth and in relation to the connecting flight. The anonymous call made by McNamee was traced to his home and he was subsequently interviewed by the police when he admitted having made the hoax call. He subsequently appeared in the District Court in August 1986 and pleaded guilty to the charge and was sentenced to a term of six months imprisonment (having already spent about four months in custody). The sentencing Judge commented that bomb hoax calls must almost inevitably result in a custodial sentence.

Canberra Office

Because of its unique practice within the DPP it is appropriate to first provide some general observations on the prosecutions conducted by the Canberra Office.

The range of offences which may be dealt with summarily in the A.C.T. is very wide and extends to offences which are punishable by terms of imprisonment up to ten years and, in the case of offences relating to money or other property, by imprisonment up to fourteen years. There is no intermediate criminal jurisdiction in the A.C.T. Consequently a larger proportion of cases is disposed of summarily in the A.C.T. than is the case in the States; indeed, the vast majority of cases prosecuted by the Canberra Office is heard and determined summarily in the Magistrates Court or the Childrens Court. While eighty defendants were tried and/or sentenced in the Supreme Court in 1986-87, a total of 35 904 matters were registered in the Magistrates Court, which included 9523 charge matters and 5209 summons matters. Although many of these matters are disposed of at the first or a subsequent mention, the Canberra Office has continued to liaise with the Magistrates Court in order to secure the prompt and efficient disposal of those cases that are listed for

hearing. It is hoped that this mutual effort will reduce protracted hearings to all but some rare instances.

During 1986 the Domestic Violence Ordinance came into operation. This Ordinance updates and consolidates the law in the A.C.T. dealing with domestic violence. The most important sanction provided by the Ordinance empowers a magistrate to make a domestic violence order to protect a spouse. Contravention of such an order is an offence punishable by a fine up to $1000 and/or imprisonment for a term up to six months. Since 10 October 1986, 242 applications have been made for domestic violence orders. In 198 of those cases an interim order has been made, and 137 final orders have been made. Fifteen persons have been charged with contravening domestic violence orders.

Although most prosecutions conducted by the Canberra Office involve offences arising under A.C.T. Ordinances, a significant part of the Office's 'Commonwealth offence' practice involves alleged breaches of the Social Security Act 1947. The financial year commenced with an initial slowing down in prosecutions in this area. This was attributed in part to the three month amnesty granted by the Government for social security defaulters which concluded in May 1986. Nevertheless, it is worthy of note that for some reason the number of social security matters referred to the Canberra Office for prosecution is significantly less than in other jurisdictions.

On the other hand, some of the matters prosecuted this year have exposed serious fraud involving large amounts of money. In previous years it was rare for the Canberra Office to see a case where the total amount defrauded exceeded $10 000. In the last twelve months there have been eight such cases, including two matters before the New South Wales District Court, where the amounts involved exceeded $30 000.

In the area of trials and sentences the financial year saw a continuation of the trend evident in previous years with a gradual increase in the number of matters listed for trial. However, there was a fall in the number of persons who were either committed for sentence or changed their plea to guilty following their committal for trial. Staff from the Canberra Office appeared as counsel in all except two matters. Those two cases were briefed out to junior counsel from the private bar, although in one case junior counsel was led by the Director. In three other cases either the Director or the First Deputy Director prosecuted for the Crown with officers from the Canberra Office.

Following are some of the more important or otherwise interesting matters conducted by the Canberra Office during the year.

Thompson - This case is notable not only for the facts giving rise to it, but for a point of law that emerged.

On 30 December 1981 the bodies of two sisters, Mirjana and Ljiljana Milosovic, were found in a burnt out motor vehicle which had collided with a tree adjacent to the Monaro Highway. Thompson was the driver of the vehicle and he told police that he had been travelling on the highway with the two girls as passengers when he had been dazzled by the lights of an oncoming car. He stated that as a result the car had left the road and struck a tree. The car had burst into flames and whilst he had been able to escape, the two girls had been burnt to death. In March 1984 the coroner, Mr Dobson SM, made a formal finding of accidental death, with no blame being attached to Thompson.

On 31 March 1984 the bodies of Radmilla Milosovic (a sister of the two girls burnt in the car), her de facto husband, and their two children were found in a house at Richardson in the A.C.T. Each had been shot through the head and some attempt had been made to burn down the house. Thompson admitted to the killings and ultimately was convicted and sentenced to four terms of life imprisonment.

Following his conviction a new inquest was ordered into the death of the two sisters, and their bodies were exhumed and further examined. The autopsy revealed evidence that in each case death had occurred before incineration, and that the cause of death was probably from gunshot wounds to the head and/or a blow with a blunt instrument. There was further scientific evidence which suggested that the car had been deliberately lit within the cabin, and with the assistance of petrol. As a result of the fresh inquest Thompson was committed for trial and was later convicted in the Supreme Court of the Australian Capital Territory of murdering the sisters. He received two further life sentences.

The most interesting argument on appeal to the Federal Court was that the Supreme Court of the Australian Capital Territory did not have jurisdiction to try Thompson in that there was insufficient evidence to establish that the deaths of the two sisters had occurred in the A.C.T. The Crown case was that the collision and fire had been staged in order to conceal the fact that Thompson had shot the girls either at the scene or somewhere else. The scene of the fire was only 40-45 metres from the N.S.W. border. However, the highway upon which they had been travelling extended southwards some 10-12 kilometres along the border before crossing back into N.S.W. Since the evidence suggested that Thompson and the two girls had been to Bredbo in N.S.W. and were returning to Canberra when the girls were killed, there was a possibility that the murders had occurred in New South Wales.

The Federal Court held, pursuant to section 25 of the Crimes Act 1900 (N.S.W.) in its application to the A.C.T., that jurisdiction depended upon the occurrence within the geographical limits of the A.C.T. of the death of the two girls or the act or acts causing their deaths. Although the evidence as to where the deaths took place was sparse,

such evidence as there was pointed to the A.C.T. as being that place, and certainly such a finding was open to the jury. Indeed, the Court held, they must have so decided. Thompson has since applied for special leave to appeal to the High Court.

In conclusion, it should be mentioned that the Special Committee of Solicitors-General has drafted a Bill for model legislation to overcome such a jurisdictional argument, by establishing presumptive jurisdictions in homicides and major assaults where there is difficulty in determining the place of commission. However, it is understood that the terms of this proposed legislation have yet to be finalised.

Papadopoulos - In this case the defendant had been granted bail in respect of two charges, including one of rape, alleged to have been committed in October 1976. However, he failed to appear at the committal proceedings in February 1977 and in fact he had resided interstate for some ten years before he was apprehended in Western Australia in August 1986 and extradited to the A.C.T. In May 1987 he was convicted on the charge of rape and sentenced to a term of four years imprisonment, but to be suspended forthwith upon his entering into a recognisance to be of good behaviour for four years and on the condition that he pay $2000 compensation to the victim.

At first glance this sentence appeared to be inadequate and accordingly consideration was given to whether the Crown should lodge an appeal.

At the time of the offence Papadopoulos had resided in Queanbeyan and was married with three young children. Following the commission of the offence he was rejected by his wife and had not been in contact with her since, although he had maintained indirect contact with his children through his brother. When he absconded on bail he went to Perth, and in 1977 he had commenced a relationship with a woman and had lived with her and her four children from a former marriage since that time. Apart from one traffic offence, Papadopoulos had no other prior convictions, and since the offence he had led a blameless life apart from another traffic offence.

In sentencing Papadopoulos Miles CJ noted that, while rape was a serious crime, this offence had not been at the more serious end of the scale. Further, the law had recently been amended with a maximum penalty of twelve years imprisonment provided for the new offence of sexual intercourse without consent, as opposed to that of life imprisonment for the offence of rape.

The Office agreed with the sentencing Judge that, while Papadopoulos' blameless life after the offence was not a mitigating factor, nevertheless it rendered irrelevant the sentencing principles of personal deterrence and

rehabilitation. Rather, the relevant sentencing principles were those of general deterrence and retribution. As to the latter, the community might well have felt that there had been no punishment of Papadopoulos at all. On the other hand, accepting the evidence that this matter had weighed heavily on his mind since the offence, it could be said that the cumulative effect of that, the trial, conviction and penalty imposed, was retribution. It was considered that sentencing courts would not regard this case as setting a precedent to be followed in future cases.

In the end result it was decided not to lodge an appeal. While the Federal Court may well have come to the conclusion that the sentence imposed fell short of satisfying the requirements of general deterrence and retribution, it was considered that it would nevertheless have declined in the circumstances of this case to order that Papadopoulos serve a custodial sentence.

Hagen and Weatherall - On 5 March 1987 Anthony John Hagen was found guilty by a jury of having murdered Colleen Anne Ransley at Canberra in the Australian Capital Territory on 21 October 1986. Stephen Edmund Weatherall was also found guilty by the same jury of being an accessory after the fact to the murder committed by Hagen. Both men had pleaded not guilty.

The Crown case against the two men was that they had met the deceased at a club in the Canberra suburb of Mawson. The two men and the deceased continued to drink in each other's company and with others there, and elsewhere, until the evening. Both men and the deceased then travelled by taxi to her flat in Mawson, stopping at a hotel on the way to purchase alcohol.

All three entered the flat and the two men continued drinking. After a short period of time Weatherall left the flat because of the continued insults from the deceased which had persisted throughout the afternoon. After Weatherall had left the flat, Hagen strangled the deceased with an electric cord which he had taken from the kitchen area of the flat. The killing occurred sometime between 7.00pm and 8.00pm. A short time later the two defendants were seen together in conversation.

Later that night Hagen, in the presence of other persons including Weatherall, admitted to killing a person. The two men spent the night at Weatherall's home and the next day Weatherall further assisted Hagen by arranging for his father to drive them to Hagen's residence to pick up some clothes, then to two banks in different suburbs of Canberra so that he could obtain money. They were then both driven by Weatherall's father to Yass to catch a train south. A few days later the two men were apprehended by Victorian police at a small town situated in New South Wales on the Murray River. They were extradited to Canberra to face the criminal charges.

On 26 March 1987 Hagen was sentenced to fifteen years imprisonment with a non-parole period of nine years. Weatherall was sentenced to three years imprisonment with a non-parole period of twelve months. At the time of writing the Federal Court has reserved judgment on appeals by both Hagen and Weatherall, and on the appeal by the Crown against the sentence imposed on Hagen.

Suen - In this case the Crown appealed against the inadequacy of a sentence of eight years imprisonment with a non-parole period of four years for possessing 129 grams of pure heroin for supply. There had been no suggestion in the case that Suen was a user of heroin and the Court at sentence proceeded on the basis that the facts permitted of no conclusion other than that Suen's possession of the heroin had been for purely commercial purposes. Further, the heroin was the largest amount ever seized in the Australian Capital Territory in one lot.

Recently the Federal Court handed down its decision allowing the Crown's appeal. The Court substituted a sentence of thirteen years imprisonment with a non-parole period of seven years.

R. v. Dainer and Anor; Ex Parte Cooke - In this matter a prerogative writ of certiorari was sought by the Office to quash a decision of a magistrate who had disqualified himself from the further hearing of a matter on the basis that his impartiality had been challenged by the defendants. A writ of mandamus was also sought to compel him to continue with the hearing in the case. After hearing argument the Supreme Court indicated that the order nisi for mandamus would have been made absolute but for advice (which later proved to be mistaken) to the Court by counsel for one of the respondents that to do so would have been futile as the magistrate was not in the short term available to continue hearing the matter.

Brown - On 11 February 1987 Alfred Charles Brown was found guilty by a jury of having murdered Daryl Tony Burgess on 25 July 1986. He was sentenced by Spender J to imprisonment for a term of fourteen years, with a non-parole period of eight years.

Brown has appealed against both his conviction and sentence, while the Crown has appealed against the sentence. At the time of writing the appeals have not been listed for hearing.

Tobin and Bork - This case was significant in that it marked the first trial in the Supreme Court of the Australian Capital Territory under the new sexual offences legislation introduced by the Crimes (Amendment) Ordinance (No. 5) 1985, (No.62). Under that legislation the common

law offence of rape was repealed and replaced by a gradation of sexual offences.

Tobin and Bork had attacked a girl at the railway station in Canberra. Tobin was found guilty of sexual intercourse without consent (section 92D(2)). Bork, who had not had sexual intercourse with the victim, but had assisted Tobin by holding her down, was guilty of sexual assault in the third degree (section 92C(2)). Each was sentenced to a term of seven years for these offences, the maximum being fourteen years.

DLS Adelaide

Gagliardi and Maurici - This prosecution involved a conspiracy to avoid excise duty payable on 1000 cartons of St Agnes Brandy which had been entered for export. Instead of loading the export shipping container with all of the duty-free brandy the defendants had filled the container with cheap spumante except for the final layer of cases nearest the container door which consisted of cases of St Agnes Brandy. When Customs officers opened the container for inspection prior to export all they could see where the St Agnes cartons. However, upon removal of the first layer of cartons the cases of spumante were discovered. A large quantity of the St Agnes Brandy had been decanted into other bottles, labelled 'Emperor' Brandy, and then sold on the open market.

One defendant pleaded guilty to the charges and the other defendant was found guilty following a trial. Both defendants are awaiting sentence at the time of writing.

Krenn v. Klitscher - This case involved an appeal by the prosecution against the inadequacy of the sentence imposed in relation to offences of failing to lodge tax returns contrary to the recently enacted sections 8C and 8H of the Taxation Administration Act 1953. The magistrate had imposed a fine of $950 in respect of the section 8C offences, but had convicted without penalty in respect of the more serious section 8H offences. After observing that the legislation specifically envisaged a graduating scale of penalties from section 8C through to section 8H the court on appeal concluded that the magistrate had erred. In upholding the appeal the Court increased the fine to $1750.

Morgan and Piacquadio - These defendants were charged with manufacturing heroin contrary to the provisions of the Narcotic Drugs Act 1967. The illicit laboratory was discovered by the police when conducting a search upon premises in the outskirts of Adelaide.

Morgan was sentenced to two years imprisonment and Piarcquadio to twelve months imprisonment. However, the sentencing judge ordered that they be released pursuant to

section 20 of the Crimes Act 1914 upon entering into a bond. A Crown appeal against the leniency of the sentence is presently under consideration.

General and Railway Supplies Pty Ltd - This prosecution has been mentioned elsewhere in this Report in the context of the necessity to request the Attorney-General to sign an ex officio indictment to overcome the inability of the Magistrate to commit the company for trial. The charges laid against the company related to applications for commencement grants from the Australian Industrial Research and Development Incentives Board. One of the criteria for receipt of a grant is that any industrial research and development on any given project must have been carried out by an Approved Research Organisation under the Act. Accompanying the defendant company's applications were copies of invoices purporting to have originated from such an Approved Research Organisation. However, the evidence established that the invoices were forgeries and had been prepared within the defendant company, although there was insufficient evidence to establish the person or persons responsible. The company pleaded guilty through its counsel and was fined $1500 and ordered to make reparation in the sum of $8906. The offences occurred prior to the amendments to the Crimes Act in 1982 substantially increasing the monetary penalties for corporations convicted of Commonwealth offences.

DLS Hobart

Mossop - This was a prosecution against a husband and wife for fraud on the Department of Social Security. Verdicts of guilty on some charges were returned by the jury after a two week trial. However, the jury was unable to agree in respect of twenty four counts against Mrs Mossop. A retrial was ordered which resulted in verdicts of guilty on all counts. Sentences of imprisonment were imposed following the first trial on both accused and on the retrial of Mrs Mossop a further sentence of imprisonment of four months was imposed.

Trade Practices Commission v. Coles Myer - This was a prosecution in the Federal Court for an offence against section 79 of the Trade Practices Act 1974 for the supply, in contravention of section 62(1) of the Act, of goods (Glucomanan in tablet form) in respect of which there was in force a notice issued by the Attorney-General in accordance with section 62(2)(d) of the Act declaring the goods to be unsafe. The banned substance had the characteristic of swelling dramatically when in contact with water such that if a tablet containing the substance was swallowed and became lodged in the throat it could cause suffocation. The tablets were sold as a dietary control. Coles Myer pleaded guilty to the charge and was fined $500.

DLS Darwin

Bird - The most significant prosecution matter conducted by this Office during the year involved the committal for trial of Gary Bird on charges in which it is alleged that he unlawfully obtained, over a period, more than $2 million from his employer, a Commonwealth statutory authority.

Fa - In last year's report reference was made to a number of prosecutions under the Fisheries Act 1952 which had resulted in the conviction of the masters of three Taiwanese fishing vessels and, in two of the matters, the forfeiture of the vessel, its fishing equipment and the fish on board. In the third matter the court had ordered forfeiture of the fishing equipment and the fish on board. It was noted that all three matters were subject to appeal.

During this year the first of the appeals was determined in the Supreme Court of the Northern Territory. The appellant challenged the constitutional validity of the Australian Fishing Zone, the method of navigational positioning of vessels by officers of the Royal Australian Navy, and argued that mens rea was an ingredient of the offences. It was also argued that forfeiture of the property (valued at approximately $110 000) was not appropriate. The appeal was dismissed.

TABLE 1

Matters Dealt with Summarily in 1986/87[i][v]

State	No. of Defendants	No. of Convictions[ii]	No. of Acquittals	Other[iii]
N.S.W.	1099 (1391)	944 (1231)	46 (31)	109 (129)
Vic.	1247 (2161)	1177 (2109)	41 (32)	29 (20)
Qld	644 (413)	607 (385)	12 (4)	25 (24)
W.A.	671 (498)	649 (454)	14 (7)	8 (37)
S.A.	739 (868)	701 (844)	5 (15)	33 (9)
Tas	173 (151)	131 (143)	8 (2)	34 (6)
N.T.	207 (80)	126 (65)	0 (1)	81 (14)[iv]
TOTAL	4780 (5562)	4335 (5231)	126 (92)	319 (239)

Notes

(i) Figures for 1985-86 are in brackets.

(ii) The 'No. of Convictions' represents all cases where a defendant was convicted on at least one charge, or at least one charge against a defendant was found proven.

(iii) e.g. all charges against a defendant withdrawn or no evidence offered by the prosecution in respect of any charge.

(iv) In 1986 the Australian Electoral Commission instituted proceedings against a large number of persons for offences under the Commonwealth Electoral Act 1918. Upon referral of the matters to DLS Darwin to continue the prosecutions that Office advised that the summonses were defective in that regulation 81(4) of the Electoral and Referendum Regulations had not been complied with. The Commission subsequently decided not to proceed with 53 of the matters.

(v) It is not possible to provide a similar breakdown of summary prosecutions conducted by the Canberra Office. In the financial year there were a total of 35 904 matters registered in the A.C.T. Magistrates Court, many of which were disposed of at the first or a subsequent mention, that is, they were not set down for hearing. The Canberra Office does not have the resources to record all matters that are disposed of other than at a hearing in the Magistrates Court or the Childrens Court as briefs for many undefended cases are received from the AFP at court on the morning of the mention. The introduction of the CMM system will make possible a breakdown of all Canberra hearing matters in future years.

TABLE 2

Legislation : Matters dealt with Summarily in 1986-87(i)(ii)

State	Crimes Act	Social Security	Customs Act	Health Insurance	Taxation Legislation	Bankruptcy Act	Other
N.S.W.	238 (225)	485 (900)	51 (39)	6 (4)	138 (102)	7 (1)	174 (120)
Vic.	271 (304)	552 (762)	23 (33)	4 (1)	20 (43)	12 (12)	365 (1006)
Qld	211 (113)	251 (120)	18 (20)	3 (-)	34 (59)	4 (-)	123 (101)
W.A.	224 (167)	239 (134)	18 (24)	1 (2)	21 (16)	10 (18)	158 (137)
S.A.	189 (194)	358 (264)	29 (26)	10 (2)	31 (18)	7 (10)	115 (354)
Tas.	20 (36)	78 (52)	5 (-)	- (-)	1 (7)	8 (1)	61 (55)
N.T.	22 (21)	50 (17)	6 (-)	3 (-)	7 (3)	0 (1)	119 (38)
TOTAL	1175(1060)	2013(2249)	150(142)	27 (9)	252 (248)	48 (43)	1115 (1811)

Notes
(i) Figures for 1985-86 are in brackets.
(ii) See note (v) to Table 1.

TABLE 3

Matters dealt with on Indictment in 1986/87(i)

State	No. of Defs	Pleas of Guilty	No. of Trials	Outcome of Trials			
				No. of Defendants	No. of Convictions(ii)	Acquittals	Other(iii)
N.S.W.	199 (152)	103 (86)	59 (47)	96 (66)	69 (48)	15 (16)	12 (2)
Vic.	55 (40)	37 (31)	12 (9)	18 (9)	12 (6)	6 (3)	- (-)
Qld	108 (62)	86 (48)	22 (12)	22 (14)	18 (11)	4 (3)	- (-)
W.A.	28 (44)	23 (32)	4 (7)	5 (12)	2 (6)	- (6)	3 (-)
S.A.	66 (115)	56 (101)	7 (12)	10 (14)	8 (11)	- (3)	2 (-)
Tas.	5 (3)	1 (1)	3 (2)	4 (2)	4 (1)	- (1)	-
A.C.T.	80 (97)	33 (53)	41 (40)	47 (44)	28 (23)	16 (14)	3 (7)
N.T.	5 (6)	3 (5)	2 (1)	2 (1)	1 (1)	1 (-)	- (-)
TOTAL	546 (519)	342 (357)	150(130)	204(162)	142(107)	42 (46)	20 (9)

Notes

(i) Figures for 1985-86 are in brackets.

(ii) The 'No. of Convictions' represents all cases where a defendant was convicted on at least one charge, or at least one charge against a defendant was found proven.

(iii) e.g. jury unable to agree on verdict or trial aborted after it had commenced, and any retrial was not completed in the year under review.

TABLE 4

Legislation : Matters dealt with on Indictment in 1986/87[i][ii]

State	Crimes Act	Customs Act	Health Insurance	Taxation Legislation	Bankruptcy Act	Other
N.S.W.	63 (48)	118 (78)	3 (8)	- (-)	- (1)	15 (17)
Vic.	28 (18)	25 (20)	- (-)	1 (1)	- (-)	1 (5)
Qld	78 (42)	18 (8)	- (-)	- (-)	2 (-)	10 (9)
W.A.	10 (12)	17 (13)	- (3)	- (-)	- (1)	1 (5)
S.A.	37 (35)	21 (16)	3 (3)	- (1)	1 (2)	4 (8)
Tas.	3 (2)	- (-)	- (-)	- (-)	1 (-)	1 (1)
N.T.	2 (3)	3 (2)	- (-)	- (-)	- (-)	- (1)
TOTAL	221 (160)	202(137)	6(14)	1 (2)	4 (4)	32 (46)

Notes

(i) Figures for 1985-86 are in brackets.

(ii) See Table 7 for the categories of cases listed for trial in the Supreme Court of the Australian Capital Territory in 1986-87. All prosecutions on indictment in the A.C.T. involved offences under A.C.T. legislation.

TABLE 5

Prosecution Appeals against Penalty

	Type of Proceeding			Type of Matter			Outcome of Appeal		
State	No. of Appeals	Summary	Indictment	Drugs	Social Security	Other	Upheld	Dismissed	Undecided
N.S.W.	11	-	11	8	-	3	6(i)	2	3
Vic.	16	14	2	-	6	10	12	1	3
Qld	2	1	1	-	2	-	1	1	-
W.A.	10	10	-	-	3	7	-	-	10
S.A.	2	-	2	-	-	2	2	-	-
Tas.	1	1	-	-	-	1	1	-	-
A.C.T.	1	-	1	1	-	-	1	-	-
N.T.	2	2	-	-	-	2	-	2	-
TOTAL	45	28	17	9	11	25	23	6	16

Note

(i) In 2 cases in N.S.W. the appeals were instituted with a view to the re-scheduling of Commonwealth and State sentences in accordance with section 4(5) of the Commonwealth Prisoners Act 1967 (see Sentencing of Commonwealth Offenders in Chapter 8)

TABLE 6

Other Prosecution Appeals

State	No. of Appeals	Decision Appealed from			Outcome of Appeal		
		Failure to Convict or Commit	Grant of Bail	Other	Upheld	Dismissed	Undecided
N.S.W.	10	4	4	2	6(i)	1	3
Vic.	-	-	-	-	-	-	-
Qld	-	-	-	-	-	-	-
W.A.	1	1	-	-	-	-	1
S.A.	12	1	3	8	1	3	8
Tas.	6	6	-	-	1	4	1
A.C.T.	1	-	-	1	-	1	-
N.T.	-	-	-	-	-	-	-
TOTAL	30	12	7	11	8	9	13

Note

(i) All 4 prosecution applications in N.S.W. to review the grant of bail were successful in that, although in each case the prosecution had sought the revocation of bail, in 3 of the matters more stringent bail conditions were substituted.

TABLE 7

Categories of cases listed for trial in the A.C.T. Supreme Court in 1986/87

Murder	2
Rape	7
Accessory After the Fact to Murder	1
Robbery	5
Arson	3
Culpable Driving	4
Indecent Assault	5
Blackmail	5
Kidnapping	1
Break and Enter	4
Malicious Wounding	4
Embezzlement	1
Assault	5
Possession of Drugs for Sale or Supply Drugs	16
Theft	2

5. MAJOR FRAUD

The Major Fraud branches were specifically established to handle the 'bottom of the harbour' matters, but it soon became apparent that sophisticated criminal activity was heavily involved in revenue related fraud. In response the DPP has developed a specialist group of officers equipped with the expertise to handle large complex commercial fraud prosecutions.

The Major Fraud branches are now handling a myriad of matters which are revenue related. These matters are extremely time consuming and resource intensive due to their size and complexity. However, as indicated by the matters described below the enormous amount of work involved in the prosecution of large scale fraud has achieved good results. Apart from those defendants who have either pleaded guilty or been convicted by a jury of conspiring to defraud the Commonwealth in 'bottom of the harbour' matters or other revenue based frauds, committal proceedings against a number of other defendants have reached the stage where either the defendants have been committed to stand trial, a prima facie case has been found, or the case is at the final address stage. Most of the committal proceedings have taken over 100 hearing days, generally involving over 100 witnesses and thousands of exhibits. Most have also been strenuously defended.

An essential feature in the handling of major fraud matters is the close working relationship between the DPP, the Australian Taxation Office, the Australian Federal Police, and other investigatory agencies that may be involved. The multi-disciplined approach that proved to be a most effective way of investigating 'bottom of the harbour' matters, continues to be used in relation to other areas of revenue based fraud. In Sydney, for example, an Investigation Task Force comprising officers from the Australian Federal Police and the Australian Taxation Office is currently investigating a number of major cases of alleged sales tax fraud. Major Fraud lawyers have been responsible for providing legal advice and assistance in the preparation of the briefs of evidence.

The investigation of major fraud will never be an easy task but the difficulties that will inevitably arise can be reduced with the involvement of the DPP in the investigation process at the earliest possible point of time. Past experience has demonstrated that early involvement will reduce the period of delay in laying charges and/or in instituting proceedings. In this regard, as noted elsewhere in this Report, in a series of cases commencing with the September 1986 case of **Herron v. McGregor** (1986) 6 NSWLR 247, the N.S.W. courts have confirmed that they have power to stay a prosecution on the ground that it is an abuse of process. Delay in bringing proceedings may, in all the

circumstances, be so oppressive to an accused as to amount to an abuse of process.

Large scale revenue fraud cases prosecuted by the DPP have not infrequently come to light some years after the event, and involve lengthy periods of investigation before any sensible assessment can be made as to whether there is sufficient evidence available to justify charges being laid. There is also usually considerable preparation required thereafter to organise the evidence in a manner sufficient to present it in committal proceedings. Because committal and trial proceedings are likely to be long and protracted and the defendants rarely in custody, the courts understandably are unable to give priority to their being listed. The DPP and other law enforcement agencies involved in these cases thus face very real difficulties in expediting their disposition.

The issue of delay in the investigation and prosecution of this type of case was raised by the respondents to the Director's appeal against the sentences imposed at first instance on Rosenthal, Su and Oades (see separate report below). In its reasons for judgment delivered on 26 June 1987 the Victorian Court of Criminal Appeal observed:

> It was put that the trial judge correctly characterised the offences as being of some antiquity, thus justifying leniency. We are not satisfied that the offences are in fact ancient or deserve that description. We are persuaded that the time spent by the tax officers in investigating the nature of the scheme both here and overseas required many hours of effort by many investigating personnel. All that would have required a great deal of time. We have taken into account that, whilst this agreement was reached no later than 1977, it did continue for some years, persisting until 1982. The time lapse between the unmasking of the offence and committal proceedings was not inordinate, notwithstanding that the offence had its nascence a decade ago.

Apart from what might be described as the logistical problems in investigating and prosecuting major fraud cases, the central issue will always be whether the available evidence is sufficient to establish the requisite mens rea. Fraud by its nature lacks fixed characteristics; it is a broad concept, and until recently there has been only a limited consideration as to whether the ingenuity of the tax avoidance industry has trespassed into the area of fraud. Apart from the rather crude tax frauds involving the transfer to straw directors who could not be traced of companies that had been stripped of their current year profits, there are schemes which include a purported treatment of the current year profits. Then there are the schemes where the fraud may be said to lie in the manner of its implementation rather than in its conception. A difficulty facing the major fraud lawyer is that schemes which are apparently fraudulent are often put forward as lawful. The diverse nature of revenue frauds, and the fact that they vary in form and degree, does

create problems. Nevertheless, the issue is not one of commercial validity but of criminal liability, and the prosecution must therefore prove dishonesty.

The following are details of certain of the prosecutions handled by the Major Fraud branches during the year.

Melbourne Office

Rosenthal, Su and Oades - These men (respectively a solicitor, accountant and futures broker), together with a number of other persons, promoted a tax minimisation scheme to high income earners in the middle 1970s to early 1980s. The conspiracy involved commodities futures trading whereby participants nominated the loss required, losses were arranged on the Sydney Metals Exchange, mirror transactions then occurred on the London Metals Exchange and funds were channelled from Australia to London, Lichtenstein, Switzerland and ultimately to Singapore. Those funds were on-lent through a captive merchant bank to the participant who had nominated the loss. The participant then claimed the trading loss in his or her tax return. The cost to the participant was 23 cents in the dollar and the commission was then shared between the three accused and another promoter. If the scheme had been successful it would have resulted in a loss of revenue to the Commonwealth of well over $1 million.

On 12 March 1987 Rosenthal, Su and Oades pleaded guilty to a charge of conspiracy to defraud the Commonwealth contrary to section 86(1)(e) of the Crimes Act 1914 after a trial which had lasted twenty five days in the Melbourne County Court. They were sentenced on 3 April 1987, Rosenthal and Su being given suspended sentences and Oades being placed on a bond. The Director appealed against these sentences and on 26 June 1987 the Court of Criminal Appeal upheld the appeal and sentenced Rosenthal, Su and Oades to eighteen, fifteen, and nine months imprisonment respectively. In each case the Court declined to fix a minimum term.

Baker, Fisher, Leaver, Coghill, Edwards, Collie and Grant - This case involved the implementation and promotion of a sales tax avoidance scheme from August 1979 to March 1982. During this period a total of $81.9 million worth of goods were placed through the scheme with a total of $16.2 million in sales tax being lost to the revenue. Sales tax investigation officers commenced enquiries in relation to the scheme in September 1979 and it was not until October 1982 that the accused were arrested. Committal proceedings were commenced in March 1983 but were not completed until December 1984 due to the delays caused by proceedings under the Administrative Decisions (Judicial Review) Act 1977 instituted by several of the defendants. Baker (the originator of the scheme), Leaver and Coghill pleaded to a count of conspiracy to defraud the Commonwealth and received gaol sentences. In addition, Coghill pleaded guilty to a further count of conspiracy to defraud relating to his involvement in current year profit stripping activities.

Fisher pleaded guilty to a count of conspiracy to defeat or prevent the enforcement of a law of the Commonwealth and received a bond. Edwards, Collie and Grant went to trial in March 1987. After a trial lasting thirty days the jury convicted Collie and Edwards on a count of conspiracy to defraud the Commonwealth and acquitted Grant. Collie (a solicitor) and Edwards (an accountant) were each sentenced to a term of imprisonment. Their appeals against sentence were dismissed on 6 July 1987.

Lockyer and Others - In August 1985, six defendants were committed for trial in relation to 'bottom of the harbour' charges of conspiracy to defraud. The trial of the defendants was listed for August 1986 in the Victorian Supreme Court. In September 1985 the defendant Ian Robert Beames pleaded guilty to conspiracy to defraud and was sentenced to two years imprisonment. His decision to plead guilty was followed by guilty pleas from two further defendants in July 1986 - Donald Brookes Lockyer, who was sentenced to two years and six months imprisonment, and Kenneth McTrusty, who was sentenced to six months imprisonment. The remaining three defendants underwent a six month trial which resulted in their acquittal in March 1987.

Rumpf - This defendant pleaded guilty on 29 September 1986 to having been involved in bottom of the harbour tax evasion involving approximately $12.3 million, resulting in Rumpf receiving approximately $4 million in commissions. Charges were laid under section 86(1)(e) of the Crimes Act 1914 and section 5(2) and 13 of the Crimes (Taxation Offences) Act 1980. On 19 December 1986 Rumpf was sentenced to a total effective sentence of two years and three months imprisonment with a minimum term of eighteen months. In March 1987 the Director successfully appealed against the sentence and an effective sentence of three years imprisonment with a minimum term of two years, together with a fine of $35 000, was substituted. On 24 June 1987 the Court of Criminal Appeal reopened the appeal as it had not been informed that Rumpf was a bankrupt.

Sydney Office

Cantwell - On 5 May 1987, after a two-week trial, David William Cantwell was convicted by a jury on three counts of conspiring to defraud the Commonwealth contrary to section 86(1)(e) of the Crimes Act 1914. He was then sentenced to two years imprisonment with a minimum term of sixteen months. This was the first trial for the Major Fraud Branch of the Sydney Office. At the trial the Crown alleged that Cantwell's organisation was responsible for the stripping of assets from forty three companies with a total contingent tax liability in excess of $2.5 million. Evidence was adduced that his organisation had grossed in excess of $5.3 million from the stripping of companies with current year profits. An earlier trial before Mr Justice Grove in August 1986 had miscarried. One of Cantwell's co-conspirators, Max Opitz, pleaded guilty in November 1986 to one count of conspiring to

defraud the Commonwealth and was sentenced to fifteen months imprisonment with a minimum term of nine months.

Other Matters - It is expected that five defendants will be indicted for offences under the Crimes (Taxation Offences) Act 1980 before the end of 1987. These trials will be the first defended hearings of charges under that Act. In another matter a defendant has been committed to stand trial early next year for conspiracy to defraud the Commonwealth contrary to section 86(1)(e) of the Crimes Act.

A further defendant has been committed to stand trial after a committal proceeding which occupied 102 sitting days but as yet no trial date has been fixed.

Two other committal proceedings against a further fifteen defendants have reached the final address stage after a combined total of 208 sitting days. In relation to these committal proceedings there have been extensive delays caused by the unavailability of transcripts.

A committal proceeding against a further defendant is currently under way and a committal proceeding against a further two defendants for offences under the Crimes (Taxation Offences) Act 1980 is scheduled to commence in February 1988. The latter committal proceeding is subject to an application to stay the prosecuton on the ground of alleged delay.

Committal proceedings against four defendants charged with offences of conspiracy to defraud the Commonwealth under section 86(1)(e) of the Crimes Act and conspiracy to hinder the enforcement of the Sales Tax Act under section 86(1)(b) of the Crimes Act in relation to an alleged sales tax evasion scheme were heard over thirty four sitting days between June and November 1986. After the magistrate had found a prima facie case against the defendants they elected to present evidence and the proceedings were adjourned to July 1987.

In November 1986 four defendants were charged with offences under sections 86(1)(e) and 86A of the Crimes Act for having allegedly conspired to defraud the Commonwealth of sales tax. One defendant, John Edward Kruger, pleaded guilty on 18 March 1987 and was sentenced to imprisonment for two years with a minimum term of six months on condition that he then enter into a recognisance to be of good behaviour for the remaining eighteen months of his sentence. It was alleged that Kruger had conspired to defraud the Commonwealth of approximately $293 000 in sales tax. After a three-week committal proceeding involving the other three defendants in March 1987 one was committed for trial with the Magistrate finding prima facie cases against the other two. One of those two defendants has elected to give evidence and the committal proceedings against both of them are scheduled to be completed in November 1987.

Another person has been charged with five counts of false pretences under section 29A(2) of the Crimes Act in relation to another alleged sales tax fraud.

An Investigation Task Force comprising officers from the Australian Federal Police and Sales Tax Investigation officers from the Australian Taxation Office is currently investigating a number of major cases of alleged sales tax fraud. Lawyers from the Major Fraud Branch of the Sydney Office have been responsible for providing legal advice and guidance in the preparation of the briefs of evidence.

Brisbane Office

During the year two trials were conducted in Brisbane with both trials resulting in convictions being recorded. An application for special leave to appeal to the High Court, and an appeal against conviction to the Queensland Court of Criminal Appeal, were also heard.

Maher - Brian James Maher applied for special leave to appeal to the High Court against both his conviction on a charge under section 430 of the Queensland Criminal Code of conspiracy to defraud a company (being count 20 in the indictment), and the sentence of five years imprisonment imposed in respect of that charge. That sentence was being served concurrently with a sentence of two years and nine months imposed following his conviction on a charge of conspiracy to defraud the Commonwealth contrary to section 86(1)(e) of the Crimes Act. The application was heard on 31 March 1987, although the Court only allowed argument on the issue whether the jury had been properly sworn to try the count.

After Maher and his co-defendant Donnelly had been arraigned, but before being put in the charge of the jury, the Crown had sought to change the indictment by deleting counts 5 and 14 (which charged conspiracies to defraud contrary to section 86(1)(e) of the Crimes Act) and to add two new counts (Nos 20 and 21) which were laid under section 430 of the Criminal Code. Although counsel for the co-defendant Donnelly objected to the proposed change, the trial judge ruled that the matter could be dealt with under the provisions of the Code relating to the joining of charges, and the Crown's application was acceded to. Maher and Donnelly were then re-arraigned and put in the charge of the jury. On 14 October 1985 Maher was convicted on the substituted count No.20.

In its judgment delivered on 24 July 1987 the High Court granted Maher's application for special leave to appeal and allowed the appeal. The Court held that consequent upon the addition of the two counts in the indictment the relevant statutory provisions required that the jury be resworn, and that the defendants were entitled to be informed afresh of their right to challenge again any member of the jury, either for cause or peremptorily. Those provisions were mandatory and a failure to comply with them rendered the trial on counts 20 and 21 a nullity. The conviction on count 20 should therefore be set aside.

At the time of writing the question whether Maher should be retried on the charge represented by count 20 is under consideration.

Spence - The trial of Graham David Spence commenced on 21 July 1986 and concluded on 15 August 1986. He was convicted on one count of conspiracy to defraud the Commonwealth and sentenced to imprisonment for twelve months. A further count of conspiracy to prevent or defeat the execution or enforcement of a law of the Commonwealth, namely the Income Tax Assessment Act 1936, was not proceeded with following the trial judge requiring the Crown to elect which charge should go to the jury. Spence's role in the conspiracy was to procure the end shareholders in the companies dumped in the current year profit stripping activities of Maher and his associates.

Ahern - This trial commenced on 22 September 1986 and concluded on 19 December 1986 with John Waymouth Ahern's conviction on one count of conspiracy to defraud the Commonwealth. He was sentenced to imprisonment for eighteen months. The Crown case was that between 1 January 1974 and 30 July 1978 Ahern had procured companies with current year profits for the Maher organisation with the knowledge that they were being placed in the hands of persons incapable of meeting the companies' tax liability. He derived considerable gain from the enterprise, sharing commissions with Maher on an equal basis. Ahern's appeal against his conviction was dismissed by the Court of Criminal Appeal early this year.

Sales Tax Frauds - On 2 June 1987 a company director was charged with seventeen offences of defrauding the Commonwealth contrary to section 29D of the Crimes Act 1914 and seventeen offences of imposition upon the Commonwealth by an untrue representation contrary to section 29B of the Crimes Act. The charges arise out of the defendant's activities as a director of a company that had imported a number of boats from Hong Kong between March 1982 and November 1984 for sale in Australia. It is alleged that the defendant completed sales tax returns on behalf of the company and that in so doing he misrepresented the purchase price of the boats, thereby avoiding payment of sales tax totalling approximately $300 000.

At the time of writing no date has been set for committal proceedings to commence although it is anticipated that they will be held some time later this year. Proceedings have been instituted in the Supreme Court of Queensland pursuant to Part IIIB of the Evidence Act 1905 for an order that a Letter of Request be issued from the Supreme Court to the High Court of Hong Kong to enable evidence to be taken from witnesses who are either unable or unwilling to come to Australia to give evidence in this matter.

Perth Office

Committal proceedings involving persons alleged to have defrauded the Commonwealth in relation to pre-tax profit stripping activities resulted in the discharge of the accused persons. A trial involving two men alleged to have defrauded the Commonwealth under similar circumstances was aborted and the retrial has yet to commence. In this trial TV monitors were used to assist the jury to understand the quite complex evidence and the role in the Crown case of the thousands of documents to be tendered. The monitors were so placed that the judge, the jury, the witness, the accused and prosecution and defence counsel each had a screen within view. Relevant documents, when placed below a powerful camera, immediately appeared on each screen, thus enabling all parties to comprehend and follow the evidence in relation to the documents. It is apparent that in complex major fraud trials every effort has to be made to simplify the jury's task, and the use of TV monitors is one of several DPP initiatives directed towards this end.

DLS Adelaide

Aston, Burnell and Thompson - These defendants were charged under section 86(1)(e) of the Crimes Act with conspiracy to defraud the Commonwealth of income tax which was due or likely to become due from individual taxpayers. In essence the fraudulent scheme involved taxpayer participants in the scheme claiming losses on trading in commodity futures which in fact had not been incurred. Taxpayers were solicited and introduced to the scheme by Aston and Burnell. A taxpayer participant would be required to pay a sum of money by bank cheque to Southern Cross Commodities Pty Ltd (Southern Cross). On the same day, in exchange for the bank cheque, Southern Cross would return the money in cash to the taxpayer less a commission of 10%. Thompson would sign a cheque drawn on Southern Cross account payable to cash for this purpose. The taxpayer would then claim the loss of the full amount provided to Southern Cross as investment losses in futures trading conducted through Southern Cross as broker. Any enquiry by the Taxation Office would be met by documents produced on a Southern Cross computer by one Streckert (who had also been charged as a co-conspirator but had pleaded guilty) which showed that the taxpayer had apparently lost that amount in trading in commodity futures. The documents appeared authentic and were calculated to deceive the Taxation Office. Upon such 'proof' of losses the claim for the deduction would be allowed, although the taxpayer's only real loss was the 'commission' that had been paid.

Aston, Burnell and Thompson were each convicted by majority verdict following a trial which commenced on 27 October 1986. Each defendant was sentenced to nine months imprisonment, but ordered to be released forthwith upon entering into a recognisance in the sum of $300 to be of good behaviour for three years (this notwithstanding that in early 1985 the Court of Criminal Appeal, in allowing the Director's appeal against a non-custodial sentence imposed at first

instance on the co-conspirator Streckert, had substituted a sentence of nine months imprisonment).

The Director also appealed against the sentence imposed in respect of Aston and Burnell. On 19 March 1987 that appeal was allowed, with the Court of Criminal Appeal substituting a sentence of nine months imprisonment in each case. Applications by both Aston and Burnell to the High Court for special leave to appeal are likely to be heard in August 1987.

Other Matters - Matters on hand at the time of writing include a proposed prosecution relating to the evasion of an alleged $2.5 million in sales tax on liquor and a prosecution of a number of persons on charges under section 86(1)(e) to defraud the Commonwealth by means of a scheme involving the gifting of shares.

6. CIVIL REMEDIES

Introduction

Pursuant to section 3(2) of the Director of Public Prosecutions Amendment Act 1985 the Director recently submitted a report to the Attorney-General reviewing the performance of the expanded civil remedies function given to the DPP under that Act. Readers are referred to that report for a more detailed exposition of the DPP's civil remedy practice. The following briefly explains the nature of the DPP's role in civil remedy proceedings. The statutory basis for the DPP's civil remedies function is described in Chapter 1.

The rationale for the use of civil remedies is to strip the profits of crime from offenders, or to at least make them pay their taxes, as well as to discourage those inclined to behave in a like manner. The DPP's involvement in civil remedies is crucial for it is in a unique position to assemble information to which it has access in the exercise of its prosecution function, and to co-ordinate and supervise the activities of a variety of Commonwealth agencies against particular individuals or entities who have outstanding liabilities to the Commonwealth. The essence of the function is the ability to galvanise action.

In exercising its civil remedy function the DPP has almost invariably utilised the services of the AGS for the conduct of the actual civil litigation. The Director's power to take civil remedies is used where urgent circumstances required immediate initial action and there was insufficient time to instruct the AGS. An example would be the need to obtain an urgent injunction to prevent the imminent sale of a debtor's assets. The injunction may be initially obtained by the DPP and the conduct of the litigation then handed over to the AGS. A co-ordinating or supervising role has to date been the primary component of the DPP's civil remedy function. Matters under consideration for civil remedy action do not always fall exclusively into specific categories of recovery. For example, a target for civil remedy action may be involved in drug related activities, be receiving social security benefits to which he or she is not entitled and have bank accounts and other assets in false names. The target is unlikely to have paid tax on any of his or her receipts. Possible avenues for recovering the ill-gotten gains may include taking action for a pecuniary penalty under section 243B of the Customs Act 1901, or a recovery action based on section 140 of the Social Security Act 1947. In addition, the Commissioner of Taxation may be able to raise a taxation

assessment based on receipts or assets. It is the task of the DPP civil remedies lawyer to determine, in consultation with the other agencies concerned, the most appropriate way of quickly establishing a liability to the Commonwealth, ensuring that assets are urgently secured before they can be dissipated, and that recovery action proceeds expeditiously. Another aspect of the DPP's role is the responsibility to co-ordinate the civil process with any related criminal prosecution.

Establishment

With the introduction of the 1985 civil remedy initiative there was an increase in funding for the DPP and the Attorney-General's Department. Both organisations recruited additional staff to deal specifically with this function. The funding approved for the initiative is shown in Table A.

Table A

Funding approved for the civil remedy 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
	3 042 600	2 765 860	5 808 460

Prior to 1 July 1985 the only civil remedy work undertaken by the DPP had been a continuation of the work commenced by former Special Prosecutor Redlich. That work was confined to Melbourne, and primarily concerned the recovery of unpaid income tax.

Following the extension of the civil remedy function on 1 July 1985, civil remedies sections were set up in DPP offices in Sydney and Brisbane in addition to the section already established in the Melbourne Office. Establishment of these new sections, including initial recruitment of staff to a reasonable operational level, took approximately three months. A civil remedies section was included in the establishment of the DPP Branch which opened in Perth in December 1985.

Recovering Taxes

The impetus for civil remedies as an ancilliary to the prosecution function arose out of steps taken to combat large scale income tax fraud. Income tax has remained the major area of civil remedy action, although there has been a significant growth in activity in relation to sales tax.

Success in this area depends, naturally enough, upon the co-operation and efforts of the Commissioner of Taxation and his officers. The ATO has in the main made available the resources necessary to assist in the exercise of the function, and has been an integral part of the initiative.

All litigation in these matters has been conducted through the AGS and the results of co-ordinated action by the DPP, the ATO and the AGS are shown in Tables B and C.

Table B

Court orders in paragraph 6(1)(fa) matters 1986-87

	Judgments entered	Injunctions obtained
Sydney	8	8
Melbourne	6	4
Brisbane	11	12
Perth	4	-
Total	29	24

Table C

Judgments and amounts secured and received in paragraph 6(1)(fa) matters 1986-87

	Judgments entered or leave to enter judgments $	Amounts secured by injunction or otherwise $	Amounts received $
Sydney	10 201 732	5 379 839	10 931 611
Melbourne	29 635 830	12 475 235	9 113 363
Brisbane	8 030 992	3 164 099	1 842 411
Perth	3 206 431	542 135	3 534 237
Total	51 074 985	21 561 308	25 421 622

Categories in Table C are not mutually exclusive. Some of the amounts recorded in judgments entered and amounts received have been recovered already and are included under receipts. Not all of the balance will be recovered in full. However, before targets are proceeded against there is some preliminary investigation of their asset position. This ensures that resources are utilised where the greatest benefit will attach.

Many of the targets for civil remedy action have been involved in 'bottom of the harbour' or other tax evasion schemes. They are usually quite adept at organising a complex arrangement for their commercial affairs, typically involving an intricate series of trusts and companies. Much painstaking work is required to show the true derivation of income, and to trace the ownership of assets to the same source. In many cases there is a substantial lead time involved between the institution of civil remedy action and recovery.

Non-Tax Recoveries

Since 1 July 1985 the Attorney-General has signed eleven instruments authorising the taking of civil remedies under paragraph 6(1)(h) of the DPP Act. Instruments were sought only after consultation with the relevant agency concerned.

A class instrument was obtained on 21 August 1985 to allow the taking of civil remedies in social security matters. It was agreed with the Department of Social Security that action under the instrument would only be taken in cases involving major fraud, and that civil proceedings would not be commenced without prior consultation.

On 10 November 1986 a second class instrument was obtained in respect of monies improperly obtained under the Health Insurance Act 1973.

The remaining nine instruments signed by the Attorney-General authorised the taking of civil remedy action in respect of specified persons. Six of those instruments were signed during 1986-87. These instruments cover matters such as fraud by employees on the Australian Postal Commission and the Australian Telecommunications Commission, and fraudulent claims under the Export Market Development scheme.

The results of civil remedy action taken pursuant to paragraph 6(1)(h) are shown in Tables D and E.

Table D

Court orders in paragraph 6(1)(h) matters 1986-87

	Judgments entered	Injunctions obtained
Sydney	8	4
Melbourne	1	-
Brisbane	-	-
Perth	1	-
Totals	10	4

Table E

Judgments and amounts secured and received in paragraph 6(1)(h) matters 1986-87

	Judgments entered or leave to enter judgments $	Amounts secured by injunction or otherwise $	Amounts received $
Sydney	1 222 011	1 398 760	263 481
Melbourne	137 015	-	426 001
Brisbane	-	143 587	152 932
Perth	66 707	-	-
Totals	1 425 733	1 542 347	842 414

It should be noted that the DPP's civil remedy practice is confined to those States where the DPP has established offices. It does not extend to those places where the Directors of Legal Services act on behalf of the DPP.

Automatic Data Processing (ADP)

The sheer volume of documents involved in many civil remedy proceedings to recover tax creates difficulties in running this sort of case. A number of ADP programs have been developed to assist in both the investigation and conduct of civil remedy litigation. An example is a relational database that enables material collected from a variety of sources to be integrated and a number of different functional relationships recognised. Cases may involve a network of up to 100 entities and involve as many as 50 000 documents. Documentary information can be entered as it is collected, indexed and sorted on the system, and the system used as an ongoing investigative tool at the same time as document tracking for evidentiary purposes is catered for.

The documents are numbered and stored in order of receipt; they are indexed and cross-referenced and can be physically located through the system. Where a particular entity or group of entities is to be examined, the names of all associated entities can be produced. This makes it easier to provide relevant information to investigators, trustees in bankruptcy and liquidators. Reports can be generated which list and track assets and liabilities by name or by associated person or entity. This enables the Office to make a more informed assessment of available civil action as well as assisting in the conduct of the proceeding once it is commenced.

7. LAW REFORM

General

One of the objectives of the DPP is to provide sound, constructive and timely recommendations with respect to the laws or proposed laws of the Commonwealth relating to the Commonwealth criminal justice system. The DPP is uniquely placed to identify deficiencies in practice in existing laws as well as to provide informed assessments in the light of operational experience in relation to proposals for criminal law reform.

As reported in the last Annual Report, a Policy Branch was established within the DPP Head Office in May 1986. 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 Office was active in 1986-1987.

During 1986-87 the DPP was consulted during the development of a number of items of Commonwealth legislation. This principally concerned the law enforcement package of Bills that was introduced into the Parliament in the Autumn session of 1987. The package mainly comprised:

- the Proceeds of Crime Act 1987 (providing a mechanism for the tracing, freezing and confiscation of the proceeds of indictable offences committed against the laws of the Commonwealth and of the Territories);

- the Telecommunications (Interception) Amendment Act 1987 (extending the present interception powers of the AFP in relation to narcotic offences to certain other serious offences, and enabling the State and Territory authorities and the NCA to apply for the issue of a warrant authorising the AFP to intercept communications);

- the Mutual Assistance in Criminal Matters Act 1987 (providing the machinery for mutual assistance between Australia and other countries in criminal investigations and prosecutions).

Due to the double dissolution of the Parliament the proposed Extradition Bill (revising and codifying Australia's international extradition laws) and the Cash Transaction Reporting Bill 1987 (requiring certain cash transactions to be reported to a central Government agency) lapsed.

Taken as a whole the package represents a very significant initiative in Australia's criminal justice system. The DPP

was given the opportunity in respect of most of the Bills to comment at various stages of their development, although on a few occasions the time allowed within which to do so was less than adequate.

The most significant part of the package from the viewpoint of this Office is the Proceeds of Crime Act. The likely impact of that Act on the operations of the DPP is discussed more fully below.

The Telecommunications (Interception) Amendment Act 1987 as passed by the Parliament was substantially the same as the Bill which had been proposed. However, a notable omission was clause 64 of the Bill. This was a sensible transitional provision dealing with the admissibility in a proceeding begun before the commencement of Part VII (inserted by the amending Act) of information 'obtained by intercepting a communication before that commencement, whether or not in contravention of sub-section 7(1)'.

At the time of writing the amending Act has not been proclaimed to come into operation and at present there is no prohibition against the admission into evidence of unlawfully intercepted communications, although the courts have a discretion to reject such evidence (**Hilton v. Wells** (1985) 59 ALJR 396).

The Office has identified one significant prosecution where a minor but nevertheless crucial part of the prosecution case relies on evidence of an unlawfully intercepted communication. If the amending Act is proclaimed in its present form this prosecution would almost certainly fail. The Office is also aware of a number of significant State prosecutions which similarly would be severely prejudiced. The Director has raised the matter with the Attorney-General and urged that a provision along the lines of clause 64 of the Bill be inserted at the earliest possible opportunity.

During the year a number of deficiencies in legislation were identified and were the subject of recommendations to the relevant administering Department. These included:

Failing to answer bail in the A.C.T. - It is not at present an offence in the Australian Capital Territory to fail without reasonable excuse to answer to one's bail. The only sanction available is for action to be taken to estreat the recognisance. This situation is to be contrasted with that in other jurisdictions in Australia, where persons failing to appear without reasonable cause in accordance with a bail undertaking are guilty of an offence: (Bail Act 1978 (N.S.W.), section 51; Bail Act 1977 (Vic.), section 30; Bail Act 1980 (Qld), section 33; Justices Act 1959 (Tas.), section 35(7)). The Office has strongly urged the Attorney-General's Department to introduce a similar offence in the Australian Capital Territory as soon as possible.

Reference appeals in the A.C.T. - All States (with the exception of Tasmania) and the Northern Territory have made

provision for what are commonly referred to as reference appeals. Under these provisions the Attorney-General may refer to an appeal court any question of law arising at or in connection with a trial on indictment where the accused person was acquitted. The rule against double jeopardy is preserved by it being expressly provided that the determination of the appeal court as to the question of law involved cannot affect or invalidate any verdict or direction given at the trial.

No express provision has been made for reference appeals in respect of questions of law arising at trials on indictment before the Supreme Court of the A.C.T., and it seems reasonably clear that existing appeal rights under the Federal Court of Australia Act 1976 may not be utilised for such a purpose. Section 24(1) of that Act, which gives a jurisdiction to the Federal Court to hear and determine 'appeals from judgments', has been read down on the basis of the rule against double jeopardy to preclude an appeal against an acquittal at first instance (**Thompson v. Mastertouch TV** (No. 3) (1978) 38 FLR 397). It would seem to follow that there can be no right of appeal under section 24(1) against a trial judge's ruling or direction to the jury when the verdict of acquittal is not itself appealable.

There is obvious merit, as has been recognised in the other Australian jurisdictions, in provision being made for contentious questions of law of general application to be resolved by the appeal courts without at the same time placing the former accused in jeopardy of being retried if the appeal court should hold that the trial judge erred. Without a means for the Crown to bring such appeals dubious rulings on questions of law will be persuasive authority amongst A.C.T. Judges and binding on the A.C.T. Magistrates' Court.

Accordingly, we have recommended to the Attorney-General's Department that provision should be made for reference appeals in respect of questions of law arising at a trial on indictment before the Supreme Court of the Australian Capital Territory. It has also been recommended, as a precautionary measure, that specific provision be made for the Crown to appeal against the quashing of an indictment filed in the Supreme Court.

'Analyst certificates' in the Customs Act 1901 - The Office has recommended that the Customs Act 1901 be amended to permit evidence of the analysis of drugs in prosecutions under the Customs Act to be given by certificate. There is provision in the drugs legislation of all States and Territories for such evidence to be given by certificate, and similar provision has been made in a number of Commonwealth Acts (see, for example, the Crimes (Biological Weapons) Act 1976). The advantages of a certificate provision in the Customs Act are obvious. While the results of analysis are rarely in dispute, at present it is necessary to call the analyst in virtually all matters. Provision for an analyst to give evidence by certificate would not only lead to a

saving in both the cost and length of criminal proceedings but would also reduce the interference with analysts' work. The matters contained in the certificate would not of course be conclusive evidence. Provision should be made for the analyst to be made available for cross-examination at the request of the defence.

Prosecution of Corporations - In Chapter 3 mention is made of the review conducted by the Office of the procedural difficulties associated with the trial of a corporation. The results of that review indicate that the difficulties are not limited simply to whether a magistrate can commit a corporation for trial. They extend to other equally important issues, for example, the summary disposition of a charge of an indictable offence against a corporation; the manner of appearance of a corporation before a court and the course to be followed if it does not appear, the manner in which a corporation may plead or answer charges, and its presence during trial. Only in Queensland, New South Wales, Victoria and the Northern Territory have some, but not all, of the difficulties been addressed.

While in many cases it will be possible to prosecute some senior officer of the corporation as the principal offender, there will be cases where that option will not be available, or where in any event the most appropriate course will be to prosecute the corporation itself. Indeed, the option of prosecuting a corporation may well prove to be more appropriate in the future if full advantage is to be taken of the Proceeds of Crime Act 1987.

The Office has recommended to the Attorney-General's Department that legislation addressing these issues should be enacted for the Australian Capital Territory. However, there is the wider question whether it would be appropriate for the Commonwealth to take the somewhat unusual step in relation to procedural matters of legislating to cover comprehensively the procedure relating to the trial of a corporation for a Commonwealth offence.

Proceeds of Crime Act 1987

Since 1979 the Commonwealth has had legislation in Division 3 of Part XIII of the Customs Act 1901 providing for the confiscation of proceeds derived from dealings in narcotic drugs imported into or exported out of Australia. The Civil Remedies Branches of the DPP have been responsible for proceedings under this legislation since 3 July 1985. As indicated in the recent report to the Attorney-General reviewing the performance of the DPP's expanded civil remedies function, activity in this area has dramatically increased since the DPP assumed responsibility for these proceedings.

On 5 June 1987 the Proceeds of Crime Act 1987 came into force. Prior to the enactment of the legislation the DPP was involved together with a number of other Commonwealth

agencies in providing comments on various drafts of the legislation.

Although the legislation applies to benefits derived from breaches of Commonwealth and Territory laws (including drug offences), it does not replace the Customs Act provisions. Accordingly, in those cases where benefits are derived from drug trafficking those benefits may be confiscated either under the provisions of the Customs Act (which are not conviction based) or the proceeds of crime legislation. This will ensure flexibilty in attacking the profits of drug trafficking.

In broad terms the object of the Act is to confiscate the proceeds and benefits derived from the commission of indictable offences against the laws of the Commonwealth and of the Territories; thus attacking the heart of profit motivated crime and preventing those profits from being reinvested in further criminal activity.

Significant functions have been conferred on the DPP under the Act in relation to the obtaining of confiscation orders, which may take the form of either a forfeiture order or an order for a pecuniary penalty (with the latter representing the benefit derived from criminal conduct, as opposed to the actual proceeds). In addition, the DPP will be responsible for obtaining restraining orders in respect of persons convicted of, or charged or about to be charged with, an indictable offence to prevent the disposal of or other dealings with property that may be subject to confiscation orders.

The legislation clearly has significant resource implications for this Office. Unlike the DPP's existing civil remedy functions under sections 6(1)(fa) and (h) of the DPP Act, these new functions will be performed by the DPP as the solicitor. The necessary resources will include financial investigators for each office, for the officers supplied to this Office by the Australian Taxation Office in relation to our civil remedies function will not be available to work on proceeds of crime matters. In addition, the Proceeds of Crime Act will have a considerable impact on our Canberra Office, as the Act applies to indictable offences under the Crimes Act 1900 (N.S.W.) in its application to the A.C.T.

It has been recently estimated that to take action under the legislation in respect of only 50% of those current matters being handled by our Sydney Office which had been conservatively assessed as having 'proceeds of crime' potential would require a virtual doubling of existing resources available for civil remedies and Customs Act work in that Office. The DPP is not in a position to divert staffing resources to perform its functions under the Proceeds of Crime Act without a serious adverse effect on our current operations. To do so would inevitably result in a failure to meet the Government's objectives in setting up the DPP. It cannot be overemphasised that without the provision of adequate resources, not only to this Office but also to

the AFP and the Bankruptcy area of the Attorney-General's Department, the legislation will be quite ineffective.

Review of Commonwealth Criminal Law

In the last Annual Report reference was made to the draft Criminal Code for the Commonwealth being prepared by Mr Justice Watson. Mention was then made that, while there are areas of Commonwealth criminal law ripe for reform, the DPP had reservations about the feasibility of attempting to simultaneously redraft and codify Commonwealth criminal law. The 'autochthonous expedient' of using the State court system for the prosecution of most Commonwealth offenders would seem to preclude the Commonwealth from enacting a comprehensive code of both substantive and procedural criminal law.

This project took a new direction with the establishment in February 1987 by the Attorney-General of the Review of Commonwealth Criminal Law. The Committee comprises the Right Honourable Sir Harry Gibbs G.C.M.G. K.B.E., the Honourable Mr Justice R.S. Watson and Mr A.C.C. Menzies O.B.E. The Committee's terms of reference, broadly speaking, are to review the laws of the Australian Parliament creating criminal offences with a view to making recommendations as to their scope and adequacy and the extent to which they might be consolidated and rationalised. The Committee has been requested to report not later than 30 June 1988.

The Director met with the Committee in March 1987 at its request to discuss, amongst other things, how organisations such as the DPP could make a contribution to the work of the Committee. The Director promised the Committee the DPP's full co-operation, and a senior lawyer within the Office has been tasked to co-ordinate the Office's submissions to the Committee.

At the time of writing the DPP has made submissions to the Committee on (i) the 'abolition' of common law offences for Commonwealth purposes, with retention in a statutory form of those common law offences that have continued relevance for the Commonwealth; (ii) the powers of the police to question etc. an arrested person in the light of the High Court's decision in **Williams v. R (1986) 66 ALR 385**; (iii) onus of proof and averment provisions; (iv) offences against government involving property and money; and (v) offences against the administration of justice.

8. SOME LAW REFORM ISSUES

Consents to Prosecute

A number of Commonwealth Acts provide that a prosecution for certain offences under the relevant Act cannot be commenced or, if commenced, cannot proceed except with the consent of the responsible Minister or some specified officer.

Although in practice all but a minute fraction of prosecutions for offences against Commonwealth law are instituted by officials (who are usually Commonwealth officers), at common law any citizen has the right to institute a prosecution for a breach of the law. That right is recognised in respect of Commonwealth offences by section 13 of the Crimes Act 1914 and is expressly preserved by section 10(2) of the DPP Act.

In the circumstances where any person, whether an official or not, is able to commence a prosecution there will always be the risk that the prosecution will be brought in what might be described broadly as 'inappropriate circumstances'. Prior to the DPP Act the powers of Crown law authorities to intervene to prevent such inappropriate prosecutions from proceeding further were relatively limited. The Attorney-General could not intervene to prevent a prosecution in the summary courts, whether for commitment or for summary conviction, against the wishes of the prosecutor. While the Attorney-General could intervene pursuant to section 71 of the Judiciary Act 1903 to prevent a trial on indictment by the entering of a nolle prosequi, most prosecutions are in fact heard and determined in the summary courts. As a result the practice developed of placing a restriction on the bringing of a prosecution in respect of certain offences. Where it was considered there was an unacceptable risk of the prosecution process being resorted to in respect of a particular offence in inappropriate circumstances, Parliament would provide that a prosecution in respect of that offence could not be commenced or, if commenced, could not be continued except with the consent of a specified person.

In recognition of the Director's supervisory role in the Commonwealth prosecution process provision was made in section 6(4) of the DPP Act enabling those persons directly authorised by a Commonwealth law to give consent to a prosecution to authorise the Director to give that consent. Pursuant to section 6(4) the Director has been authorised by the Attorney-General and certain other Ministers to give consent to prosecutions for offences under a number of Acts. However, a section 6(4) authorisation may only be given to the Director. Very often the particular matter will not

require the personal attention of the Director and accordingly other senior officers have been given the power to consent in the few instances where that course has been available.

Having regard to the functions and powers of the Director under the DPP Act it is doubtful whether many of the existing requirements for consent now serve any useful purpose. The Director is empowered to intervene at any stage of a prosecution of a Commonwealth offence instituted by another person (except a prosecution on indictment instituted by the Attorney-General or a Special Prosecutor). Pursuant to section 9(5) of the Act the Director may take over a proceeding instituted by another person for commitment or for summary conviction. Having taken over the proceeding the Director may continue it as the informant or decline to carry it on further. Pursuant to section 9(4) of the Act the Director may decline to proceed further in the prosecution of a person who has been committed for trial. Very many breaches of Commonwealth law involve the 'public' as victim in the sense that there is no one individual who has suffered from the offence and who might have some incentive to commence a private prosecution. As indicated above there are in practice very few private prosecutions as such for alleged breaches of Commonwealth law, and in any event most of the offences that at present require consent are not of a kind where there is any real risk of a private prosecution. Almost all such matters are referred to the DPP following an investigation by either the Australian Federal Police or the responsible department. However, irrespective of whether a prosecution for a Commonwealth offence is instituted by an official or a private citizen, the Director has sufficient powers to bring the prosecution to an end if its continuance would not be justified in the public interest.

It is sometimes difficult to now discern why a consent to prosecute provision was included in the first place but it would seem that the reasons fall into one or more of the following broad categories:

(a) to secure consistency of practice, for example, where it was not thought possible to define the offence so precisely that it covered the mischief aimed at and no more;

(b) to prevent abuse, or the bringing of the law into disrepute where, for example, the offence is of a kind where proceedings may be brought in trivial cases;

(c) to enable account to be taken of mitigating factors which may vary so widely from case to case that they were thought not susceptible of statutory definition;

(d) to provide some central control over the use of the criminal law in sensitive or controversial areas, such as censorship;

(e) to ensure that the decision to prosecute takes account of important considerations of public policy or of an international character, such as might arise in relation to offences of hijacking, unlawful communication of official secrets or offences against internationally protected persons.

The matters referred to in (a) to (c) above are taken into account in the decision whether to prosecute any offence, not just those where a consent to prosecute is required, and in these sorts of cases there would seem to be no real need for the requirement to remain. There may be a case for retaining the requirement in cases that fall into category (d) to ensure that the appropriateness of a prosecution is considered at a sufficiently high level within the DPP, often in consultation with the responsible department. Only in respect of category (e) would there seem to be a clear case for retaining the consent to prosecute. Such cases require consideration of matters that will often lie outside the DPP's special expertise and, indeed, it is this sort of case where hitherto the Attorney-General has not delegated the power to consent to the Director.

At best, many consent-to-prosecute provisions impose an additional but unnecessary step in the prosecution process. However, they can lead to practical difficulties when they are in a form that precludes the institution of a prosecution until consent has been obtained. It may be impracticable to proceed by way of summons and the alleged offender will sometimes have the opportunity to decamp before the written consent can be obtained. If a consent-to-prosecute provision is necessary it will ordinarily be sufficient for it to be in a form that enables a prosecution to be instituted but precludes any further step in the prosecution until the consent has been obtained.

In the course of the next year the DPP will be undertaking a review of consent-to-prosecute provisions in Commonwealth legislation with a view to recommending the repeal of at least those that appear to be in categories (a) to (c) and accordingly do not now serve any useful purpose. This has already been done in relation to section 139 of the Social Security Act 1947.

Sentencing of Commonwealth Offenders

The last Annual Report referred to the arrangements that had been made by the Commonwealth with Victoria, South Australia, Western Australia, the Northern Territory and Norfolk Island which would enable a court in those places when sentencing a federal offender to impose in appropriate cases one of the 'half-way' sentences or orders, such as a community service order or work order, which are now available under the legislation of most States.

It is a matter of considerable regret that at the time of writing the Commonwealth has still not been able to secure

the agreement of the remaining States of Queensland, N.S.W., and Tasmania to enter into similar arrangements. So long as those States remain recalcitrant there is little that the Commonwealth can do to alleviate the situation. The result is that in those three States courts can still be faced with a limited choice of sentencing options when dealing with a federal offender, none of which may do justice to the circumstances of the particular case. In those three States the courts have on occasions been critical of the inadequate range of sentencing options available in Commonwealth prosecutions. Where that has occurred the DPP has sought to bring to the attention of the court concerned the efforts of the Commonwealth to reach an arrangement with the State.

However, the operation of a number of the arrangements that have been entered into have not been without their difficulties. The provision of State half-way sentences and orders to federal offenders was effected by the new section 20AB of the Crimes Act 1914, which provides:

Where under the law of a participating State or a participating Territory a court is empowered in particular cases to pass a sentence or make an order known as a community service order, a work order, a sentence of periodic detention, an attendence centre order, a sentence of weekend detention or an attendence order, or to pass or make a similar sentence or order or a sentence or order that is prescribed for the purposes of this section, in respect of a person convicted of an offence against the law of the State or Territory, such a sentence or order may in corresponding cases be passed or made by that court or any federal court in respect of a [person convicted of an offence against the law of the Commonwealth].

As a result of Victorian legislation which came into operation on 1 June 1986 one of the sentencing alternatives that became available in that State is what is known as a 'community based order' under sections 28 and 29 of the Penalties and Offences Act 1985 (Vic.). Section 29(1) of that Act describes a number of core conditions, none of which require the performance of any period of community service or work, periodic detention, attendance at an attendance centre, weekend detention or similar punishment as required by section 20AB of the Crimes Act. In addition to the core conditions, the Victorian legislation requires that a community based order should also have attached to it one or more 'program conditions'. However, only one of those program conditions satisfies the requirements for an order under section 20AB. If that particular program condition had stood alone the requirements for an order under section 20AB would have been satisfied. As the availability of a community based order under the Victorian legislation to federal offenders could not be determined by reference to the manner of the administration of that legislation, it was considered that such orders were not available under section 20AB in respect of federal offenders. The DPP view was drawn to the attention of the Attorney-General's Department who

quickly moved to arrange for 'community based orders' under the Victorian legislation to be prescribed for the purposes of section 20AB.

However, it was considered that there were more fundamental obstacles in relation to the availability to federal offenders of 'community service orders' under South Australian legislation, pursuant to which community service orders cannot be made in isolation. What a court can do is to require a person against whom a charge has been proved to enter into a bond for up to one year with conditions attached, one of which may be that a given number of hours of community service be undertaken. This was considered not to be a 'community service order' or similar order within the terms of section 20AB - but rather a bond. Accordingly, this Office reluctantly concluded that section 20AB did not enable a federal offender dealt with in South Australia to be required to perform community service. As major modifications to the relevant provisions of the Crimes Act 1914 seemed to be required, the Attorney-General's Department advised this Office that the most appropriate course would be to await the coming into operation of legislation proposed by the South Australian Government which would provide, inter alia, disposition by way of a community service order otherwise than as a condition of a bond.

Although submissions to the above effect were put by the DPP to South Australian courts, they were met with divergent views. In the matter of **Adams v. Carr** the presiding magistrate accepted the submissions but only to the extent that they required the conclusion that community service orders were not available as a condition of a recognisance, whether under State or Commonwealth law. The magistrate held that a community service order simpliciter was available in sentencing a federal offender, that is, without being a condition of a recognisance. We considered there was no alternative but to appeal the magistrate's decision in that case.

In its judgment in **Adams v Carr** delivered on 19 June 1987 the South Australian Full Supreme Court held that the provisions of the relevant South Australian legislation could not be applied under section 20AB. However, the Full Court declined to follow the decision of the Supreme Court of Tasmania in **Bantick v. Blunden** (1981) 36 ALR 541 and held that a requirement for community service could be validly imposed as a condition of a recognisance entered into upon a conditional release under section 20(1) of the Crimes Act 1914.

Hitherto the approach of the Commonwealth has been to seek to apply State sentencing laws to federal offenders. However, in so doing the Commonwealth has not been content to simply take the State law as it has found it. Rather it has felt the need to provide an overlay of Commonwealth law modifying, sometimes quite substantially, the application of the State law to federal offenders. As the above illustrates, the 'mesh' between State law and the overlay of Commonwealth law

applying the State law to federal offenders has not infrequently proved to be less than successful. Another glaring example of this is in relation to section 4 of the Commonwealth Prisoners Act 1967, which provides for the fixing of a 'minimum term of imprisonment' (that is, a non-parole period) in respect of a federal offender sentenced to a term of imprisonment. When enacted section 4(4) had the intended effect that, where a federal offender was to be sentenced in respect of more than one offence, the court was required to fix a single non-parole period in respect of each term of imprisonment to which the federal offender was sentenced, rather than fix the one non-parole period in respect of the aggregate of the head sentences. This requirement was the bane of courts when sentencing federal offenders for multiple offences. If the court wished to accumulate one or more of the sentences it was obliged to indulge in what Fullager J referred to in the case of **Cerullo** (Vic. C.C.A., judgment delivered on 27 November 1986) as an 'absurd mathematical exercise', by tailoring the sentence for each individual count in a way which achieved the appropriate overall sentence, notwithstanding that the sentence imposed in respect of each individual count, viewed in isolation, may not have been an appropriate one.

While the problems created by section 4(4) of the Commonwealth Prisoners Act have been known for some time, a factor which contributed to the delay in its being addressed quickly was the long standing reference to the Australian Law Reform Commission on 'Sentencing of Federal Offenders'. While this reference was made in 1977, and the Commission delivered an interim report in 1980, its final report has yet to be received!

This Office was of the clear opinion that this deficiency could not await the Commission's final report and that it should be remedied, if only as an interim measure pending the Commission's final report. Ultimately that was the course decided on, and amendments to permit a court to fix a single non-parole period in respect of the aggregate of the head sentences was included in the Statute Law (Miscellaneous Provisions) Bill (No.1) 1987. That Bill lapsed with the double dissolution of the Parliament.

However, the proposed amendments expressly limited the power to fix a single non-parole period to the situation where the offender is to be sentenced in respect of only Commonwealth offences. It is where an offender is before the court for sentence in respect of both State and Commonwealth offences that the requirements of section 4(4) have occasioned the greatest practical difficulty. In circumstances where the court wishes to accumulate the State and Commonwealth sentences, section 4(5) of the Commonwealth Prisoners Act empowers the court to direct that the Commonwealth sentence commence at the expiration of any non-parole period fixed in respect of the State sentence. The device in section 4(5) is quite foreign to usual State sentencing practice. Bearing in mind that many State judges and magistrates are only very infrequently required to sentence a federal offender,

occasionally section 4(5) is not utilised in the accumulation of the State and Commonwealth sentences. Rather the Commonwealth sentence is expressed merely to be cumulative on the State sentence in accordance with usual State practice and, contrary to section 4(4), a single non-parole period will sometimes be fixed in respect of the aggregate sentence. The result is an hiatus between the Commonwealth and State sentences with the offender being eligible for release on parole before commencement of the Commonwealth sentence. If in fact released on parole the prisoner would be required upon the expiration of that parole period to return to prison to commence service of the Commonwealth sentence! In the last financial year it has been necessary for the DPP to institute appeals in a number of cases with a view to rectifying such anomalous situations by re-scheduling the sentences in accordance with section 4(5).

Even when a Commonwealth/State offender is sentenced in accordance with section 4, the present regime is conducive to mistakes being made in relation to the release of the offender. Because section 4, if utilised, requires the State and Commonwealth sentences to operate essentially independantly of each other, there have been occasions where State correctional authorities, through error, have released an offender in accordance with the terms of the State sentence only, notwithstanding, for example, that the non-parole period fixed in respect of the Commonwealth sentence precluded the release of the offender at that time. At least three such instances occurred in 1986-87. In the absence of statutory authorisation a prisoner prematurely discharged from custody cannot be arrested and returned to prison. While amendments to cure this defect were included in the Statute Law (Miscellaneous Provisions) Bill (No.1) 1987, as indicated above that Bill lapsed following the double dissolution of the Parliament.

The desirable solution would be to permit a court sentencing a Commonwealth/State offender to fix a single non-parole period in respect of the aggregate sentence, with perhaps the question whether the offender should be released on parole being dependent on the agreement of the parole authorities of both the relevant State and the Commonwealth. However, it is understood that the Attorney-General's Department considers that there are constitutional difficulties with such an approach.

There are many deficiencies in existing laws relating to the sentencing of federal offenders, a number of which are the result of the fact that since the Commonwealth Prisoners Act came into operation the State laws upon which that Act relies have become increasingly diverse and complex. While it is understandable that the Attorney-General's Department considers that the necessary overhaul of Commonwealth legislation in this area must await the ALRC's report, it is a matter of considerable regret that that report has been so long delayed.

Contempt of Court

In Chapter 4 reference is made to the proceedings instituted against the ABC, Mr Wran and Nationwide News Pty Ltd for contempt of court. The fines imposed upon each corporate defendant are the most severe monetary penalties that have been imposed by a court in this country for contempt relative to pending proceedings. They will serve to remind the media, in particular, of the very serious consequences which flow from the publication of a statement having the tendency to prejudice the outcome of a particular case. What usually occurs is that a trial is aborted with a consequent waste of public money and court time. The accused person must wait longer to have his or her case heard, and that may be a considerable period of time where a serious contempt is committed. In some cases it may be very difficult to overcome the prejudice which has been created, both for the defendant and the prosecution. Clearly more responsibility is required on the part of programmers and editors. That emerges from the court's remarks on sentence in respect of Nationwide News Pty Ltd. It was said:

> In our opinion it must have been obvious to Mr Farelly (the editor-in-chief) that what he proposed to publish would constitute a serious contempt. Yet he did not take legal advice. It is clear to us that he made a plain commercial decision which can be neither justified nor excused ... It was calculated and deliberate, done in pursuit of economic gain, and quite without any reasonable extenuation ... Editorial independence and the sound reasons that underlie such a tradition cannot license editors to commit contempts of court ... (the newspaper failed) ... to recognise its legal obligations and to initiate measures to remedy the evident defects in its present system.

There is much to be said for the view that the conduct which constitutes a contempt of court should be more closely defined. It is all very well for lawyers to say that a contempt will be committed when, as a matter of practical reality, there is a real and definite tendency to prejudice or embarrass pending proceedings. It is quite another to apply that to individual cases. It is surely preferable to state what sorts of conduct will constitute a contempt and then, perhaps, have a general provision. That would achieve certainty in the law and, as such, would increase deterrent values. Further, penalties should be defined. At present a number of options are available which range from imprisonment and fine to reprimand and an order to pay costs. However, provision should be made for those who commit contempt to make an economic contribution to the costs which have been thrown away when trials are aborted because of their acts. That could be done by way of a statutory civil remedy which would become available upon the making of a finding of contempt by a court. There is a general provision in section 21B of the Crimes Act 1914 which enables that to be done in limited cases, but there should be a particular provision for contempt cases to underline the seriousness of what has been done.

The Australian Law Reform Commission report on contempt was tabled in the Parliament on 4 June 1987. It is a substantial document which proposes fundamental changes to the law of contempt, many of which are long overdue. The audacious and commendable proposal is to abolish the common law of contempt as it relates to most federal and Territory courts, and replace it with defined statutory offences. However, it is unfortunate that the reforms recommended, if implemented, will only have a limited practical application. The greater number of contempt proceedings concern publications which prejudice the administration of criminal justice. Given that most Commonwealth prosecutions are conducted in State courts exercising federal jurisdiction it is readily apparent that the proposed reforms would not have a wide operation.

Williams v. R: Questioning After Arrest

At common law a person who has been arrested is required to be brought before a justice as soon as reasonably practicable to be dealt with according to law.

The common law rule still applies directly in a few Australian jurisdictions, while in most of the remainder it has been reproduced in a statutory form. The general arrest provision in section 8A of the Crimes Act 1914 is silent on when an arrested person must be brought before a Justice, and accordingly the matter is regulated by the relevant requirements under State law pursuant to section 68(1) of the Judiciary Act 1903.

Few would now dispute that the questioning of a suspect, whether arrested or not, plays not only a legitimate but indeed an essential part in the contemporary criminal justice system. The police have a duty to endeavour to discover the truth of what happened. Questioning is one of the principal means that the police have at their disposal to do that. To question an arrested person is to give that person the opportunity to admit his or her guilt, if that be the case, but in any event to provide his or her account of what happened, which may tend to confirm or dispel the reasonable grounds that founded the arrest. It is now commonplace for some, perhaps the crucial, evidence against an accused at trial to have been obtained while the person was in the custody of the police.

However, the practice of the police carrying out investigations involving an arrested person has had to develop within the constraints of a common law rule which recognises the only legitimate use of arrest as being for the purpose of taking the suspect before a justice. In England the inevitable tension between the strictures of the common law rule and the reality of proper police practice was resolved some twenty odd years ago in favour of a relaxation of the duty of a police officer in respect of an arrested person. This amounted in reality to countenancing detention for investigation, provided what was done following arrest was

to inquire further into the suspected offence before the person was brought before a justice or sooner released was reasonable.

However, in its recent decision in **Williams v. R** (1986) 66 ALR 385 the High Court dispelled any suggestion that the more flexible English approach can have any application in Australia short of legislation specifically providing for the taking of an arrested person before a justice to be delayed pending further investigation. In the view of Mason, Brennan, Wilson and Dawson JJ the sole purpose of the common law requirement and its statutory equivalents is to safeguard the civil liberties of the arrested person, and that safeguard has primacy over the exigencies of the particular investigation. Detention of an arrested person is authorised solely for the purpose of taking the arrested person before a justice, and then only for so long as that is not delayed beyond the point in time that it is practicable to do so. While there is nothing to prevent the police questioning an arrested person during a period of such lawful detention, once it is practicable to bring the arrested person before a justice 'it is the completion of the inquiries and not the bringing of the arrested person before a justice which must be delayed' (per Mason and Brennan JJ at page 401). In their Honours' view, if the common law rule no longer meets the needs of the community then the striking of a different balance between the interests of the community and those of the arrested person was for the legislature. It could not be done by a relaxation of the requirements of the common law rule as had occurred in England.

In the light of the High Court's decision in **Williams** it is inevitable that the courts will in future feel constrained to approve of only relatively short periods of questioning after arrest (perhaps in many cases a matter of only an hour or two), with the real risk of exclusion of inculpatory evidence if obtained, although fairly, after the time that the court considers it was practicable to take the person before a justice.

The common law rule is incompatible with the community's interest in offenders being brought to justice, and in the police being not unduly hampered in performing that task. It should be possible to question an arrested person or otherwise investigate him or her while in police custody. There is a compelling case for the common law rule to be abandoned for Commonwealth purposes, and be replaced with a statutory framework within which the police may lawfully question etc. an arrested person, subject to appropriate safeguards to protect the interests of the arrested person, before the obligation arises to take the person before a justice, if not sooner released either unconditionally or on bail. This has been done in Victoria, South Australia, Scotland, Ireland and England. In those places the common law rule has been abandoned in favour of schemes which permit the police to detain an arrested person for the purpose of investigation for a specified period before police custody must cease. In most of those places provision has been made

for the initial period of police custody to be extended by a judicial authority.

However, merely to provide statutory authorisation for the police to delay taking an arrested person before a justice, without more, would create an imbalance against the interests of the arrested person. Any statutory authorisation of detention for investigation must be part of an integrated regulation of the post-arrest stage of the type proposed in the lapsed Criminal Investigation Bill 1981. In this regard, the DPP is firmly in favour of the introduction as soon as possible of the use of tape recorders as the standard method of conducting a record of interview with an arrested person.

The issues involved in the recording of interviews with suspects have been fully canvassed by numerous law reform bodies, committees etc., both in Australia and elsewhere. So far as the DPP is aware all who have considered this matter recently have come out in favour of the use of tape recorders. They provide a means which has hitherto been lacking to monitor what actually occurs during the interview situation. The use of tape recorders would reduce considerably the scope and potential for disputes over confessions and admissions at the subsequent trial, as well as provide a protection to the police in respect of allegations that a confession has been fabricated. The DPP is also satisfied that the logistical problems involved in the introduction of tape recorders can be overcome relatively easily. The DPP generally supports the approach on tape recording adopted in clause 32 of the Criminal Investigation Bill 1981, although it is considered that improvements could be made to that clause which would encourage the use of tape recorders, rather than tape recording being one of three acceptable procedures.

Secrecy Provisions in Commonwealth Legislation

To meet the demands and expectations placed on it government is required to gather and retain an enormous variety and quantity of information concerning the affairs of its citizens. One purpose this information serves is to ensure that people and organisations who receive payments of public money are in fact entitled to receive it. To determine an entitlement for such benefits usually involves a person meeting statutory criteria, and this almost always involves a person disclosing personal information about himself or herself in order to establish the relevant criteria.

It is claimed that people will be more frank and honest with the information they provide if there is a guarantee it will not be disclosed, and it will be kept confidential to government - in short, that it be used for no other purpose than that for which it is provided. This expectation is met by the inclusion of a secrecy provision in the relevant statute. These provisions, in general, provide that persons shall not, except in the performance of their duties or in the exercise of their powers or functions under the relevant

statute, divulge any information concerning the affairs of another person that has been acquired in the performance of those duties or in the exercise of those powers and functions.

Where a person provides false information to a department there is usually no difficulty in disclosing information held by the department to police, prosecutors and courts as it will normally fall within an exception to the secrecy provision.

The difficulty posed by secrecy provisions is that they act as an inhibiting factor on information sharing between Commonwealth agencies. This may be illustrated by a simple example. A common device to defraud the revenue is for people who are employed to claim unemployment benefits. Because they are employed they file tax returns with the Australian Tax Office (ATO). Obviously this information would be of great assistance to the Department of Social Security in detecting welfare cheats. Conversely, the ATO would have a keen interest in knowing the person was in receipt of unemployment benefits. An exchange of information between agencies of this type would clearly be a simple, cheap and effective method of detecting and thereby deterring fraud. By deterring fraudulent conduct more assistance could then be provided to those in the greatest need.

Secrecy provisions can also lead to other anomalies. During the investigation of a doctor alleged to have defrauded the Health Insurance Commission (HIC) it became obvious that a comparison of figures from the HIC with those held by the ATO was likely to reveal significant discrepancies. Unfortunately, each agency was prevented by secrecy provisions from disclosing information to the other. Both agencies could disclose the information to the DPP but on condition that the DPP did not reveal it to the other. This is a most unsatisfactory situation.

Accepting that there is a need to safeguard the handling of information which may have been compulsorily acquired and which is private, confidential and sensitive, nevertheless it becomes an absurdity when fraud on the Commonwealth is facilitated by the enforced lack of communication between agencies. It is difficult to see any justification for allowing criminals to hide behind secrecy provisions in the manner which is permitted at present.

Secrecy provisions should allow for information to be shared between relevant agencies and to be provided to law enforcement agencies, in each case so that it may be used for law enforcement purposes. It is understood that the Attorney-General's Department has commenced a major review of secrecy provisions in Commonwealth legislation. It is to be hoped this review will result in our concerns in this area being met.

Delay in the Prosecution Process

> To no-one will we sell, to no-one will we deny or delay right or justice.
>
> Cl.40 Magna Carta (1215)

In a series of cases in the Supreme Court of New South Wales the echoes of Magna Carta and the earlier Assize of Clarendon (1166) have been heard as the Court has reaffirmed in a most categoric way the principle that 'justice delayed is justice denied'.

The landmark case was the N.S.W. Court of Appeal's decision in **Herron v McGregor and Ors** (September 1986). While that case was concerned with delays in bringing disciplinary proceedings under the Medical Practitioners Act, there followed in quick succession three further decisions in N.S.W. making the application of the principle to criminal cases beyond doubt : **Whitbread and Ors v. Cooke** (December 1986), popularly known as the Cambridge Credit case, a decision of Maxwell J concerning committal proceedings for conspiracy to defraud; **Joel and Ors v. Mealey** (April 1987), a decision of Yeldham J concerning committal proceedings in relation to allegedly false prospectuses; and **Watson v. A-G of NSW** (May 1987), another decision of the Court of Appeal concerning a proposed trial in the District Court for conspiracy to obstruct the course of justice. In each of the cases the events to which the charges related were rather distant in time - in Gill the events occurred between 1973 and 1977, in Cambridge Credit they were between 1966 and 1974, and in Joel and Watson they were in 1980 - and all potentially involved considerable evidence based upon recollection. Orders permanently staying the prosecutions were made in each instance on the basis that their continuance would amount to an abuse of process.

It is clear that in looking at delay the Courts will have regard to the whole period from the date of the offending conduct to the likely date of final disposition of the charges. Thus the period prior to charging - the investigative phase - will be scrutinised, as well as the period from charging until trial. For obvious reasons the investigative phase will usually be regarded as commencing from the time some law enforcement agency became aware that offences may have been committed.

To date there have been two applications to a superior court for a stay on the ground of delay involving offences under Commonwealth legislation, and another to a Magistrate in committal proceedings in the A.C.T. in respect of offences under the Territory's Companies Ordinance. Both applications are, as yet, unresolved. However, the potential for further applications exists, particularly in relation to large scale revenue fraud cases prosecuted by the DPP.

It is perhaps useful to canvass some of the factors isolated by the courts as relevant to the question whether a stay should be granted. First, delay resulting from deliberate obstruction or frustration of the investigation process by a defendant through concealment of evidence or the laying of false trails will generally not be taken into account. Nor will delay in the laying of charges or in bringing the defendant before the courts due to his or her flight from the jurisdiction. Similarly, adjournments at the behest of the defence generally will not be taken into account - although unjustified acquiescence in defence applications for adjournments will be.

Secondly, time is not delay. Much depends upon the pattern and circumstances of the particular case. The laying of charges in respect of a very minor offence some ten months after the event, and the final disposition of the matter twelve months later may represent an undue delay, whereas such a timetable would be unduly ambitious in relation to the charging and trial of offences involving a complex fraud.

Thirdly, in considering delay other than that which may be laid at the feet of the defendant, the courts have not looked only to that which may be attributed to the investigator or prosecutor but also to that which is a consequence of the court system - for example listing delays - over which the prosecution has no control. This is especially galling when the delays occur in State courts because of pressure of business, given that the Commonwealth cannot itself solve the problems involved.

Fourthly, although in all four cases the courts looked closely at the particular circumstances, the possibility has been left open that time per se might amount to delay sufficient to found a successful application. This has been described by some as presumed prejudice, although the courts have rejected this in as much as there has been an attempt to distinguish it from actual prejudice. The courts have said, in effect, that in some instances it may be that in view of the time that has elapsed a fair trial would be impossible.

Fifthly, pending charges involving unrelated matters will not necessarily afford a justification for postponing the laying of charges in the case under review; nor will consideration of representations from the defence that a matter not proceed.

The sixth and final factor to which attention is drawn is that there must be a balancing of the competing interests of the right of an accused to a speedy trial, and the general community interest in bringing miscreants to justice.

However, the law as it presently stands abounds with uncertainty. There is the question of when, if ever, mere length of time will justify a stay and, if so, should this principle apply where the accused contributed to the delay? At a more practical level, how does the court assess the possible prejudice flowing to an accused from delay if it is not presumed? If an investigation has taken a long time, how

does the prosecution demonstrate there has not been delay? Does it bear the burden of proof and to what standard? What sort of enquiry should the court embark upon? The cases to date have not squarely raised these problems.

One means employed by the legislature to obviate the risk of prejudice to an alleged offender by delay in the institution of a prosecution is to require that a prosecution be commenced within a certain period following the commission of the offence. Section 21 of the Crimes Act 1914 is such a provision which applies, subject to a contrary intention in any other Act, to all offences against Commonwealth law. It is broadly to the effect that a prosecution for an offence punishable by six months imprisonment or less, or a pecuniary penalty only, must be commenced within one year of the commission of the offence. A prosecution for an offence punishable by more than six months imprisonment may be commenced at any time.

The imposition of such arbitrary time limits is generally an unsatisfactory method of preventing prejudice to an alleged offender by reason of delay. By their nature they do not permit account to be taken of the circumstances of the particular case. The period involved between commission of the offence and when the authorities are in a position to institute the prosecution may not in fact present any real risk of prejudice to the suspected offender, or that which may exist may be minimal and outweighed by other factors in favour of a prosecution proceeding. In this regard, it ought be borne in mind that many offences against Commonwealth law are not of a type that are likely to be detected at the time the offence is committed. Particularly in relation to offences involving fraud on the Commonwealth, many are only detected following a course of conduct which eventually arouses suspicion.

As a general proposition the DPP considers that the issue of delay in the institution of a prosecution should be resolved on a case by case basis in the exercise of the prosecutorial discretion, with reliance on the court's inherent powers to stay prosecutions which amount to an abuse of process should the exercise of that discretion err. Statutory time limits should be kept to a bare minimum, applying only to very minor offences and specifying realistic time limits. It is considered that the one-year limit under section 21 is unjustifiably restrictive in a provision of general application. If it is considered that section 21 should be retained broadly in its present form, a more realistic time limit would be two years.

There are a number of offences punishable by more than six months imprisonment where special provision has been made imposing a time limit on the institution of a prosecution. In many instances it is impossible to see any justification for the time limit. Until recently a glaring example was the indictable offence under section 62 of the National Health Act 1953. Although punishable by imprisonment for five years or $10 000, the offence was subject to the restriction in

section 134B of the Act that a prosecution for an offence under the Act had to be commenced within three years of the commission of the offence.

In a few Australian jurisdictions the legislature has sought to partly address the issue of delay in the criminal justice system once charges have been laid. In Victoria, for example, strict time limits have been enacted for the commencement of the trial after committal, and in the Northern Territory there are provisions permitting an accused to require the presentment of an indictment in default of which the prosecution may be at an end. The DPP generally supports such a time limit approach, provided there is provision for extensions to be granted by the court for good cause. However, simply to impose time limits within which an indictment must be presented or the trial commenced is no panacea. More fundamental reforms of the criminal justice system are required to make it more efficient.

9. SOME OPERATIONAL ISSUES

Guidelines on Jury Selection

Pursuant to section 68(1) of the Judiciary Act 1903 the selection of a jury to try an alleged Commonwealth offender is regulated by the law of the State or Territory in which the trial is to be held.

There are marked differences between the laws of the various States and Territories regulating the composition of juries, both as to specifying those persons who are disqualified, exempted or able to choose whether or not to sit on a jury, as well as the respective rights of the defence and the prosecution in the actual jury selection process. The only Commonwealth 'initiative' in this area has been to make provision in the Jury Exemption Act 1965 for certain Commonwealth employees or classes of Commonwealth employees to be added to the list of persons who by the law of a State or Territory are exempt from liability to serve as a juror.

While these differences of course mean that the classes of persons from which a jury is drawn to try a Commonwealth offender will vary from State to State, of more fundamental concern is that the laws applying in many places operate to preclude a jury from being representative of the community. Apart from the wide and varied range of exemptions by reason of occupation, or being a spouse of a person in an exempt occupation, in some jurisdictions women can still elect not to be liable to serve as a juror or to be excused from serving as a juror at a particular trial by reason of the nature of the offence involved or the evidence likely to be given. In some jurisdictions the categories of persons disqualified from jury service extend beyond the obvious ones of persons who are serving a sentence or who have been convicted of an offence to more vague grounds such as being a person of 'bad fame and repute'.

While in a majority of the jurisdictions the Crown and the defence have an equal number of peremptory challenges (usually six or eight), in most jurisdictions the Crown has an additional power to stand potential jurors aside, which can be exercised in some places to an unlimited extent. Assuming there is a valid place for the peremptory challenge as a means to exclude persons against whom partiality is suspected but cannot be proved (such as would justify a challenge for cause), there is much to be said for the present law in South Australia which gives both the Crown and the defence only three peremptory challenges, with the Crown having no additional power to stand aside.

There is little that the Commonwealth can do by way of legislative intervention to restore the jury to its proper position as a representative body. So long as the Commonwealth must continue to use the State court systems for the trial of most Commonwealth offenders it must as a matter of practicality take the State law and procedure in relation to the selection of juries as it finds them. For the most part the necessary changes to restore the ideal of a representative jury must come from the States themselves. However, there are two areas where the Commonwealth can effect improvements. First, there should be a review of the jury laws applying in the A.C.T. with a view to limiting to the bare minimum the rights of the Crown and the defence in the jury selection process, and also the categories of persons not required or ineligible to sit as jurors. Secondly, although admittedly it would have little real impact, there should be a thorough review of the categories of Commonwealth employees exempted from liability to serve as jurors in federal and State courts pursuant to the regulations made under the Jury Exemption Act 1965. For example, the exemption of most Commonwealth officers resident in N.S.W., Qld and S.A. from serving as jurors in those States is absurd. Those people are as representative of the population as one could find, and should not be precluded from participation in the processes of the law in this way.

Short of legislation the most that can be done is to ensure that, in performing their role in the jury selection process, Commonwealth prosecutors seek to act at all times in a manner which promotes the ideals of a representative, balanced and impartial jury, within the constraints imposed by the applicable State or Territory legislation, and that this is done in a generally consistent manner throughout the Commonwealth. To that end 'Guidelines for the Assistance of Prosecution Lawyers on Jury Selection' were issued by the Director on 1 January 1987, initially on a confidential basis to ensure that they were workable in practice. Some slight changes were made in the light of the operation of the Guidelines during that initial period. The terms of the Guidelines are set out in Appendix I.

The Guidelines recognise that, while the DPP's practice in jury selection should be uniform throughout Australia as far as possible, the varying State laws mean that there are some limits to the uniformity that can be achieved. As to the matters that may be taken into account in deciding whether to challenge, or stand aside, a potential juror, the function of the prosecutor is not to achieve a jury that will favour the prosecution, but rather, as at all stages of the prosecution process, to be fair. Except where it is necessary to avoid a disproportionate representation of a particular group in the community, the Guidelines state that no potential juror should be challenged, or stood aside, on grounds of sex, race, religion or (unless it has a bearing on fitness for jury service) age.

The Guidelines recognise that as a matter of basic fairness the prosecution should have no more rights in jury selection

than the defence. Accordingly, in those jurisdictions where the prosecution has greater rights than the defence the Guidelines require the DPP to voluntarily limit the number of potential jurors that may be peremptorily challenged, or stood aside, to the number of peremptory challenges available to the defence. This policy is only to be departed from in exceptional cases where the interests of justice clearly require that additional potential jurors be challenged or set aside.

Charging State Offences in Error

In **R v. Loewenthal; ex parte Blacklock** (1974) 121 CLR 338 the High Court held that, where a Commonwealth law prescribing certain conduct is intended to be exclusive and exhaustive, any State law covering the same ground which would otherwise have been applicable is inoperative.

Occasionally State police have not appreciated that a Commonwealth offence covers the criminal conduct in question and have laid a charge under State law. In this regard, it is acknowledged that sometimes there is little to indicate that a Commonwealth offence covers the field. In relation to offences involving theft and damage to property, for example, the owner of the property in respect of which the offence has been committed may not be readily identifiable as a Commonwealth agency.

Where the incorrect State charge is indictable the error may often not be identified until the committal papers have been forwarded to the relevant State Crown law authorities. While they have customarily referred such matters to the DPP to prosecute on the appropriate Commonwealth charge, it is not possible for an indictment to be filed based on the committal on the State charge. Although section 6(2B)(b) of the DPP Act authorises the filing of an indictment in respect of any offence founded on facts or evidence disclosed in the course of the committal proceedings, a condition precedent is that the person has been committed for trial in respect of at least one offence against Commonwealth law. Accordingly, it is necessary to arrange for such matters to be remitted to the magistrate for a committal on the appropriate Commonwealth charge. An available alternative is for an ex officio indictment to be signed by the Attorney-General pursuant to section 71A of the Judiciary Act 1903 - but that section requires the indictment to be filed in a Supreme Court. Most Commonwealth prosecutions on indictment are determined in the intermediate District or County Courts and in most instances a prosecution in a State Supreme Court could not be justified.

It was proposed that the restriction in section 6 on the filing of an indictment in such cases be overcome by amendments to the DPP Act in the Statute Law (Miscellaneous Provisions)(No.1) Bill 1987. A new sub-section 6(2C) was to be inserted which in effect would authorise the filing of an indictment in respect of the appropriate Commonwealth offence

where through error a person has been committed for trial only on a State charge or charges. As mentioned elsewhere, that Bill lapsed with the double dissolution of the Parliament.

However, an amendment to the DPP Act will provide only a partial solution to the problem. Most prosecutions are determined at the summary court level and there is the potential for a person to be convicted at that level on an incorrect State charge. In March 1987 the Director wrote to the State and Northern Territory Police Commissioners alerting them to the problem and requesting that they take such steps as were available to them to inform their officers of it. It was suggested that the appropriate DPP or DLS Office be contacted whenever there was any doubt, no matter how remote, whether a particular offence was one against Commonwealth or State law. Generally speaking the response of the Police Commissioners was most encouraging, with undertakings to take steps such as emphasising the matter in training courses and alerting all police prosecutors.

The Prosecutor at Sentence

The last Annual Report (at pages 38-39) canvassed whether the traditional role of the prosecutor in the sentencing process remained valid. The proposition was put that there was a clear community interest in ensuring that appropriate penalties are imposed. Whatever justification there may have been for the traditional view that the prosecution should play only a minor role at sentence, it must now be regarded as incompatible with the Crown's right to appeal against a penalty it considers inadequate. Reference was also made to the divergent views amongst the courts as to the proper role of the prosecutor on sentence, with the traditional view generally prevailing in the eastern seaboard States, while elsewhere in Australia the prosecution has for some time played a more positive role in the sentencing process and, indeed, is encouraged by the courts to do so. However, the recent decisions of the Victorian Court of Criminal Appeal in **DPP (Vic.) v. Casey and Wells** (20 March 1986) and of the N.S.W. Court of Criminal Appeal in **R v. Jermyn** [1985] 2 NSWLR 194 are encouraging signs that the traditional view is on the wane in Victoria and N.S.W. and that there will soon be a broadly common approach to this issue throughout Australia.

It is clearly desirable that Commonwealth prosecutors should seek to follow a generally uniform practice throughout the country as to the matters that should be put to a court on sentence, consistent with their overriding duty to be fair. To that end 'Guidelines for the Assistance of Prosecution Lawyers on Sentence' were issued on 1 December 1986 to DPP lawyers and to officers of the Australian Government Solicitor who act for the DPP. As was the case with the Guidelines concerning jury selection, these were initially issued on a confidential basis and then reviewed on the basis of the experience gained in the initial period of their

operation. The terms of the Guidelines are set out in Appendix II.

The Guidelines recognise that the DPP must take the State courts as it finds them and accordingly there are some limits to the uniformity that the DPP can achieve in this area. One of the matters that the prosecutor should have regard to in considering whether to address on penalty and, if so, what matters to cover, is the likely attitude of the court or a particular judge or magistrate to an address on sentence.

The Guidelines also recognise that in many cases there will be no need to address on penalty at all and that, as a general rule, addresses on penalty in summary matters are likely to be less frequent, and briefer.

Any address on penalty will be primarily directed to assisting a court in relation to matters that are relevant to sentence. In appropriate cases that may include submitting that the court should impose a particular type of penalty. However, the prosecution should not urge the imposition of a particular penalty (such as, for example, a specific term of imprisonment) although in appropriate cases it may be proper for the prosecution to make some general submissions as to the desirable range.

Special mention should be made of cases where the defendant is unrepresented. While that should not preclude the prosecution addressing on penalty if it would otherwise be appropriate to do so, the Guidelines counsel the need for special care in such cases. The prosecution should, for example, ensure that all matters that are beneficial to the defendant are brought to the attention of the court. As a general rule, the matters dealt with in an address on penalty where the defendant is unrepresented should be kept to a minimum.

It should be acknowledged that the Guidelines are viewed by some in the private bar as going beyond the traditional role of the prosecutor at sentence and there has been resistance by some counsel appearing for the Crown in N.S.W. to addressing on penalty. In some cases, after due consideration of counsel's views, it has been considered appropriate to instruct counsel that the submissions be made.

An address on penalty will sometimes involve assisting the court with details of sentences imposed for offences of a like nature. In the past there have been difficulties in providing a court with sufficiently comprehensive and up-to-date sentencing statistics, particularly in relation to sentences imposed in other jurisdictions. As a first step to remedy this all remarks on sentence in respect of matters determined in the superior courts, and judgments on appeal, are now to be stored in a central data base. In addition, summaries are to be prepared of all sentences imposed on persons convicted of drug and fraud offences which are to be stored in a like manner.

Civil Disobedience Prosecution Guidelines

Appendix II to the last Annual Report published guidelines for civil disobedience prosecutions. Those guidelines did not find favour with the former Human Rights Commission which in its 21st Report to the Attorney-General concluded that paragraph 8 of the guidelines 'is inconsistent with Articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR) and has the potential to lead to infringements of Articles 19 and 21 of the ICCPR. Accordingly, the Commission recommends that the guidelines be revised to achieve consistency with the ICCPR and to eliminate the notion that arrest can, in any circumstances, be treated as a punishment'.

Paragraph 8 of the guidelines provided, in part:

> In some cases the decision to effect an arrest will provide an immediate solution to 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.

Those words must be read in the context of the guidelines as a whole. The paragraph was not intended to offend against the Covenant, nor to abrogate or affect the duties of a police officer in relation to an arrested person. The paragraph was directed not to the decision to arrest, but rather to the decision whether to consent to a prosecution under section 23(2) of the Public Order (Protection of Persons and Property) Act 1971. The whole question of balancing the right to peaceful protest and assembly against the rights of persons to pass freely upon public property raises difficult and often delicate competing public interest considerations. The guidelines were very much intended to strike a proper balance in this area.

The Commission wrote to the Director on 28 August 1986 drawing the perceived difficulties to his attention. The Commission concluded by stating that it 'would be pleased to co-operate with you in ensuring that the Guidelines are consistent with Australia's obligations under the ICCPR'. A reply was sent on 30 October 1986 in which it was suggested that if the Commission had further concerns there should be discussions at an early date, and that this Office would be happy to consider any amendments the Commission might have in mind to overcome its concerns. Regrettably, the Commission chose instead to furnish the Attorney-General with a report within a week of the 30 October reply. The first the Office learnt of the course taken by the Commission was from a newspaper article on 3 December 1986 following tabling of the Commission's Report in the Parliament. The Commission was bound to endeavour to effect a settlement of the matter by section 9(1)(b)(ii) of the Human Rights Commission Act 1981. That clearly was not done.

Notwithstanding this most unfortunate sequence of events, amendments to the guidelines were quickly considered in the light of the Commission's Report. Amended guidelines were issued by the Director on 14 January 1987. They are published at Appendix III to this Report. The major change that has been made is to the former paragraph 8, which now becomes paragraph 7. The effect is to remove any possible implication that a police officer may arrest as a form of punishment, which was perceived to be the main concern of the Commission.

Problems in the Criminal Justice System in N.S.W.

The availability of courts and judicial officers is continuing to cause problems in the criminal justice system in New South Wales.

Growth in resources has not kept pace with the increase in the number and duration of cases. Commonwealth prosecutions brought by the DPP have significantly contributed to the growing burden on the New South Wales court system. It is now commonplace for the committal hearing and trial of Commonwealth drug and fraud prosecutions to last several weeks, sometimes several months. Some of the more important Commonwealth prosecutions have been conducted in the Supreme Court. This has had an impact upon State prosecuting authorities which indict exclusively in the Supreme Court in respect of certain matters (murder and related offences, certain sexual assaults and arson offences).

The period between charge and committal hearing, and between commitment and trial, will depend on a number of factors, particularly the expected duration of the hearing and whether or not the defendant is in custody. In lengthy matters a committal hearing may not be listed for several months to a year, and the trial listed many months after commitment. These delays cause unfairness to accused persons, and in some cases may contribute to a prosecution being abandoned. The matter has been recently addressed by the New South Wales Law Reform Commission which, in a discussion paper, has tentatively suggested, amongst other things, the abolition of committal proceedings in order to expedite the process. The Sydney Office has made a submission to the Commission in relation to the issues raised in the discussion paper.

The Director and senior officers of the Sydney Office have had discussions with judges of the Supreme Court and listing authorities in New South Wales. There has been a tendency to suggest that the DPP is the cause for some of the problems associated with the backlog of criminal cases. This is perhaps understandable when one considers the number and duration of Commonwealth prosecutions. However the DPP, if it is to perform its functions effectively, must prosecute those cases referred to it that conform with the considerations outlined in the Prosecution Policy. Surely nobody would suggest that we should not pursue drug importation or major fraud cases. They are of critical

importance,, not to the Commonwealth as such, but to the people of Australia. The DPP can only assist in a limited way in relation to the provision of court facilities. For example, it was possible for court rooms to be provided at Westfield Towers and the American Express Building in Sydney for the purpose of hearing lengthy major fraud committals.

However, the lack of court facilities is not the only cause of delay. Often a transcript of proceedings will take many months to produce. A trial cannot commence until the transcript of the committal proceedings is available, and in lengthy and complex matters it is often desirable that a transcript be available at the committal before the commencement of final addresses. In some cases lengthy adjournments have occurred due to the unavailability of the transcript, although in a few instances it has been possible for the Office to arrange for contractors to prepare an 'unofficial' transcript from tape recorded evidence so that the matter can proceed more expeditiously.

These delays have also had an impact upon the question of bail. Judicial officers who in other circumstances would not have granted bail to certain accused persons in serious matters have been reluctantly compelled to do so due to the expectation of a long period on remand. If this trend continues it is inevitable that some accused persons will flee the jurisdiction.

Some years prior to the establishment of the DPP two Courts of Petty Sessions (now Local Courts) were established at the St James Centre (the building occupied by the then Deputy Crown Solicitor) to deal with Commonwealth criminal matters. However, while cells for holding defendants in custody were also established, access to the court and the cells is through a public area. The magistrate who sits at that location has indicated that he does not wish to hear custody matters at the Court as he feels that more secure courts are available in other locations. A review of the security of the St James Local Court is being conducted by the Australian Federal Police.

Security has been a problem in other courts. In some prosecutions it has been necessary to call witnesses who require strict security measures. Courts suitable for such cases have not always been available. These problems have occurred at all levels and are likely to continue, particularly in the growing category of very serious narcotic prosecutions where informant evidence is often critical to the Crown case.

Prosecutions under the Bankruptcy Act 1966.

Occasionally the DPP is informed by a registered trustee of offences committed by a bankrupt which have come to light in the course of the administration of the bankrupt estate. The offence may involve conduct such as the obtaining of credit without making the appropriate disclosures under the Act.

Not infrequently the evidence to prove an offence is already available, for example, in the form of a transcript of an examination under the Bankruptcy Act where the bankrupt discloses the offence.

It was agreed some time ago between the DPP and the Attorney-General's Department, which administers the Bankruptcy Act, that where a registered trustee is prepared to be the informant in a prosecution for an offence under the Act this Office would carry on the prosecution and that the Attorney-General's Department would accept liability in respect of any costs incurred in the prosecution.

However, for understandable reasons a registered trustee may not be prepared to be an informant, or to carry out any further investigations that may be necessary before an offence can be established. The position of a registered trustee is essentially little different from that of an ordinary private citizen who reports an allegation of criminal conduct to the authorities in the expectation that those authorities will do all that is necessary to bring the allegation before the courts. Further, it may be thought unreasonable to expect registered trustees to undertake any further investigations that may be necessary as this would involve them in tasks not directly related to their usual duties.

The DPP has expressed the view to the Attorney-General's Department that the Official Receivers should be prepared to make their officers available to be informants in matters referred by registered trustees, and that the Official Receivers should carry out any further investigations of a non-complex nature that may be necessary in such cases. The Department has indicated that Official Receivers will make their officers available to act as informants where a registered trustee has discovered a breach of the Act, and provides sufficient evidence of the breach to justify a charge being laid, but is not prepared to be the informant. However, discussions are still continuing with the Department on the more important question of the Official Receivers carrying out any further non-complex investigations that may be necessary before a charge can be laid.

External Training

For some years DPP lawyers have assisted in the training of Commonwealth officers whose duties involve the investigation and prosecution of offences against the laws of the Commonwealth. Generally, such assistance has been provided on request, with lawyers being made available from time to time to speak at training seminars conducted by various Commonwealth departments and agencies. This has been of mutual benefit to the DPP and the various agencies involved.

However, it has been recognised for some time that the provision of this service is in need of rationalisation. Accordingly, in the Sydney Office for example it is proposed

to conduct seminars later this year for the benefit of Commonwealth officers whose duties involve the investigation and prosecution of offences against the laws of the Commonwealth.

Publication of 'No Bill' Decisions

Traditionally it has been the practice of Crown law authorities not to make available beyond interested Government agencies the reasons for a decision not to proceed to a trial on indictment although a committal order has been obtained.

In January 1987 the Director issued a press statement briefly setting out the reasons for his decision not to indict Mr Morgan Ryan following the order for a retrial by the New South Wales Court of Criminal Appeal. Although this departure from the usual practice was considered necessary as a result of the considerable public interest in that particular case, at the same time the Director stated that he had directed a review of the existing policy.

One of the standards by which any prosecution system must be judged is the extent to which it is accountable, in the sense that those who make decisions in the prosecution process can be called on to explain and justify their actions. The need for accountability is particularly acute in relation to 'no bill' decisions. Once a magistrate has determined in open court that there is a case fit to go to a jury, it seems somewhat anomalous that a decision by Crown law authorities not to present an indictment should be immune from public scrutiny. It can, in certain cases, give rise to a suspicion that the prosecution was discontinued for improper reasons, but in any event public confidence in the administration of the criminal justice system can only be enhanced where those responsible for making such decisions can be seen to do so in a proper manner.

Although any decision not to proceed to a trial on indictment will be made in accordance with the criteria in the Prosecution Policy Statement, the reasons for so doing can be distilled under the following broad headings:

- nature/seriousness of the offence;
- delays in the charge being laid and/or the trial proceeding;
- strength of the prosecution case, including concerns about witnesses;
- other more serious charges pending which cannot proceed jointly with the subject charge;
- the health of the defendant or major witnesses;

- charge bargaining resulting in a plea to charges to be determined at the summary level;

- an adequate penalty imposed in respect of a State charge which substantially covers the same factual situation as the Commonwealth charge;

- assistance by the accused to the Crown or law enforcement agencies;

- inability to obtain a fair trial;

- where the allocation of the necessary prosecution and court resources cannot be justified having regard to the nature of the offence involved and the likely penalty if convicted.

If the reasons for 'no bill' decisions are to be published, there are the questions as to how that might be done, and the exceptions that should apply to such a general rule.

At present the reasons for a no bill decision are ordinarily made available to the Australian Federal Police and/or the department or agency concerned with the administration of the relevant legislation. This should be extended as a matter of course to the main victim of the alleged offence (if any), as well as any other individual or body who may have a special interest in the particular case. As to publishing reasons to the public at large, the most appropriate course would seem to be to make the reasons available to the media and others on request in most cases, rather than, for example, issuing a press statement as a matter of course.

However, a general policy of publishing reasons for no bill decisions must accommodate the legitimate interests of suspects, accused persons, victims and witnesses. Clearly a general rule to publish reasons for no bill decisions must be subject to exceptions where disclosure beyond interested government agencies would be contrary to the public interest. In its recent discussion paper Procedure from Charge to Trial the New South Wales Law Reform Commission at pages 439 and 440 listed the circumstances that it considered required non-disclosure as including:

- where the reasons involve an adverse reflection on the credibility or reputation of particular witnesses;

- where there are related civil or criminal proceedings either pending or proposed and the disclosure may prejudice those proceedings;

- where there is a possibility that the prosecution will proceed if additional evidence becomes available;

- where disclosure would lead to the identification of an informant;

- where the disclosure would threaten national security;
- where disclosure would result in an unjustifiable invasion of the privacy of any person;
- where disclosure might result in violence or intimidation being directed towards any person.

However, it does not necessarily follow that the existence of one or more of the above would in all cases preclude any reasons being given to victims, other interested individuals or to the public at large. It may still be possible for more general reasons to be given. For example, as a result of an attack during the committal proceedings on the credibility of a principal prosecution witness, it may be concluded that the prospect of a jury being satisfied of the defendant's guilt is not reasonably open and that therefore the prosecution should be discontinued. In such a case it would often be possible for any published reasons to refer nevertheless to the unlikelihood of a conviction being secured, without detailing why that was so. Again, it may sometimes be feasible for full reasons to be made available, for example, to the victim of the alleged offence, but on a confidential basis.

The DPP's policy on this matter will be finalised during the 1987-88 year and published in the next Annual Report, if not earlier.

'Welfare Fraud' Prosecutions

Section 138(1) of the Social Security Act 1947 creates a series of offences which, broadly speaking, deal with the making of a false or misleading statement in connection with or in support of, a claim for a welfare benefit, or the obtaining of such a benefit by means of a false or misleading statement. The offences are summary and punishable by a fine not exceeding $2000 or imprisonment for a period not exceeding twelve months.

Notwithstanding the existence of these specific offences dealing with fraudulent claims on the Department of Social Security, conduct which constitutes an offence against section 138(1) will almost invariably also constitute an offence against one or more of the general provisions of the Crimes Act 1914; for example, sections 29A, 29B, 29C, 29D and 67(b). While the maximum penalty applicable on summary disposition is the same as that applicable for section 138(1) offences, when prosecuted on indictment the maximum penalty applicable for these Crimes Act offences is at least double and, in some cases, considerably higher.

It is not an infrequent occurrence in Commonwealth legislation that an offence under a specific Act covers the same ground as some general provision of the Crimes Act. In this regard there is a plethora of offences similar to those

under section 138(1) in virtually every piece of legislation which has a legislative scheme for money going from the Commonwealth to some individual or body. In part. this is a result of the 'ad hocery' which has characterised much of the development of Commonwealth criminal law. The Commonwealth does not have any general head of criminal law power under the Constitution; rather the creation of offences must be incidental to the exercise of some specific head of Commonwealth power. As a result there has been a tendency for offences of a quite narrow compass to be created, notwithstanding that the mischief aimed at would often be adequately addressed by a charge under a general provision of the Crimes Act.

However, the fact that these offences under specific Acts co-exist with the general provisions of the Crimes Act must be taken as some indication of a preference on the part of the Parliament for charges to be ordinarily laid under the specific Act rather than the Crimes Act. Accordingly, the Prosecution Policy provides some general guidance on the use of provisions of the Crimes Act which cover the same ground as provisions of a specific Act. Broadly speaking, it is provided that ordinarily the provisions of the specific Act should be applied unless to do so would not adequately reflect the nature and the extent of the criminal conduct disclosed by the evidence.

Notwithstanding this general guidance, hitherto there has been a lack of uniformity in the use of Crimes Act provisions in the welfare fraud area. The criticism by the South Australian Court of Criminal Appeal in **Vasin v. R** and **Scherf v. R** (1985) 61 ALR 541 concerning this lack of uniformity was not without justification. There was a need for more detailed guidance to be provided to prosecutors as to the circumstances which would justify resort to the Crimes Act in this area. Accordingly, in June 1987 the Director issued guidelines which were to the effect that ordinarily charges should be laid under the Social Security Act unless the evidence discloses either systematic or internal fraud. In addition, where a substantial proportion of the Social Security offences disclosed by the evidence are out of time, the guidelines provide that charges under the Crimes Act may be laid where to proceed on only the Social Security Act charges that are within time would not adequately reflect the nature and extent of the criminal conduct disclosed by the evidence.

Those guidelines are in the nature of an interim measure only. In this regard, a new development that must be borne in mind in the welfare fraud area is the Proceeds of Crime Act 1987, which was passed by the Parliament in early June 1987. A condition precedent for action under that legislation is that the offender must have been convicted of, or be charged or about to be charged with, an indictable offence against a law of the Commonwealth or of a Territory. Notwithstanding that the guidelines may lead to the conclusion on the facts of a particular case that charges under section 138 should be laid, it may be appropriate to

charge under the Crimes Act or the Proceeds of Crime Act itself so that recovery action can be taken under the Proceeds of Crime legislation. It is too early in the development of the 'proceeds of crime' initiative to provide detailed guidance on when such a course will be justified. For the time being regional offices have been directed to raise with Head Office any case where it is minded to lay a Crimes Act charge or charges in the welfare fraud area to enable action to be taken under that legislation.

Secondly, the DPP has been pressing for some time for the repeal of the time limit restrictions on prosecutions for offences under the Social Security Act. Until recently the entitlement to receive certain types of welfare benefits were reviewed only infrequently, and it was not uncommon for a recipient to have been receiving for many years benefits to which he or she was not entitled. However, even though the Department of Social Security may have investigated suspected breaches as soon as they came to notice, by the time the brief of evidence was referred to this Office a substantial proportion of the section 138(1) offences may have been out of time. The Department of Social Security accepted our view that the time limit restriction in section 139 served little purpose and that it was appropriate for the DPP to make decisions on a case by case basis as to whether an offence is stale or is otherwise not appropriate to prosecute. Section 40 of the Social Security Amendment Act 1987, which came into operation on 5 June 1987, provided for the repeal of section 139. However, by section 3(3) of that Act the repeal of section 139 only applies to offences committed after section 40 came into operation. It is understood that the Department has accepted our view that the distinction between pre and post amendment offences does not serve any useful purpose and that it will seek the introduction of legislation into the Parliament later this year providing for the complete repeal of section 139.

Finally, it is to be hoped that the review of Commonwealth criminal law at present being undertaken by the committee chaired by Sir Harry Gibbs will result in the repeal of the many offences under specific Acts of obtaining money etc. by means of a false or misleading statement, with reliance being placed instead on the appropriate general provision of the Crimes Act. It would then be for the court to take account of the relative seriousness of the particular case in determining, firstly whether the matter should be dealt with summarily or on indictment and secondly the appropriate sentence if the defendant should be convicted.

10. ADMINISTRATION

FINANCIAL MANAGEMENT

The Office has taken several initiatives throughout the year aimed at improving its financial management performance and facilitating the Office's move to program budgeting in 1987-88. The DPP is progressively strengthening its staff structures in these areas both in Head Office and the regional offices. Accounting and purchasing operations have been reviewed and a major assessment of information needs is now under way.

Program Budgeting

The Office will be adopting program budgeting for the 1987-88 financial year and has been working to develop its program format, review its objectives and articulate its strategies. The Government was explicit in its intention to revitalise and reorganise Commonwealth prosecution processes through the establishment of the DPP. Objective indicators, which will measure the degree of achievement of objectives, are currently being developed and tested.

The project undertaken to analyse the information needs of the Office will assist in identifying those indicators and the information needed to illustrate effective and efficient performance.

Internal Audit

Another initiative aimed at assessing our performance in purchasing and accounting operations was the engagement of an Internal Auditor. Inspections of aspects of the purchasing and accounting operations in each of the Offices of the DPP were completed during the latter half of the financial year. The findings are under consideration by senior management but they indicate that although the Office was established in a relatively short period, that has been accomplished without loss of probity in these areas.

The Attorney-General's Department co-ordinates the estimates requirements for the portfolio and undertakes final processing in purchasing and accounts operations. This involves the DPP in day to day liaison with the Department. These are areas in which major service-wide reforms are being introduced. We hope to adopt these initiatives quickly. The DPP will be involved in further consultation with the Department in 1987-88 to improve and simplify procedures.

Financial Statement

In general there was very little variation in the expenditure for 1986-87 compared with the budget. The work of the Office in the main is the result of the activities of other organisations involved in law enforcement, such as the AFP. The DPP must prosecute those cases referred where it is appropriate to do so having regard to the considerations set out in the Prosecution Policy. Accordingly, while striving for maximum efficiency, the Office has little room within which to reallocate priorities in order to accommodate a situation of insufficient funding.

	Estimated Expenditure $('000)	Actual Expenditure $('000)
Appropriation Act No. 1		
Salaries and Payments in the Nature of Salaries	12 067	11 232
Administrative Expenses	4 468	4 454
Compensation and Legal	5 690	5 129
Appropriation Act No. 2		
Plant and Equipment	230	119
Special Appropriations (Director's Salary and Allowances)	137	118
Total Expenditure	22 592	21 052
Revenue		138
Total Outlay		20 914

The variation in relation to the 'salaries' item is primarily due to a lower than anticipated level of inoperative staff, difficulties experienced in recruiting suitably qualified senior staff, and the high turnover rate across all areas of the Office. A more planned approach to recruitment is slowly redressing the problem of attracting qualified staff.

A shift in the nature of the workload in the major fraud area from investigation to prosecution resulted in some savings in running costs. This enabled the Office to bring forward the

planned upgrade of its computer facilities. This proved to be fortuitous as the system was running at near maximum capacity. However, increased workloads arising out of work being undertaken by the Department of Social Security, the Australian Taxation Office, the Australian Federal Police and the National Crime Authority and of legislation passed in 1986-87, will prevent the Office from being able to reallocate priorities to the same extent in coming years.

The saving in 'compensation and legal' mainly reflects the delays being experienced in major cases pending the outcome of appeals.

PERSONNEL MANAGEMENT

Recruitment Campaigns

The year saw a continued high turnover in legal staffing. A systematic legal recruitment campaign was undertaken throughout the year to combat this problem. The campaign was successful and the DPP was able to attract good quality legal staff throughout Australia. However, this high turnover is still of great concern. It clearly reflects the disparity between public and private sector salary rates. For this reason, recruitment will continue to be a high priority for the DPP for the foreseeable future.

Personnel Management Scheme Placement

The DPP has a commitment to efficient personnel management within the Public Service. The Office has made a place available under the Personnel Management Scheme to give that person an insight into the DPP as well as personnel management in a small organisation.

Security - Personnel

The last Annual Report stressed the need for personnel employed by the DPP to be beyond reproach and to have no criminal connections or convictions for serious offences. To this end, a comprehensive review of security procedures has taken place to ensure that staff have been checked by the Australian Federal Police and the Australian Security Intelligence Organisation to their appropriate security level.

Work is nearing completion on the development of new security clearance application forms which will help to ensure that applicants for positions in the DPP understand our security needs.

Industrial Democracy and E.E.O.

Open lines of communication between management and staff on work-related issues continue to be given the highest priority in all DPP Offices, and all offices hold regular staff and lawyers meetings.

Meetings are also held on a regular basis with Staff Associations. National and Regional Consultative Councils meet on a regular basis as part of the DPP's Industrial Democracy initiatives. Implementation of the Equal Employment Opportunity plan progressed steadily during the year and realistic objectives for all target groups were included when the Program was reviewed in November 1986. Tasks were assigned to designated staff members to involve them more closely with the work of the Program. For example, Sexual Harassment Contact Officers were appointed and trained, and Smoke Free Project Officers were involved in looking towards the establishment of a smoke free environment in the DPP Offices by 1 March 1988.

Staff have been kept informed through the DPP Staffing Bulletin of the major changes affecting them which are occurring in the Australian Public Service.

Summer Clerkships

Last year for the first time the Sydney and Melbourne Offices employed 'summer clerks' during the 1986-87 three month university break. The purpose behind this exercise was a developmental one for the law students, the Office and the legal profession as a whole.

Lawyers from both offices visited all Sydney and Melbourne universities with a law faculty in order to publicise the DPP's existence and to invite applications for summer clerkships. The response was excellent, resulting in two summer clerks being placed in the Sydney Office and four in the Melbourne Office. A similar exercise will be undertaken this year.

Articled Clerks

During this year the DPP has been examining the employment in the DPP of articled clerks, particularly in the Perth Office. Consultations have taken place between the Public Service Board and the Australian Government Lawyers' Association both of whom have agreed to the concept. The stage is now set for the commencement of advertising and selection procedures, which are scheduled for the latter half of 1987.

Legal Training

As outlined in the last Annual Report, a firm of consultants was retained to develop a legal training and induction program for use throughout the DPP. This program is aimed at new legal staff and uses a combination of set courses, videos

and manuals. In addition, the program will also provide training for supervisors in the skills of supervision and interviewing.

The DPP also undertook, although on a very small scale, a staff exchange program between offices. This proved to be a most worthwhile initiative. It will be continued and, if resources allow, expanded.

Mandatory Continuing Legal Education

Currently the Sydney Office of the DPP employs approximately fifty lawyers of whom thirty six have current practising certificates.

The Law Society of N.S.W. has introduced mandatory continuing legal education (MCLE) for all solicitors as a condition of retaining a practising certificate. Each solicitor is required to undertake ten units of training at approved courses each year. The initial period for compliance is 1 January 1987-31 March 1988. From 1989 practitioners will be required to certify when seeking to renew their certificate that they have accumulated the required units during the preceding year. A unit is equated as one hour's attendance at an approved course. It has been decided to conduct a series of 'in-house' lectures to assist lawyers in the Sydney Office to accumulate the required number of units. The Law Society has recently reviewed the relevant guidelines and all MCLE requirements may now be satisfied by way of 'in-house' lectures.

Over the next twelve months papers are to be presented each month by lawyers from the Office, covering matters such as extradition, bail, search warrants, telephone interceptions/ listening devices and trade practices prosecutions. Sydney Office lawyers have responded to the program enthusiastically. The timing, location and subject of the courses have been designed to meet the needs and convenience of staff. Each lecture has been accredited MCLE points by the Law Society.

Any lawyer who wishes to do so can totally satisfy his or her MCLE requirement by attendance at the 'in-house' lectures. However, the Sydney Office continues to encourage attendance at training courses conducted by the Law Society and other organisations. In addition, lawyers from the Australian Government Solicitor, National Crime Authority and State DPP have been invited to attend any of the Office's 'in-house' lectures. The Sydney Office has also agreed to provide lawyers to conduct seminars arranged by the Law Society.

Other Training

Because of its small size the DPP cannot undertake its own administrative and non-legal training. For this reason considerable use was made throughout the year of courses offered by other departments and professional bodies. This approach has proved to be quite successful and will be continued.

Staff List

The staff list is a computerised listing of positions and persons in the Office of the Director of Public Prosecutions.

Since late 1986 the staff list has been designed around the Speed II Wang Word Processing System. The regional offices have direct access and update facilities to the list. The master list, held by Head Office, is updated monthly by the regional offices forwarding magnetic tape copies of their information.

The staff list provides:

- staffing information to management
- staff usage statistics to management and outside organisations
- the capacity to include personal data in accordance with E.E.O. requirements and for development and training purposes

The new system provides management with accurate and timely information and facilitates planning and review activities.

Establishments Computer System

Development of the Establishments Computer System commenced in early 1986. The main components of the system are:

- a position history data-base, containing a record of all transactions and references for each office in the DPP from creation to abolition;

- electronic records of DPP duty statements and organisation charts;

- use of the computer for preparation of all establishments variation documentation via Classification Authorities Register (CAR) submissions.

An audit of the system and DPP classification levels conducted by officers of the Public Service Board in July 1986 resulted in a favourable report.

Conferences

Two conferences were held for Deputies in 1986-87, the first in Brisbane in September 1986 and the second in Canberra in April 1987, to discuss operational problems and national organisation. The Directors of Legal Services from Adelaide, Hobart and Darwin also attended the Brisbane conference. In addition, a number of more specialised conferences were held during the year for prosecutors, section heads and civil remedy lawyers.

Two conferences for administrative officers were held during the year to exchange ideas, discuss general administrative matters (both personnel and finance related), to co-ordinate

working procedures, and to report on the status of current and projected activities.

These conferences continue to be a most useful forum for discussion between Head Office and the regional offices.

Establishment and Staffing

ASL allocation for 1986-87 by Office was as follows:

Head Office	35.5
Canberra Office	26.0
Sydney Office	134.0
Melbourne Office	107.0
Brisbane Office	36.0
Perth Office	30.0
Total	368.5

This total does not include allocation for paid inoperative staff.

Actual staffing usage as at 30 June 1987 for each office was as follows:

Head Office	40.49
Canberra Office	26.50
Sydney Office	141.12
Melbourne Office	98.00
Brisbane Office	37.23
Perth Office	27.60
Total	370.94

The ASL allocation for 1987-88 is 374.3. The allocation as between offices had not been determined at the time of writing.

End of Month Staffing for 30 June 1987 on a National Level

Full Time

	Perm		Temp	
	Male	Female	Male	Female
BAND 1	17	2	-	-
BAND 2	78	28	1	1
BAND 3	65	129	13	29
Sub Total	160	159	14	30
Total	319		44	

Part Time

	Perm		Temp	
	Male	Female	Male	Female
BAND 1	-	-	-	-
BAND 2	-	-	.65	-
BAND 3	-	-	1.06	.68
Sub Total	-	-	1.71	.68
Total	-		2.39	

Grand Total: 365.39 (inoperative staff are not included in this total)

Excerpt from End of Month Legal Staffing Figures as at 30 June 1987

		Actual Male Occupant	Actual Female Occupant	Not Actually Filled as at 30 June 1987
SES	L.6	1		
	L.4	3		
	L.3	2		
	L.2	8		1
	L.1	2	1	1
	PLO	32	7	9
	SLO	32	18	13
	LO	22	15.75	30
	TOTAL	102	41.75	54

ACCOMMODATION

Considerable progress has been made during 1986-87 towards realising our long-term goal of housing the Office satisfactorily. Much of this progress is due to the assistance provided by the Department of Local Government and Administrative Services.

The Sydney Office saw completion of a major refit during the second half of 1986-87 which had commenced in November 1985. Space for a new document repository, to replace temporary and now dilapidated premises which have been costly to maintain, has been leased and will become available for occupation in July 1987 after completion of a suitable fitout.

It is expected that the additional space allocated to the Melbourne Office will become available during the second half of 1987-88 following the relocation of the present tenant. An associated redistribution of floors and a consequential refit will still unfortunately not see that office's difficulties resolved until late 1987-88 or early 1988-89. New document storage facilities were completed during 1986-87 and are now fully operational.

Accommodation for the Canberra Office was identified and allocated earlier than expected. A suitable fitout was completed in May 1987 and that office's operations are now consolidated in the one locality.

Although tenders have been let for the refit of the Head Office premises, the necessary work will not be completed until late 1987.

With the completion of the Head Office fitout physical security of all premises against unauthorised access will rate equally well. Other security aspects, particularly those concerning inter-office communications, are under review and various new measures will be implemented during 1987-88.

AUTOMATIC DATA PROCESSING (ADP)

The DPP collects and analyses a vast amount of diverse information, and has been using computer systems to manage this information. Computers are used in litigation support, case matter management, word processing and other legal information data bases.

Our major ADP effort has been to support lawyers in lengthy litigation by assisting in the organisation of evidentiary material, exhibit lists and witness statements. The system is used mainly in the major fraud committal hearings and trials.

ADP support has been extended recently to a wider range of cases, particularly in the civil remedies area, and the capabilities of the systems are becoming increasingly sophisticated. We expect this trend to continue in the future.

The DPP has continued to build on its ADP equipment and systems developed in previous years. The Office is continuing to make substantial use of its Wang VS facilities. To meet growing user demands for computer support, the DPP has enhanced the hardware capability in its

offices. We have also upgraded most of our terminals to more ergonomic models, and acquired more suitable print capacity.

To allow faster development of systems to meet these growing demands, the Office has acquired Speed II, an application which operates on the Wang VS computers. Already this product has allowed us to achieve some remarkable successes, allowing the Office to develop new systems offering greater capability at lower cost than previous systems.

The Office is making increasing use of personal computers, primarily for stand-alone word processing and spreadsheet applications. There is growing interest in this area and it is expected that the applications of PCs within the Office will continue to expand. Our Wang PCs can also be connected to the VS installations.

It is intended to run a pilot network during 1987-88 linking two of our VS installations. If this proves to be effective we will proceed to network all the VS machines and link them into Attorney-General's Facom M200.

This will provide better overall control and access to important data holdings between State offices.

The DPP is continuing to use the Facom M200 operated by the Attorney-General's Department. Most of our use of this machine is based on use of the text retrieval system STATUS to search material to assist in the preparation and prosecution of cases. Considerable use is made of the SCALE facility supported on the M200 by the Attorney-General's Department and this equipment is also used to allow DPP staff access to the CLIRS database. Our thanks to the Attorney-General's ADP support staff for their continued assistance to the DPP over the year.

Recruitment

The Office has experienced the usual difficulties in obtaining and retaining suitable professional staff and has experienced a continuing level of turnover in the ADP area. Fortunately, we have recently been experiencing a better response to advertisements for such staff and we have been able to maintain a suitable level of experienced professional staff. A small increase in the number of ADP staff is envisaged for 1987-88.

Case Matter Management System

A development that is of considerable importance to the efficient management functioning of the Office has been the new Case Matter Management System. This is a computerised file registry system operating in each office. It provides management, as well as individual DPP lawyers, with control of case files, allowing the status of cases to be ascertained and monitored both at the individual level and in the aggregate. It will allow the DPP to keep better statistics

of office activity. The system will also, over time, build up a data holding of comparative information (about items such as bail and sentences) that should be of assistance to DPP lawyers.

An interim system was made available in the early stages and used as a prototype pending the implementation of a final system. This approach proved effective, allowing each office some experience with a system of the type envisaged. A consolidated specification, taking account of the various needs of the offices, was then developed and, from that, a new system. This system has now been put in place around Australia and early indications are that it is meeting our objectives.

User Needs Analysis

In mid-1986 the DPP commenced development of an ADP strategic plan. However, as part of the Office's continuing strategic planning it was decided to undertake a user needs analysis in order to have a better basis for such planning.

The analysis is designed to provide the organisation with a basis from which to plan its ADP strategy for the next few years. It will assist in documenting how matters were dealt with previously, such as in bottom of the harbour cases, to enable us to learn from past experience. It will also provide the basis for determining the statements of objectives and functions as well as the performance monitors which are required to be provided for the introduction of Program Budgeting in the 1987-88 financial year. It is also expected to provide feedback on the ADP work already being undertaken by the Office, and ways in which existing systems can be improved. This analysis is a significant undertaking both in terms of total resources involved and, more importantly, in terms of its potential impact on the Office.

The DPP called tenders from consultants who specialise in this type of work. At the time of writing a team of four is actively working on the analysis. This team comprises two specialist consultants, a lawyer (who is acting as team leader) and the DPP's Information Systems Manager.

LIBRARY SERVICES

During the year the Office consolidated its library operations and strengthened its librarian structure. Librarian positions in Brisbane and Sydney were filled on a permanent basis. The librarian position in the Perth Office is to be filled on a permanent part-time basis and recruitment action is expected to be finalised during July 1987. The librarians meet as a group at least once a year to exchange ideas and discuss forward planning strategies.

The most significant initiative taken during the year was to join the Australian Bibliographic Network (ABN). DPP libraries now have extensive searching capability through the ABN, CLIRS, SCALE and DIALOG systems. All DPP offices will

have access to bibliographic information for inter-library loans, bibliographies and other requirements such as identifying all editions of a book. It will give access to a range of technical information for ordering, cataloguing and classifying, resulting in a reduction in the duplication of effort across the DPP.

The Sydney library will be responsible for cataloguing and classifying each of the DPP collections and for adding information to the ABN records. This arrangement will enable the sole librarians in the libraries in other offices to serve more efficiently the information needs of their Office. The other main benefit of joining ABN is to be able to obtain a computer-produced catalogue tailored to the needs of the DPP without implementing an in-house computerised system. Other products of the system are catalogue cards, shelflists and book labels.

During the next year there will be several major library accommodation changes particularly in the A.C.T. Despite these disruptions the librarians will be aiming to review and consolidate their collections and further develop an in-house national current awareness service to support DPP lawyers.

KEYBOARD SERVICES

In September 1986 the former RSI Prevention Working Party was reconstituted as the Keyboard Working Group. The Group was asked to review and report on training, equipment, policies and practices, supervisory responsibilities and occupational health and safety measures which affect DPP staff using keyboards. The Group comprised a project officer and a personal secretary from Head Office, as well as the Computer Operations Controller from the Melbourne Office and Word Processing Operator Grade 2 from Sydney Office. The Group visited all offices and presented a very comprehensive report in March 1987. Their recommendations covered all aspects of keyboard operations.

The Office has been progressively upgrading its Wang word processing capacity and its furniture, and has strengthened its keyboard supervisory structure in Sydney and Melbourne.

The work of the Group and the measures being taken have helped to ensure that there were no new reports of RSI during the past year and that all previous sufferers have returned or are progressively returning to full time duty.

There will be consultation with staff associations before finalising a prevention and management programme. It is envisaged that the Group will continue to provide advice and will further develop their recommendations and an implementation plan.

OTHER MATTERS

Client Information Booklet

In March 1987 a 'Client Information Booklet' was printed and made available to Commonwealth departments and agencies. Its purpose was to assist them in their dealings with the DPP.

APPENDIX I: GUIDELINES FOR THE ASSISTANCE OF PROSECUTION LAWYERS ON JURY SELECTION

These guidelines are for use by DPP lawyers, officers of the Australian Government Solicitor who act for the DPP in criminal matters, and private counsel briefed by or on behalf of the DPP.

Introduction

1.1 The criminal jury is an ancient and fundamental institution. It dates back at least to the 13th century. Most serious charges to which the accused does not admit guilt continue to be heard before judge and jury.

1.2 Jury panels have traditionally been chosen at random from those eligible for jury service. However, both prosecution and defence have long had a right to participate in the selection process.

1.3 The law in most parts of Australia is inapt to produce a jury that is truly representative of the community. In most places the categories of persons not required to serve on juries are very wide. In addition, in most places the prosecution or defence, or both, have the right to exclude a large number of potential jurors otherwise than for cause. Assuming there is a continuing place for the right to exclude potential jurors without cause, there is much to be said for the present law in South Australia which gives both the Crown and the defence only three peremptory challenges, with the Crown having no additional power to stand aside. However, we must take the law as we find it from time to time.

1.4 It must be borne in mind that in this area, as in many others, the responsibilities of prosecution lawyers differ sharply from those on the defence side. Prosecutors act in the public interest. Defence lawyers care, first and foremost, about the accused. Generally speaking it will be appropriate for those on the prosecution side to exercise more restraint in jury selection than is incumbent upon defence lawyers.

1.5 The DPP's practice on jury selection should, as far as possible, be uniform throughout Australia. However, there are limits to the uniformity that can be achieved. The rules concerning eligibility for jury service vary between jurisdictions, as do the

procedures on jury selection, and the amount of information available on the potential jurors. The number of challenges available to the prosecution, and the manner in which they may be exercised, also vary. In some places the prosecution has the same rights of peremptory challenge as the defence. In other places the prosecution may ask potential jurors to stand aside. In a few places the prosecution may do both.

1.6 It is beyond the scope of these guidelines to review the law and practice in each jurisdiction. All prosecutors must be familiar with the relevant law and procedure before participating in jury selection.

1.7 In all jurisdictions there is provision for a challenge to the jury panel, and for individual jurors to be challenged for cause. Neither of these powers is exercised very often, and each may be looked upon as largely theoretical in nature. Neither topic is dealt with here.

The role of the prosecutor

2.1 The function of the prosecutor in the selection process is to ensure, as far as is possible, that the jury selected is impartial, balanced and generally representative of the community. The extent to which he or she can do so is dependent on the information available, the number of potential jurors who may be challenged, or stood aside, and the number of people on the jury panel. Generally the prosecutor's function can only be performed imperfectly.

2.2 It is not the function of the prosecutor to seek to achieve a jury that will favour the prosecution. The primary duty of the prosecutor, as at all stages of the prosecution process, is to be fair.

2.3 The prosecutor may, however, take steps to ensure that the jury chosen is not such as to unduly favour the defendant.

2.4 The decision whether to challenge, or stand aside, a potential juror depends on the professional judgment of the individual prosecutor. Any views expressed by the AFP, or other agency, should be given such weight - if any - as is appropriate. Prosecutors do not act on police 'instructions' in jury selection.

2.5 If a prosecutor has information concerning a potential juror which is not available to the defence and which gives reasonable grounds for believing that the potential juror may unduly favour the prosecution, he or she should either challenge, or stand aside, the potential juror or make the relevant information available to the defence. (Note that there is no corresponding obligation on the defence).

Matters that may be taken into account

3.1 In deciding whether to challenge, or stand aside, a potential juror, a prosecutor may take into account any available information which is relevant to that decision having due regard to his or her role in the selection process.

3.2 Subject to paragraph 3.4, it is a matter for the professional judgment of the individual prosecutor to assess the relevance of available information and the weight that should be given to it.

3.3 A prosecutor may challenge, or stand aside, a potential juror who is otherwise suitable for jury service if the potential juror belongs to a group that is already heavily represented on the jury and it appears that a more balanced jury may be achieved if the potential juror is excluded.

3.4 Except in the circumstances outlined in paragraph 3.3, no potential juror should be challenged, or stood aside, on grounds of sex, race, religion or, unless it has a bearing on fitness for jury service, age.

The number of challenges

4.1 In some jurisdictions the prosecution can peremptorily challenge, or stand aside, the same number of potential jurors as the defence. This currently applies in N.S.W., Queensland and South Australia. In other places the prosecution may stand aside or challenge more potential jurors than the defence.

4.2 It may give the impression that the prosecution is seeking to achieve a jury favourable to it if it is seen to peremptorily challenge, or stand aside, a greater number of potential jurors than can be challenged by the defence. This could undermine public confidence in the jury.

4.3 More importantly, as a matter of basic fairness, the prosecution should have no more rights in jury selection than the defence.

4.4 It is DPP policy in jurisdictions other than N.S.W., Queensland and South Australia to voluntarily limit the number of potential jurors that may be peremptorily challenged, or stood aside, to the number of peremptory challenges available to the defence. This policy will only be departed from in exceptional cases where the interests of justice clearly require that additional potential jurors be challenged or stood aside. Where there is more than one defendant, the limit is a number equal to the total number of challenges available to the defendants.

The power to stand aside

5.1 In some jurisdictions the prosecution may elect to either challenge an unsuitable potential juror, or ask him or her to stand aside. This currently applies in Western Australia, the A.C.T. and the Northern Territory.

5.2 There is no objection to the prosecutor standing aside jurors, rather than exercising a peremptory right of challenge, in those jurisdictions where either course can be followed. However this is subject to the over-riding consideration that the prosecution will generally not assume greater rights in the jury selection process than is given to the defence by legislation - see paragraph 4.3 above.

Confidentiality

6.1 Members of the prosecution team should not discuss with anyone else, and certainly not with anyone connected with the defence, the reasons for challenging or standing aside a juror. Nor should they attempt to seek from the defence any reason for any of their challenges.

30 June 1987

APPENDIX II: GUIDELINES FOR THE ASSISTANCE OF PROSECUTION LAWYERS ON SENTENCE

These guidelines are for the assistance of DPP lawyers and officers of the Australian Government Solicitor who act for the DPP. Their purpose is to achieve a measure of uniformity in the DPP's participation in the sentencing process. The guidelines should form the basis of discussions with, and where appropriate instructions to, private counsel briefed by or on behalf of the DPP.

Introduction

1.1 The traditional role of the prosecutor on sentence has been limited to outlining the facts, presenting an antecedent report and ensuring that the court makes no errors of fact or law.

1.2 This role has been justified by reference to the prosecutor's position as an officer of the court whose duty is to assist the court in ascertaining the truth according to law, and the overriding duty to be fair. However, while the prosecutor undoubtedly has these duties, it does not follow that he or she can have no role in the sentencing process. The community clearly has an interest in ensuring that a proper penalty is imposed when a person has been convicted of a criminal offence. This is recognised in the statutory right which the Crown now has in every Australian jurisdiction to appeal against a penalty considered to be inadequate. It is inconsistent with that right to suggest that the prosecutor has no role in helping to ensure that a proper penalty is set at first instance.

1.3 The recent trend of judicial authority is towards the prosecutor playing a greater role in the sentencing process : see **R v. Tait and Bartley** (1979) 24 ALR 473, **R v. Travers and Davies** [1983] SASR 112, **R v. Jones** [1984] WAR 175, **R v. Casey and Wells**, unreported, Vic Sup Crt 20 March 1986, **R v. Jermyn** [1985] 2 NSWLR 194, and also Temby, 'The Role of the Prosecutor in the Sentencing Process', (1986) 10 C.L.J. 199.

1.4 These guidelines outline matters that may properly be put to a court on sentence and which should be put in appropriate cases. It is not intended that they should reduce to nought the discretion of the prosecutor, still less that of the court. The form and content of any address on penalty will depend upon

the circumstances of the individual case. In many cases there will be no need to address on penalty at all.

1.5 It is a matter for the prosecutor to decide whether to address on penalty and, if so, what matters to cover. The only exception is in the case of major prosecutions, in which an outline of proposed submissions should be settled by the Director, a Deputy Director or an SES officer. These are dealt with in section 5 below.

1.6 These guidelines apply to both summary proceedings and proceedings on indictment, although the nature of the proceedings will be relevant in determining whether to address on penalty and, if so, the matters that should be covered. As a general rule, addresses on penalty are likely to be less frequent, and briefer, in summary matters than in proceedings on indictment given the nature of matters dealt with summarily and the exigencies of time that are often involved. In an appropriate case, however, the prosecutor should address on penalty in a summary matter, even at the cost of delaying other matters.

1.7 It must always be borne in mind that the role of the prosecutor in the sentencing process is not to ensure that the maximum possible penalty is imposed, but rather that the penalty which is imposed is appropriate in all the circumstances of the case. The prosecutor must remain dispassionate and must not seek to sway the court by rhetoric or an appeal to emotion. The prosecutor's overriding duty, as at all stages of the criminal process, is to be fair.

Matters that may be addressed

2.1 Depending on the circumstances of the case, an address on sentence may properly cover any, or all, of the following matters:

i. An adequate presentation of the facts, including any circumstances of aggravation or mitigation and whether the defendant has spent any time in custody. (It will not be necessary to repeat matters already fully canvassed).

ii. Whether the defendant has made, or has offered to make, reparation.

iii. An outline of the defendant's antecedents including his or her criminal record, if any, and such subjective material as is needed to present a fair picture of the defendant to the court.

iv. Whether the defendant has co-operated or promised to co-operate in any investigation or prosecution of alleged co-offenders.

v. An outline of the range of sentencing options available and the relevant laws governing the sentencing of the offender (such as the Commonwealth Prisoners Act 1967 and sections 17A to 20AC of the Crimes Act 1914).

vi. A reference to any authorities that may indicate the appropriate sentencing principles that should be applied by the court.

vii. A reference to any recent sentences imposed in similar cases, including the extent to which the cases are comparable factually, and the nature of the plea. (Remember that there are variations in practice and procedure in different jurisdictions).

viii. The prevalence of the relevant offence, its effect upon the Commonwealth and the community and, if it be the case, the need for possible future offenders to be deterred. In this regard, the prosecutor must be in a position to substantiate any statements of fact by, for example, referring to relevant statistics or, where appropriate, calling a witness.

ix. Any legislative history which may assist the court (e.g.: if the maximum penalty applicable has recently been increased).

x. Where defence counsel or the court suggests a possible manner of disposition which in the professional judgment of the prosecutor would be outside the range available in the exercise of a sound sentencing discretion, submissions suggesting one or more possible options should be put forward.

xi. In appropriate cases it is proper for a prosecutor to submit that the court should impose a particular type of penalty (e.g.: imprisonment rather than a bond or fine). The prosecutor should not urge the imposition of a particular penalty (such as two years imprisonment), although there is no reason why in appropriate circumstances the prosecutor should not submit that a short (or moderate, or lengthy) term of imprisonment is appropriate.

xii. Any information requested by the court.

The above list is not exhaustive. Additional matters may arise in particular cases which should be addressed on sentence.

2.2 The prosecutor should always ensure that the court does not fall into error in the sentencing process. In particular:

i. Where the defence puts matters to the court in mitigation which are untrue or unjustified, those matters must be disputed. If necessary the defence should be put to proof.

ii. If it appears that the court is considering a sentencing option which is not available, the matter must be drawn to the court's attention.

iii. If the defence calls character witnesses or expert witnesses on sentence, the prosecution should be prepared to test their evidence by cross-examination, or calling rebutting evidence, if there is reason to doubt its accuracy.

2.3 In considering whether to address on sentence and, if so, what matters to cover, a prosecutor should have regard to all relevant matters, including the following:

i. Whether the matter has proceeded by way of plea or hearing and, in either event, the extent to which it is necessary to repeat any matter that was canvassed in the hearing or the prosecution's summary of the facts.

ii. Whether the matter is being dealt with summarily or on indictment.

iii. The seriousness of the particular case, including any circumstances of aggravation or mitigation and whether the defendant has made, or has offered to make, reparation.

iv. The nature of the offence, including its prevalence, the need to deter others and whether the legislative history of the offence is relevant.

v. Whether there are any recent relevant authorities or legislative developments of which the court may be unaware.

vi. The penalties imposed by the particular judge or magistrate in similar matters.

vii. Whether the defendant is represented.

viii. Whether the defence has addressed, or intends to address, on penalty (and if so what was or may be said).

ix. The likely attitude of the court or a particular judge or magistrate to an address on sentence.

Unrepresented defendants

3.1 It may be appropriate for a prosecutor to address on penalty notwithstanding that the defendant is not represented.

3.2 However the prosecutor's duty to be fair is particularly acute if the defendant is not represented. In such cases the prosecutor should:

i. ensure that all matters beneficial to the defendant are brought to the court's attention;

ii. avoid raising controversial matters, or any matter which the defendant may be unable to challenge;

iii. minimise an address on matters that may confuse the defendant (e.g.: the legislative history of the provision, or comparative sentencing statistics);

3.3 As a general rule, the matters addressed should be kept to a minimum where a defendant is not represented.

Failure to address

4.1 If the prosecution fails to make submissions on sentence it may face difficulty if it subsequently wishes to appeal against the penalty imposed. In **R v. Jones** [1984] WAR 175 Burt CJ said (at 179):

> ...an appeal court on a Crown appeal may decline to intervene to correct [a sentencing error]... if the Crown has failed in its duty to assist the sentencing judge to avoid the error and a fortiori if the Crown with the knowledge of what the sentencing judge intended to do has, by its counsel acquiesced in, and to that extent encouraged him, to do what he did.

4.2 It may only be in exceptional circumstances that an appeal court will allow the prosecution to put submissions which were not put below. This will be so particularly where, on a plea of guilty, the prosecution did not challenge the version of the facts presented by the defence at sentence.

Major prosecutions

5.1 In a major prosecution, involving serious or contentious charges, an outline of proposed submissions on sentence should be prepared wherever practicable and, depending upon the seriousness of the case, should be settled by the Director, a Deputy Director or an SES officer. If counsel has been briefed in the matter, the proposed submissions should be prepared in consultation with counsel.

5.2 If it is not proposed to address on sentence in such a matter, the action officer should seek approval for that course of action.

10 June 1987

APPENDIX III: GUIDELINES FOR 'CIVIL DISOBEDIENCE' PROSECUTIONS

On 8 January 1986 guidelines were issued under section 11 of the Director of Public Prosecutions Act 1983 on 'Civil Disobedience' prosecutions. They were directed to the Commissioner of Police of the Australian Federal Police, the Deputy Directors of Public Prosecutions and the Directors of Legal Services in Adelaide, Hobart and Darwin. They were prepared following consultation with the Australian Federal Police and the Attorney-General's Department. Following a report by the Human Rights Commission dated 6 November 1986 certain changes have been made to the guidelines to ensure that they are consistent with Australia's obligations under the 'International Covenant on Civil and Political Rights'. The amended guidelines are set out below. They supplant those which were issued on 8 January last.

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 Q.C., 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 prosecution 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 alleged 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, Norman 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. 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. By way of illustration, in 1984 a large group of protesters gathered at the HMAS Stirling Base in Western Australia. AFP

officers spent a great deal of time pushing back those protesters who sought to breach the perimeter fence. In those circumstances it was understandable that those protesters who did eventually force their entry onto the base were arrested.

8. 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 fact that a justified arrest has been effected and/or there is evidence which, in the opinion of the DPP or the authorised officer, could result in the conviction of the alleged 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 police. If a decision is made not to consent to the institution of a prosecution the AFP should be notified, orally if time is of the essence, and, in any event, in writing outlining the reasons for the decision.

9. 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 1983. 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.

10. 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.

11. 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 circumstance 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'.

12. 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 IV: REASONS FOR DECISION IN 'C.J.L v. GISELA BERNET'

Set out below are the written reasons that were prepared at the time for the Director's decision to take over and terminate the private prosecution that had been instituted against Ms Gisela Bernet. The only change that has been made is to omit the full name of the original informant in view of the prohibition in section 121 of the Family Law Act 1975 against publishing an account of Family Court proceedings that are sufficient to identify a party to those proceedings.

On 4 August 1986 a summons was taken out by [C.J.L.] alleging that Gisela Bernet did on 5 February at Canberra "attempt to prevent the course of justice in relation to the judicial power of the Commonwealth in contravention of section 43 of the Crimes Act 1914 (Commonwealth) as amended".

2. This Office was apprised of the matter by the Attorney-General's Department later in August. By submission dated 23 September Mr McCarthy, Acting Senior Assistant Director, has recommended that I take over the prosecution pursuant to sub-section 9(5) of the Director of Public Prosecutions Act 1983. Mr McCarthy has further recommended that having taken over the prosecution I should decline to carry it on further.

3. The matter is one of novelty and difficulty, particularly as to the second aspect. After careful consideration I have decided to accede to both recommendations.

4. Shortly stated the reasons for that decision are these:

a) It is clearly in the public interest that prosecutions relative to the administration of justice should be conducted by an appropriate independent prosecuting service, such as this Office, rather than a private individual who might appear to be actuated by motives of revenge or vindication or both.

b) While the present prosecution could succeed an acquittal is the most likely end result.

c) Contempt proceedings could be brought against the present defendant, and it is very likely that they would succeed.

d) In any event, the recent High Court proceedings must have gone far to make clear to persons in the position of this defendant that they must not act as she did.

5. In even shorter summary, it is distinctly contrary to the public interest that this prosecution should be taken further, particularly as an alternative is available.

6. The summons was initially returnable on 8 September 1986. It was then adjourned for mention on 10 October 1986. In the meantime the informant was required, pursuant to section 12 of the Director of Public Prosecutions Act, to furnish to me a full report of the circumstances of the matter, a copy of the statements of any witnesses, and each material document. That was done by statement which was made available on 8 September 1986, and comprises the material which was before the High Court, and which led to that Court ordering on 30 July that Renaud J. be prohibited from further proceeding in the proceedings in which [C.J.L.] and his wife were parties.

7. The following is taken from the reasons for decision of Gibbs C.J. in the High Court proceedings - re J.R.L. ex parte C.J.L.:

"The applications came on for hearing in the Family Court on 4 February 1986. A court counsellor, Ms Bernet, had, pursuant to a direction of the court, furnished a report dated 28 August 1985. In November 1985 she had been directed to prepare a further report and her further report, dated 31 January 1986, became available to counsel only during the hearing on 4 February 1986. The report strongly favoured the wife; it stated that the child was "on the way to a severe anxiety neurosis" and that if she remained living with her father her condition could be expected to deteriorate. At that stage of the proceedings it was not known whether the counsellor had any qualifications that fitted her to make this diagnosis. It had never previously been suggested that the child was affected in this way, and the husband, who was later shown the report, wished to have the child examined by a psychiatrist or psychologist. On the following day (5 February) counsel for both parties agreed that the hearing could not proceed to a conclusion until investigations had been made into matters raised in the report. The date on which the hearing might be resumed was discussed. May 27 was suggested. Both counsel said that in the circumstances they did not wish to have the counsellor called to give evidence that day and the judge indicated that the counsellor could go home. However, the hearing proceeded to enable a medical witness to be examined and to enable the course of further proceedings to be debated.

At some time on 5 February 1986 the counsellor approached the wife and said that the proposed adjournment was outrageous and that she proposed to do something about it. She in fact discussed the matter with the Director of Court Counselling at Parramatta and then went to the judge's chambers during the luncheon adjournment and had a conversation with the judge. Shortly afterwards, the judge called counsel for both parties into her chambers, introduced them to the counsellor and told them that the counsellor had some recommendations in regard to the child. There then occurred a conversation, substantially between the judge and the counsellor, in the course of which the judge said that the counselling service was extremely concerned about the length of the adjournment and the counsellor said that she thought that a separate representative should be appointed for the child, and that there should be supervision by the Canberra Counselling Service. The judge made certain remarks that appeared to indicate some of the matters which she had earlier discussed with the counsellor. She said, "The counsellor has said that she is a clinical psychologist". She said to the counsellor, "What do you think ought to be done? You think very strongly the child should be returned to her mother. The earlier she is returned emotionally it is better for the child". Later, again the judge said to the counsellor, "You are asking that the child be placed with the mother". She also asked the counsellor "Why did Norm see it as a possibility?" and the counsellor replied "The time is seen as too long for the child". The judge's question may have been directed to the possibility of separate representation for the child, but the reference to "Norm", who was the Director of Court Counselling at Parramatta, shows that his views must have been mentioned during the conversation between the judge and the counsellor. When the hearing resumed that afternoon, counsel for the wife sought the appointment of a separate representative for the child. Counsel for the husband asked the learned judge to disqualify herself from hearing the matter further but the judge refused to do so. The judge ordered that a separate representative be appointed to represent the child, gave certain directions as to procedure and adjourned the hearing".

8. The High Court decided that an order nisi for prohibition should be made absolute (per Gibbs C.J., Mason and Brennan J; Wilson J. and Dawson J. dissenting). All Justices made comments more or less critical of the counsellor. Gibbs C.J. observed that "any interference with a judge, by private communication or otherwise, for the purpose of influencing his or her decision in a case is a serious contempt of court". "It is quite antipathetic to and subversive of the exercise of the judicial power that a judge should receive private communications from any

official, however well informed and well intentioned, even if the official is an officer of the court". The learned Chief Justice further said that "it was wrong of the counsellor to attempt to influence the judge and ill-advised for the judge to speak to the counsellor in private". Mason J. agreed that private communications made to a judge for the purpose of influencing his or her decision in a case is a serious contempt. A judge should be alert to avoid any such communication, and the sound instincts of the legal profession could generally be relied upon. In relation to the approach made by Ms Bernet, the learned Judge said it was not authorised by the Family Court Act, or the Rules made thereunder. "It was a very serious departure from the cardinal principle which governs the hearing and determination of cases in courts of justice, though it is plain enough that the motive for the departure was concern on the part of Ms Bernet for the future welfare of the child".

The other member of the majority was Brennan J., who said:

"No doubt both Ms Bernet and Mr Goodsell were motivated by professional concern for the welfare of the child, but that was the issue being litigated between husband and wife. It was the issue which the judge had to determine and, in the absence of any statutory provision authorising the counsellor to approach the judge, it was improper for her to raise privately with the judge any aspect of that issue".

9. Wilson J. was more oblique in the way he treated the counsellor. He said that judges must bear constantly in mind the basic rule, essential to the preservation of confidence in the judicial system, namely that the proceedings of courts of justice should be conducted "publicly and in an open view" : **Scott v. Scott** (1930) A.C. 417 at 441. This had been overlooked by the judge. The discussion which occurred in chambers should have taken place in open court. In his view neither the parties nor any onlooker who saw the counsellor enter the chambers of the judge, followed shortly thereafter by a conference attended by counsel for each of the parties, could reasonably consider that there might have been a denial of natural justice. Dawson J. said that the status of the counsellor, which was akin to that of an expert witness who might be called by the court, did not justify the private approach which she made to the judge. However, the statutory provisions compel the conclusion that she was not in the camp of one side or the other. He said that the judge acted wrongly in seeing the court counsellor privately, from which would seem to follow the conclusion that the court counsellor erred in making the approach she did, but that was not stated in terms. He also thought there could be no apprehension

of appearance of bias, because of the conference which followed immediately after the private approach.

10. There seems no reason to doubt that Ms Bernet made the approach she did in good faith, in purported discharge of her statutory duties, and after having checked with her superior. Be that as it may, she erred, and has been reprobated. So has the judge, at least by the outcome of the High Court proceedings. That result must have reverberated through the Family Court, and in particular the ranks of all judges and all court counsellors. The lesson will not be lost upon the members of either class.

11. It was said in **R v. Murphy** (1985) 63 A.L.R. 53 at 59 that : "The gist of the offence is conduct which may lead to and is intended to lead to miscarriage of justice whether or not a miscarriage actually occurs", quoting **R v. Machin** (1980) 1 W.L.R. 763 at 767. That case dealt with the common law offence of perverting the course of justice, and in **R v. Murphy** the Court of Appeal in New South Wales was considering the offence under section 43 of the Crimes Act of having perverted, as opposed to prevented, the course of justice. That makes no difference so far as intent is concerned.

12. Either Ms Bernet intended to bring about a miscarriage of justice, or she did not. If the former, then she has been roundly criticised, and her conduct has been exposed to the light of day, which is one of the purposes of the criminal law. Further, she can be dealt with for contempt of court, and the proceedings could be taken by any person, including [C.J.L.]. If the latter, then she has already suffered quite enough.

13. I agree with Mr McCarthy that it is unlikely a jury would be prepared to find that Ms Bernet acted with the intention of preventing the course of justice. I am a little more sanguine than he is - in his view conviction is "most unlikely" - but certainly the case is one in which other public interest factors must be of the greatest significance. As it seems to me they tell strongly against continuing with this prosecution. There is only one public interest factor which is to the contrary.

14. That is the fact that the criminal proceedings have been launched by a private person. It is recognised that the public authorities, no matter how impartial and careful they may be in the discharge of their duties, are not infallible. Prosecutors can err, as can investigators, or indeed anyone else. The right of private citizens, as opposed to officials, to bring criminal proceedings is recognised as being of high importance : see the new Prosecution Policy of the Commonwealth, tabled in the Parliament in February

1986, at paragraph 3.6. In the few cases that have arisen I have been reluctant to utilise the power conferred by section 9(5) of the D.P.P. Act so as to terminate such a prosecution. All such cases which come to attention require special scrutiny.

15. Nonetheless, the power is there. A recognition that my advisers and I are fallible might ordinarily tip the scales against termination when it can be seen that the prosecution has arguable substance. However in my view different considerations apply when, as here, the case is relatively weak and there is a remedy available which is apparently simpler to pursue and would be sufficient to meet the exigencies of the case. That is not to say that [C.J.L.] should commence contempt proceedings - that is entirely for him to decide - or that if he does so condign punishment is called for.

16. To put the matter another way, the law of contempt recognises that any person can move a court of appropriate jurisdiction to punish when given conduct has taken place. The procedure is summary, and infractions of proper procedure which prevent the course of justice from flowing freely are commonly dealt with in that manner. As there is no need for the criminal law to be invoked, as Ms Bernet's conduct has already been exposed and criticised, and as the prosecution if taken is rather more likely than not to fail, I am clearly of the view that the public interest does not require that this prosecution be pursued. I am further of the view that it is in the public interest that the prosecution be brought to an end. Indeed, even were it not for the fact that contempt proceedings can be taken, I would in the rather special circumstances of this case take the view that no further action against Ms Bernet is called for, and that pursuit of the prosecution would be inappropriate. In that regard I note that each and every member of the High Court appeared ready to accept that her conduct stemmed from sincere if mistaken beliefs as to proprieties.

17. Arrangements are to be made for copies of these reasons to be made available to [C.J.L.] and Ms Bernet. They can do with them as they will, but section 121 of the Family Law Act will have to be borne in mind.

Ian Temby Q.C.

Following the decision to take over the charge referred to above the matter was mentioned in the Magistrates' Court, Canberra, on 10 October 1986 when the court was informed of the Director's decision. It was then disclosed that a further summons had been served on Ms Bernet on 3 September 1986, alleging that she had attempted to obstruct the course of justice. There was no material difference between the two charges and on 13 October 1986 the Director decided to take over the further charge with a view to declining to carry it on further.

APPENDIX V: APPOINTMENT OR DELEGATIONS MADE BY THE DIRECTOR UNDER VARIOUS ACTS

- Crimes Act 1914, section 21AA: appointment of various officers in all States, the Australian Capital Territory and the Northern Territory to sign documents under that section (taking other offences into account);

- Freedom of Information Act 1982: delegations to various persons to make decisions concerning the provision of access and the amendment of documents;

- Social Security Act 1947: the Director has delegated his power to consent to prosecutions under the Act pursuant to section 139(2) to various officers;

- Public Order (Protection of Persons and Property) Act 1971: the Director has delegated his power to consent to prosecutions under the Act pursuant to section 23(2) to various officers;

- Crimes Act 1900 (N.S.W.) in its application to the A.C.T.: the Director has delegated his power to consent to prosecutions under section 92L of that Act to various officers and has authorized various officers to sign the document referred to in section 448 of that Act (taking outstanding charges into account).

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- Banking Act 1959, section 70(1), (offences under the Banking (Foreign Exchange) Regulations);

- Telecommunications (Interception) Act 1979, section 7(7);

- Airports (Surface Traffic) Act 1960, section 16(1).

- Air Navigation Regulations, regulations 317(1) and (2).

APPENDIX VII: FREEDOM OF INFORMATION STATISTICS 1986-87

Requests

Matters on hand as at 1 July 1987	2
Requests received	11
Granted in full	1
Granted in part	8
Access refused	4

Review of Decisions

There was one request for internal review that had not been addressed as at 30 June 1986 and four such requests were received during 1986-87. Of these, internal review resulted in access being granted in part in three cases and the original decision to refuse access confirmed in two cases. In addition, one matter was lodged with the Administrative Appeals Tribunal but was subsequently withdrawn.

APPENDIX VIII: SIGNIFICANT PUBLICATIONS BY THE DPP

The following major speeches were given by the Director in 1986-87:

- July 1986: Australian Bar Association Second Biennial Conference, Alice Springs: 'The Decision to Prosecute'.
- 27 August 1986: Young Lawyers Section, Law Society of New South Wales: 'The DPP - What Every Lawyer Should Know'.
- 17 September 1986: Justice Administration Public Oration: South Australian Institute of Technology: 'Imprisonment and Parole - The Judges' Function and Prisoners' Rights'.
- 30 September 1986: Canberra Chamber of Commerce, The Australian Institute of Management, Canberra Division and the Royal Australian Institute of Public Administration (A.C.T. Division): 'Fraud and the Manager'.
- 19 May 1987: Centre for the Study of Law and Technology: 'Legislative/Judicial Efforts to deal with Technocrime'.

Copies of the above material are available on request from the Director's Secretary on (062) 70 5600.

The following papers by the Director were published in Australian law journals in 1986-87:

- 'The Role of the Prosecutor in the Sentencing Process'. Criminal Law Journal, Vol.10 No.4, August 1986, pp 199-215.
- 'Imprisonment and Parole - The Judges' Function and Prisoners' Rights'. AFPA Journal, Vol.7 No.11, December 1986,* pp 7-13.
- 'The DPP and Ministerial Responsibility'. Law Institute Journal, Vol.61 No.6, June 1987, pp 568-569.

* Also published in pamphlet form by the South Australian Justice Administration Foundation, 1986 Justice Administration Oration.