DIRECTOR OF PUBLIC PROSECUTIONS

Annual Report 1987–88

DIRECTOR OF PUBLIC PROSECUTIONS
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Commonwealth Director of Public Prosecutions

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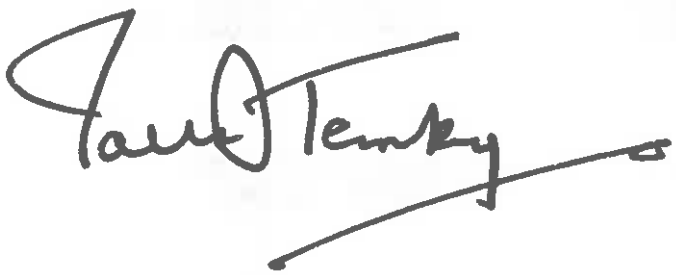
September 1988

The Hon. Lionel Bowen MP,
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 1988, in accordance with section 33(1) of the *Director of Public Prosecutions Act 1983*.

Yours faithfully,



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DIRECTOR'S OVERVIEW

This is the fifth Annual Report of the Office of the Director of Public Prosecutions. The first related to only a part year. As would be expected after more than 4 years of existence, the organisation has now settled down and is functioning in an efficient and effective manner. Work done in previous years was consolidated and built upon during 1987-88, and some new challenges arose, most of which were or are in the course of being addressed. This report deals with all such matters.

The functions of the Office were extended during the last year, with a consequential increase in staff. It is worth noting that all staff increases from the outset have been based upon, and justified by, new functions. In the early days staff numbers rose as regional offices were opened. Later the allocation of further resources became necessary due to statutory amendments which extended the DPP's role, and as a result of Government decisions. The most recent initiative in the second category was the *Proceeds of Crime Act 1987* which lead to 20 positions being allocated in 1987-88. The former Civil Remedies branches in each regional office have been reorganized into Criminal Assets branches. We are now nearly fully staffed in this important area.

As at 30 June the Office comprised some 420 people, nearly 40% of whom were lawyers. It continues to be the case that we are a large law office which, although it has specialist functions, is not narrow in its fields of legal interest and involvement.

In the main work area, that of prosecutions, there have been notable successes. Some highlights were:

• the **Saffron** case, which was a major achievement in the revenue fraud area;

• the Sydney appeal which resulted in record sentences being imposed upon a couple named **Curry** who had been convicted of several drug importation offences;

• still in Sydney, the **McLean** and **Cornwell - Bull** matters;

• in Melbourne, the completion of the very protracted committal proceedings against **Vereker** and others;

• the trial arising out of a murder on **Christmas Island**, in which matter both Canberra and Perth Offices made important contributions;

• the prosecutions relative to **Indonesian fishing vessels** in the North West;

• the completion of "bottom of the harbour' matters in Queensland with the hearing of the **Ahern** appeal, which was dismissed by the High Court just as this report was nearing completion.

These are but some of the thousands of cases conducted Australia wide each year. They range from the relatively routine to some of the most difficult and important prosecutions in the country.

As at the date this overview is written, DPP lawyers have been closely involved with other agencies in the recovery, to the benefit of tax-payers of Australia, of over $50M from criminals. This largely comprises profits derived from illegal activities, together with some property forfeited as having been used to facilitate the commission of crimes. The report contains details of the results achieved in the year under review, and the amounts in the pipeline as at 30 June 1988. Some of the DPP's best and brightest people work in this area and the work they are doing is highly innovative. It seems clear that this important and rewarding initiative will be a permanent feature of the Australian criminal justice system, at least at the federal level. There is also every reason to hope that the high rate of return to this stage can be continued.

We continue to contribute to reform of the law in areas that are of obvious concern to the Office, at present principally through the Review of Commonwealth Criminal Law under the chairmanship of Sir Harry Gibbs. As would be anticipated, the work done to date by the Review is both scholarly and sensible, and the DPP has high hopes that it will lead to beneficial legislative change.

There will be found in Appendix 1 the guidelines relative to the giving of reasons on request for decisions not to proceed with a trial on indictment, notwithstanding that a magistrate has made a committal order. This is a significant step forward in making the DPP accountable for its decisions. The report also advises of liaison guidelines agreed between the DPP and the Australian Federal Police, and of amendments to the guidelines on jury selection dealing with jury vetting.

We continue to make progress in winding up the prosecution of those alleged to have facilitated the evasion of income taxation by company stripping. These 'bottom of the harbour' cases in Queensland and Western Australia have been effectively completed. However, there is a total of 21 defendants in these cases who have yet to be dealt with in Victoria and New South Wales. In both States, but particularly in New

South Wales, court delays and queues of litigants have been constant problems.

It is also worth noting that the level of investigation and prosecution activity in relation to evasion of sales tax continues to be high. Of more current interest is the fact that a new relationship has developed between the DPP and the Australian Customs Service in relation to frauds involving the evasion of customs duty. There are already some large prosecutions in this area under way and a greater number is under investigation. The DPP is involved in these investigations in a continuing advice role. We are constantly seeking to ensure that law enforcement, particularly in relation to revenue fraud, is as widely spread as possible. Until recently those who evaded customs duty could say with absolute confidence that the worst risk they ran was that of a significant monetary penalty. Some of these people will now go to prison.

It seems likely that the Office will face 2 major challenges shortly, each of considerable difficulty. One is represented by the proposed federal legislation in relation to the companies and securities industry. At present prosecutions in this area are largely conducted by State agencies. If the proposed legislation is enacted there will be a large increase in the workload of the DPP. In that event the difficulties at present being experienced in recruiting and retaining staff of ability and experience are bound to be exacerbated.

Secondly, and more imminently, legislation is at present before the Parliament which, if enacted, will give Australian courts jurisdiction over war crimes and crimes against humanity committed in Europe during World War II. In anticipation of that happening, a small unit within Head Office has been established which has done much valuable work in researching a number of novel issues that are likely to arise in these prosecutions, as well as liaising with the Attorney-General's Department and, in particular, its Special Investigations Unit. The DPP also made a major submission to the Senate Standing Committee on Legal and Constitutional Affairs on the *War Crimes Amendment Bill*. The report of that committee reflected many of the views put to it by the DPP. If the legislation is passed, and if evidence sufficient to justify prosecutions is available, then there will be a huge task in front of us. The prosecutions are likely to be as demanding and sensitive as any the country has seen.

We aim to provide a high quality service to the departments and agencies that refer work to us, and indeed to the people generally. Within a law office the legal work is necessarily done by lawyers, but they could not function without support. In providing their service, they are in turn serviced by all of the other occupational groups - secretaries, clerks,

keyboard operators, drivers, those who make the computers work and tell them how to think, the people who add up the figures, and so I could go on. To all of them great credit is due after what has been a distinctly successful and rewarding year.

I make mention of 3 particular initiatives in the area of administration: accommodation, program budgeting and fines and costs.

As to the first of these, progress in rehousing the Melbourne Office has been disappointingly slow, but we are getting there. Successful extension projects have been carried out in Sydney and Perth, and the refurbishment of Head Office is practically completed. Two small sub-projects remain to be done there. By the end of this calendar year the formerly shabby accommodation will have become stylish.

Program budgeting has undoubted benefits, in requiring managers to concentrate upon objectives, indicators of performance and their objective measurement. I strongly support the fresh perspectives these approaches impel us towards. A lot of work has been done in establishing and measuring performance criteria: some important work still remains to be done. However, a risk which must be guarded against is that program budgeting on a portfolio basis can, in the absence of care, impinge upon agencies which are intended by the Parliament to be independent of the Departments of State which have portfolio responsibilities.

The third matter may appear mundane to some, but is nevertheless quite important. During 1987 it was agreed that we should take over the recovery of fines and costs from the Australian Government Solicitor. The criminal justice system cannot be seen to work properly if those persons solemnly ordered by a court to pay a financial penalty are not in fact made to pay, assuming their continued ability to do so. A great deal of effort has gone into effecting the changeover, the task is practically complete and the monies are starting to flow in a satisfactory manner.

I express the appreciation of the Office to the Attorney-General's Department for its ready willingness to discuss matters of mutual concern, if not always to agree with us, and especially to the Australian Federal Police who manage to get better even while they are getting bigger, which is no mean feat.

My appointment expires on 5 March next, and by the time this report is tabled in the Parliament it will have been announced that I am not to be re-appointed.This is therefore the last Annual Report that I am privileged to deliver. Some concluding observations seem justified. They address the

question: Have we met Parliamentary and public expectations? In what follows the direct quotes are taken from the second reading speech by the then Attorney-General, Senator Gareth Evans, QC - see *Hansard* for 10 November 1983 at 2496.

One clear expectation was and is that the Office should be independent, at least in the sense that the key prosecution decisions should not be taken at the direction of, or in order to please, the Government of the day. The Act makes clear that the Attorney-General, as the first law officer, bears ultimate responsibility for what the Office of DPP does, and how it is done. That is right and proper: in a democracy the elected Minister should have primacy over the appointed official, even granted that the latter is a statutory law officer, with security of tenure who reports to Parliament. However any directions given by the Attorney-General to the Director must be published in the Parliament. Only one has been given in some 4.5 years, and that was done in a non-operational matter, after discussion and with my acquiescence. The expectation that: *'Day to day prosecution decisions will ordinarily be made by the Director or his officials'* has been greatly exceeded in practice. That is what has invariably happened. Such decisions are taken without fear or favour, and entirely outside the party political process. There can be no doubt that the DPP is widely recognised as being an independent although accountable entity.

Another expectation was that the Office would *'revitalise and re-organise Commonwealth prosecution processes.'* It is contended that has been done. Large steps have been taken, as detailed in successive annual reports, to improve morale and performance. Adequate resources have been granted, and they have been utilised so as to enable the Commonwealth to handle successfully prosecutions which rank among the most difficult, document intensive and challenging as have ever been undertaken anywhere. Various guidelines have been issued so as to make clear how the Director and his delegates exercise their important statutory functions. While the Office has not been entirely immune from criticism, and nor should it be, there have been no manifest failings which could lead to a diminution in public confidence in the Office. Thus we have met the expectation that creation of the DPP would *'restore public confidence in Commonwealth criminal law enforcement'* . The contrast between the present position, and that which prevailed 5 years ago, is very stark.

Much has been achieved: but much remains to be done. The momentum must continue, and complacency be resisted. There is always the prospect that the factors which led to the DPP's establishment, and those which have sustained it as an efficient and effective prosecution body, will be forgotten. Any tendency to allow the Office to become administratively dependent upon or integrated with the Attorney-General's Department

must be vigorously resisted. Future appointments to the position of Director ought to be of persons of eminence in the private legal profession, not public servants. At the very least there would be a perception that those who have worked with and under Government over any significant period cannot be relied upon to operate independently of it when the necessity arises.

I consider myself privileged to have served as Director of Public Prosecutions. It has been particularly gratifying to work with the individuals who have over the years made up the Office, practically all of whom have been both gifted and committed to the Office of DPP and the ideals which it represents.

I.D.TEMBY, QC

1. OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

ESTABLISHMENT

On 5 March 1984 the *Director of Public Prosecutions Act 1983*(DPP Act) came into operation and the Office of the Director of Public Prosecutions (DPP) was established. Its primary purpose was to take over the criminal law functions previously performed by the Crown Solicitor's Division of the Attorney-General's Department. Most of the functions of the Attorney-General in relation to the prosecution of offences against Commonwealth law were also taken over by the Director.

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 and the external territories except Norfolk Island.

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;

- to institute or carry on, or co-ordinate or supervise the institution or carrying on, of proceedings for the recovery of pecuniary penalties;

- 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 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.

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 pecuniary penalty matters most closely connected with the enforcement of criminal law, including all taxation prosecutions, and the Australian Government Solicitor (AGS) has retained responsibility for the remainder.

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.

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 (AFP) 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 section 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 DPP Act to decline to proceed further in the prosecution of a person who has been committed for trial. Pursuant to the arrangement under section 32 of the DPP Act senior officers in the Director of Legal Services (DLS) offices in Adelaide, Hobart and Darwin may also exercise the power under section 9(4) on the same limited basis.Other authorities have been given by the Director to various persons under the Acts specified in Appendix 3.
The Director has been granted the power to consent to certain prosecutions under the Commonwealth Acts and ACT Ordinances specified in Appendix 4.

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 the Parliament within 15 sitting days. No section 8 directions or guidelines were issued in the past year.

ORGANISATION

As at 30 June 1988 the Office comprised 6 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 DLS who are officers of the Attorney-General's Department, pursuant to an arrangement under section 32 of the DPP Act.

The prosecution workload in the Adelaide Office of the DLS continued to be high in 1987-88. As a result, the Director submitted a bid for resources to set up a separate DPP Office in Adelaide in the new policy proposals for the Attorney-General's Portfolio for the 1988-89 Budget. The proposal was entirely dependent upon allocation of additional resources. Unfortunately the bid was unsuccessful. The current section 32 arrangement will therefore continue to operate in relation to South Australia. There are no present proposals 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 4 branches: Legal, Criminal Assets, Policy and Administrative Support.

The Legal Branch maintains oversight of, and provides input into, the more important prosecutions 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 relating to prosecutions. 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 other than in respect of recovery of criminal assets.

The Criminal Assets Branch maintains oversight of, and provides input into, the more important recovery proceedings conducted by regional offices, as well as assisting the Director in the development of policies and guidelines relative to the recovery of criminal assets. The Branch is also responsible for making recommendations with respect to the laws or proposed laws relative to the recovery of criminal assets.

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

Sydney Office - The Office comprises 5 branches: Major Fraud, General Prosecutions, Criminal Assets, Organised Crime and Administrative Support.

The Major Fraud Branch is responsible for the prosecution of the remaining 'bottom of the harbour' cases as well as the prosecution of other revenue fraud matters.

The Organised Crime Branch handles a range of matters but principally cases referred by the National Crime Authority (NCA) and the Organized Crime Unit of the AFP. The Branch also handled cases referred by the Joint Task Force on Drugs, which was disbanded towards the end of the period under review.

The General Prosecutions Branch is responsible for all prosecutions not dealt with by the Organised Crime and Major Fraud Branches, including general fraud and drug offences.

The Criminal Assets Branch has absorbed the work of the former Civil Remedies Branch. It has responsibility for:

(i) pursuing, and co-ordinating the recovery of, civil remedies in those matters where the DPP has authority to act;

(ii) the exercise of the DPP's functions under the *Proceeds of Crime Act 1987*; and

(iii) the taking of proceedings under Division 3 of Part XIII of the *Customs Act 1901*.

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

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

The Major Fraud Branch does revenue and other fraud work. Otherwise the other branches do the same work as their counterparts in Sydney.

Brisbane Office - The Office comprises 4 branches: Prosecutions, Major Fraud, Criminal Assets and Administrative Support. The branches have the same functions as their counterparts elsewhere with the Major Fraud Branch also doing general fraud work.

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

Perth Office - The Office comprises 4 branches: Fraud, Prosecutions, Criminal Assets and Administrative Support.

The Fraud Branch undertakes general fraud as well as 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 5 branches: Municipal Prosecutions, Magistrates Court, Superior Courts, Criminal Assets 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 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. During the year a Criminal Assets Branch was established which has the same functions as its counterparts elsewhere. In addition, due to the number and complexity of fraud matters now being referred to the Office, a position was established to deal with fraud matters, both revenue related and general fraud.

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 Prosecution Services Branch. This Branch is made up of 3 Legal Work Units, being General Prosecutions, Criminal Assets and Proceeds of Crime, and Major Fraud.

Prosecutions and criminal assets work 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 2 places the prosecution work comprises mainly summary prosecutions.

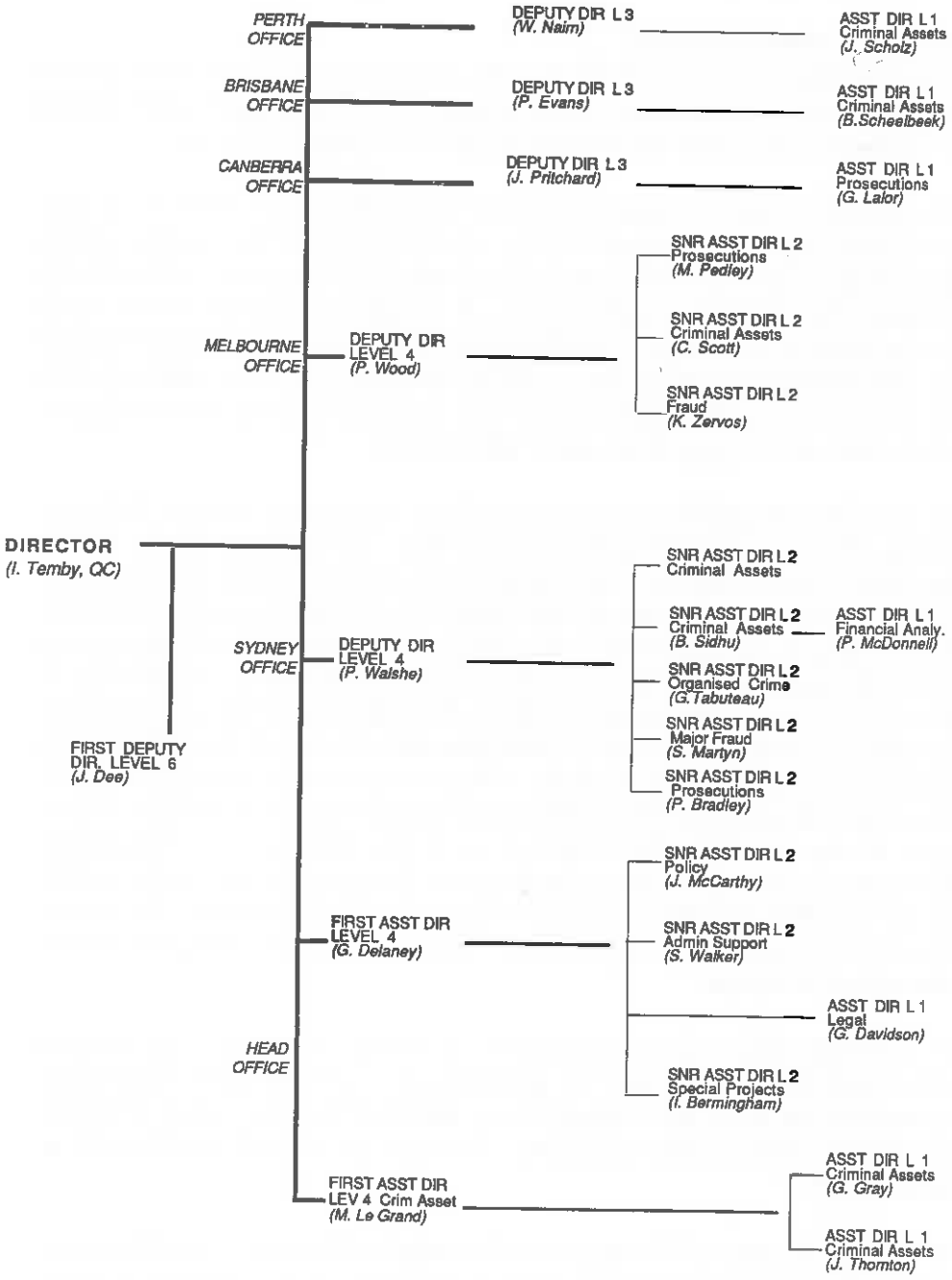
REVIEWS

Reviews and subsequent re-organizations of the establishment of each DPP Office have been conducted on a regular basis in response to requests from the Regional Offices. 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 15.

DIRECTOR OF PUBLIC PROSECUTIONS
TOP STRUCTURE
Operating Arrangements as at 30 June, 1988



2. EXERCISE OF STATUTORY FUNCTIONS AND POWERS

NO BILL APPLICATIONS

Under section 9(4) of the DPP Act the Director has power to decline to proceed further in the prosecution of a person who is under commitment or has been indicted for an offence against Commonwealth law.

The power is used infrequently. It only comes into play where there have been committal proceedings before a magistrate and the magistrate has decided that there is sufficient evidence available against a defendant to warrant that person standing trial. It is unusual for a matter to be discontinued at that stage. Nonetheless, circumstances can change between the committal proceedings and a matter coming on for trial and errors can be made. The power under section 9(4) provides an important safeguard to prevent unnecessary trials from taking place.

As noted in last year's Annual Report there has been a limited delegation of the Director's power under section 9(4). All senior officers in DPP regional offices who have been authorized to sign indictments have also been authorised to consider no-bill applications that are made 'at the court door'. They have no power to discontinue the proceedings but they can reject the application if it is clearly unmeritorious and it would delay the trial to refer the matter to the Director. They have also been authorised to discontinue a prosecution on Commonwealth charges if the defendant has already been dealt with on State charges which substantially cover the same factual situation. In all other cases the power under section 9(4) can only be exercised by the Director or, in his absence, the First Deputy Director. As a result of an amendment to the arrangement under section 32 of the DPP Act certain senior officers in DLS Adelaide, Hobart and Darwin have also been authorised to determine no bill applications under the same conditions.

In 1987-88 there were 44 matters in which the DPP was formally requested by a defendant to discontinue a prosecution following a committal for trial. In 21 cases it was decided that the matter should not proceed to trial. In the remaining 23 cases the no bill application was unsuccessful.

A further 36 cases did not proceed to trial following committal on the basis of a recommendation from a regional office without a formal request from the defendant.

In one of the 57 cases which did not proceed to trial the defendant had already stood trial twice, with the jury being unable to reach a verdict on each occasion. In 2 cases the trial did not proceed because of legal

technicalities and in 4 matters Commonwealth charges were withdrawn because the defendant had been dealt with on State charges which covered the same subject matter.

The remaining cases were discontinued because it was considered that a conviction was unlikely or because it was not in the public interest that the matter proceed. The main consideration in each case was the state of the evidence, although there were few cases in which charges were withdrawn solely because of perceived deficiencies in the Crown case. Factors such as the age of the defendant, his or her mental condition, the length of time since the commission of the alleged offences, the likely penalty in the event of conviction and the attitude of identifiable victims were also taken into account in some cases.

Of the 23 cases in which a no-bill application by the defence was not successful, 9 defendants were convicted, or had a case found proved, on one or more charges, 5 were acquitted and 9 matters remain unresolved.

As noted elsewhere in this Report, the Director has decided that the reasons for no-bill decisions will in future be made available on request to persons who have a special interest in the case, to concerned members of the public, and to the media. The new policy represents a significant move towards greater public accountability in the administration of Commonwealth criminal law.

APPEALS

Section 9(7) of the DPP Act gives the Director the same rights of appeal in matters being conducted by the DPP as are exercisable by the Attorney-General. The power to sign a notice of appeal pursuant to that section has been delegated only to the First Deputy Director.

Most appeals brought in exercise of the power under section 9(7) are where it is considered that the penalty imposed was manifestly inadequate. Occasionally, however, the right to appeal against a sentence has been employed, not because it is considered that the penalty imposed was inadequate, but rather as a means of correcting a technical error in the sentence. There were 2 such cases in the year under review.

In some States no time limit is imposed by statute in respect of appeals by the DPP against sentence. However, in the 1984-85 Annual Report it was stated that in such a case the DPP aims to file appeal papers within one month from the date sentence is handed down. This policy was recently reviewed and the policy is now to keep to the statutory time limits in those places where one applies, and to apply the time limits applicable to defendants elsewhere, with the exception of New South Wales and South

Australia when local practices are taken into account. In 4 States this will require an appeal to be filed considerably earlier than one month from the date sentence was imposed. While there is usually provision for an extension of time in those places where statutory time limits apply to the DPP, the Director's policy is not to approve an extension being sought in the absence of very cogent reasons.

The decision to appeal against sentence is never taken lightly. There must be a clear community interest in the penalty being reviewed, and the prospects of success must be high. With the exception of appeals to correct a technical error in the sentence, the DPP will only appeal where the sentence is clearly below the acceptable range of penalty having regard to the nature of the case and the sentences imposed in comparable cases.

Statistics on appeals by the prosecution, including appeals against penalty, are contained in the following chapter. However, set out below are some examples considered during the year which indicate the considerations involved in deciding whether or not to appeal against a sentence.

Owen - On 8 November 1987 Owen was found in an unconscious state in his seat when his flight from Bangkok landed at Perth airport. He had concealed internally, to use the accepted euphemism, 8 condoms containing heroin but one of the condoms had leaked releasing heroin into his body. The remaining heroin was removed from his body at Royal Perth Hospital and, upon analysis, was established to comprise 188.6 grams pure weight. Owen pleaded guilty to one count of importation of heroin and one count of possession of heroin, both contrary to section 233B(1) of the *Customs Act 1901*, and on 29 February 1988 he was sentenced to an effective term of 5 years imprisonment with a minimum term of 9 months.

At first sight it appeared that the sentence was distinctly below the 'tariff' for importations of similar quantities of heroin by similar means, even when account was taken of various subjective factors mentioned below, and accordingly consideration was given to whether it would be appropriate for the Crown to appeal against the sentence. In this regard, any Crown appeal would have been primarily directed at the length of the minimum term.

However, for a number of reasons it was ultimately decided not to appeal. First, account had to be taken of the period of approximately 4 months that Owen had been remanded in custody prior to sentence. Allowing for notional remissions on that period he had received the equivalent of a head sentence of 5.5 years with a minimum term of 15 months. Secondly, there were a number of subjective factors to be taken into account in Owen's

favour. Apart from the fact that he had co-operated with the authorities in identifying his accomplices and was prepared to testify against them, he had suffered a number of permanent mental and physical disabilities as a result of the accidental overdose of heroin. These disabilities had severely impaired his opportunities for future employment. He was also an addict at the time of the offences and was to have been paid in kind for acting as a courier. While it might be thought that the sentence, particularly the minimum term, was still on the light side notwithstanding these matters, it was considered that it was not so disproportionate to the seriousness of the offence as to shock the public conscience. Accordingly, although this was very much a matter of judgment, it was considered that any appeal would likely fail. There was also the consideration that in view of the special features of the case the sentence was not one that could be relied on by defence counsel in any future case as a precedent of general application.

McLean- Mention is made in chapter 3 of the prosecution of McLean who was sentenced in August 1987 to an effective term of 24 years imprisonment with a minimum term of 16 years for offences involving 5 separate importations of large quantities of heroin and other narcotics, as well as one planned importation. Two of the importations involved a commercial quantity of heroin, and were therefore punishable by life imprisonment.

An appeal was instituted against the sentences imposed on the ground that they were inadequate. McLean was entitled to a substantial discount as he had pleaded guilty at a very early stage (albeit he had been caught redhanded in respect of the last importation), he had volunteered information which had disclosed the commission of 3 earlier importations and one planned importation of which the police had been unaware, and he had given information to the police relating to other persons who were involved. On the other hand, it was hard to imagine a worse case involving the importation of a commercial quantity of heroin. McLean had been a senior law enforcement officer and had abused a position of trust to arrange the importation of substantial quantities of narcotics over a 5 year period. He had personally devised and carried out 4 importations. Even making allowances for the mitigating factors present, there was a danger that the effective sentence for such a very bad case could set a benchmark for future bad cases.

However, in early 1988 the Director reviewed the question whether the appeal should proceed. In December 1987 the New South Wales Court of Criminal Appeal had substituted sentences of 26 years imprisonment with a minimum term of 16 years in respect of the 2 Currys (mentioned in Chapter 3), who had been involved in only 2 importations and one planned importation. Although the Currys had pleaded not guilty, against

that there was not the aggravating factor of a breach of trust. It was arguable that the sentences imposed on the Currys set a more reliable benchmark than that imposed on McLean. There was also the consideration that McLean's wife had recently died, and he had also suffered a heart attack. The Director decided that, in all the circumstances, the public interest did not absolutely require that the appeal proceed. After taking into account humanitarian considerations, the appeal was withdrawn.

Bowman and Rossi - These 2 persons, who are sisters, were sentenced in the Perth District Court on 1 December 1987 to concurrent terms of 9 months and 5 months imprisonment respectively (both without a minimum term) after pleading guilty to 4 and 3 counts respectively of imposing on the Commonwealth. Each offender had falsely claimed to the Department of Social Security that she was separated from her husband. As a result Bowman received over a 7 year period a total of nearly $50 000 in supporting parents benefits to which she was not entitled, while Rossi was paid a total of approximately $24 500 in benefits. In each case the Court ordered that the Commonwealth sentence commence at the expiration of a minimum term of 6 months imposed in respect of State sentences currently being served.

The Director appealed against the sentence in each case as they were considered to be so out of step with the prevailing 'tariff' for such offences as to be manifestly inadequate. In each case the offences had been committed out of greed and were in the upper range of seriousness. While the sentences imposed in respect of each count were appropriate, it was considered that the sentencing judge had fallen into error in ordering that they be served concurrently. In addition, it was apparent that widely different sentences were being imposed by courts in Western Australia for welfare fraud offences, particularly at the summary level. The present matters presented an ideal opportunity for guidance to be obtained from the Court of Criminal Appeal on the appropriate sentencing principles that apply in such cases which would enable a greater measure of consistency in the future.

On 17 February 1988 the Court of Criminal Appeal allowed each appeal and increased the effective sentence in each case threefold, again without fixing a minimum term. In the course of its judgment the Court referred to statistics which the Crown had furnished in the course of argument which revealed the depradations being made on the public purse by such offences. In the year ending 30 June 1987, for example, there had been 2,074 successful prosecutions involving the fraudulent receipt of approximately $13m in social security benefits. The Court observed that 'the increasing prevalence of these crimes and the ease with which they

can be committed requires a sentence which will act as a deterrent to the community in general'.

Webb - In this Queensland matter an appeal was lodged against the sentence imposed on a defendant convicted on 2 counts of fraudulent misappropriation. The defendant, who was the manager of a Commonwealth Bank agency, had abused a position of trust to cheat an invalid pensioner of at least $15 000 by manipulating an account that she was managing on his behalf. The defendant was sentenced to what was, in effect, a suspended sentence and was ordered to repay the money by instalments that would have taken 15 years to extinguish the debt. While there were some mitigating factors, it was considered that the sentence did not properly reflect the seriousness of the offence. The Court of Criminal Appeal agreed. It substituted a sentence that required the defendant to serve 6 months imprisonment before being released on a good behaviour bond. The Court noted that a sentencing court has a duty to have regard to the deterrent aspect of sentencing, particularly where there had been a breach of trust. The Court also altered the terms of the restitution order, commenting that such orders should have some practical prospect of being complied with within a reasonable time.

INDEMNITIES AND UNDERTAKINGS NOT TO PROSECUTE

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 power has been delegated only to the First Deputy Director.

During the year, the Director or First Deputy Director signed 12 undertakings under section 9(6) relating to 10 separate matters. Seven of the matters involved serious narcotic offences, one involved an offence of arson prosecuted in the A.C.T. and one involved alleged fraud offences. The remaining matter involved proceedings to recover a pecuniary penalty under section 243B of the *Customs Act 1901*.

A further 2 indemnities were signed by the Attorney-General on the recommendation of the DPP. Both indemnities related to the same prosecution, involving alleged sales tax offences. Both witnesses resided outside Australia and were therefore not compellable witnesses.

The Attorney-General also signed 4 indemnities on the recommendation of the DPP to enable witnesses to give evidence in State proceedings and one indemnity to enable a witness to give evidence in a taxation appeal before the Administrative Appeals Tribunal. Section 9(6) of the DPP Act has no application in these circumstances.

The Director also has power under section 30(5) of the *National Crime Authority Act 1984* to give a person who is to appear before the NCA an undertaking that any answer given or document produced, or any information or document obtained as a result of the witness giving evidence, will not be used in a prosecution for an offence against a law of the Commonwealth or a Territory other than an offence of perjury.

In the course of the year the Director signed 10 undertakings under section 30(5) relating to 5 NCA investigations.

The number of undertakings and indemnities granted in 1987-88 was less than in some previous years. That does not reflect a change of policy by the DPP. The DPP recognises the need for caution in relying on evidence from indemnified co-offenders but there are cases in which it is appropriate, indeed essential, that such evidence be used. In some types of crime a prosecution would be virtually impossible without testimony from participants.

TAKING OVER PROSECUTIONS

Pursuant to section 9(5) of the DPP 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.

As mentioned in last year's Annual Report, the need to resort to the power under section 9(5) has arisen only rarely, and then only in cases when the informant had been a police officer. However, during 1986-87 the power was used for the first time to take over and then discontinue a prosecution instituted by a private individual. In November 1987 it was again used to bring a private prosecution to an end.

The case in question was a prosecution for assault brought in the ACT. There had been a background of conflict between the parties and it was clear from statements made to police officers shortly after the alleged assault that the prosecution would not succeed. It appeared that the informant sought vengeance and that the prosecution was oppressive as well as groundless.

Paragraphs 3.6 to 3.9 of the *Prosecution Policy of the Commonwealth* address the question when the power under section 9(5) should be exercised to bring a private prosecution to an end. The relevant part of paragraph 3.6 provides:

> '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' (per Lord Wilberforce in **Gouriet v. Union of Postal Workers** [1977] 3 All ER 70 at 79). On the other hand, that right may be employed to bring groundless, oppressive or frivolous prosecutions. A balance must therefore be struck between, on the one hand, the private citizen's rights under section 13 of the Crimes Act and, on the other hand, the Director's duty implicit in sub-section 9(5) to ensure that unworthy prosecutions do not proceed'.

One of the key elements in the balancing process is the need for criminal proceedings to be conducted in a balanced and impartial manner. Significant duties designed to achieve fairness in the prosecution process are imposed on the prosecution. The interests of justice are not served by a malicious or over-zealous prosecutor who may be tempted to overlook the need for fairness in pursuit of a conviction. The more serious the case, the greater the need for impartiality. This consideration is particularly acute in any case where it appears that the informant may be motivated by an ulterior purpose.

***EX OFFICIO* INDICTMENTS**

There were 2 matters in 1987-88 in which the Attorney-General signed an *ex officio* indictment.

In one matter a magistrate in South Australia purported to make a committal order against a body corporate following a committal hearing. As noted in last year's Annual Report, a magistrate in that jurisdiction is unable to make a committal order against a body corporate under the common law rules which still apply in South Australia. The Attorney-General signed an *ex officio* indictment to enable the matter to proceed to trial.

In the second matter the defendant had been committed to stand trial on charges under the *Crimes (Taxation Offences) Act 1980*. Under section 9(4) of that Act a prosecution can only proceed beyond the preliminary stages if the Attorney-General or a person authorised by him has signed a written consent. There was a question whether a valid consent had been signed in the instant case and, accordingly, whether the committal order

was valid. The Attorney-General signed an *ex officio* indictment to ensure that there was no possibility of the trial foundering on the point.

3. THE CONDUCT OF COMMONWEALTH PROSECUTIONS

This chapter contains case descriptions of some of the more important or otherwise interesting prosecutions conducted by or on behalf of the DPP during the year. In addition, some cases have been included to give an indication of the range of matters dealt with by the Office. Chapter 4 deals with the work of the Office in Major Fraud matters. Prosecutions conducted by the Canberra Office of the DPP, as well as Commonwealth prosecutions in the external territories, are dealt with in Chapter 5.

Tables on the prosecution activity of the Office appear later in this chapter. The tables do not include those prosecutions conducted by other Commonwealth agencies (principally common form prosecutions conducted by the Australian Taxation Office with the agreement of the DPP), State police or private individuals.

SYDNEY OFFICE

Saffron - On 25 October 1987, after a trial lasting 6 weeks, Saffron was found guilty by a jury of one count of conspiring to defraud the Commonwealth contrary to section 86(1)(e) of the *Crimes Act 1914*. This matter had been investigated by the NCA.

Saffron had had an interest in a number of night clubs in the Kings Cross area. It had been alleged by the Crown that between 1969 and 1981 he had withheld taxable income from the Commissioner of Taxation by means of a dual bookkeeping system. One set of books had recorded the correct takings of the businesses, while the other had contained false figures regarding those takings. The Crown alleged that it had been the latter set of books that had been forwarded to Saffron's accountant for the preparation of his personal taxation returns, as well as the taxation returns of the companies that had operated the businesses.

On 5 November 1987 Saffron was sentenced to the maximum term of 3 years imprisonment, with a minimum term of 2 years and 3 months.

Prior to the verdict, senior counsel for Saffron had reserved (pursuant to section 72 of the *Judiciary Act 1903*) a number of questions of law for determination by the Court of Appeal in the event of a conviction. The hearing of those reserved questions of law, together with the hearing of an appeal by Saffron against his conviction, were heard by the Court of Appeal on 14-17 June 1988. Judgment was reserved.

Curry and Hardes - In this matter Patrick and Elizabeth Curry had been convicted of conspiring between 1 March and 18 April 1984 with one Hardes to import heroin into Australia. This charge related to an

agreement between the Currys and Hardes that the former travel to Bangkok where they would make contact with Hardes who would give them a commercial quantity of heroin to bring back with them into Australia. Although the Currys flew to Bangkok on 2 April 1984, they were then informed by Hardes that there had been a delay in obtaining the heroin. After waiting for a few days the Currys were forced to return as they had business commitments in Australia.

The Currys were also convicted on 4 other charges; 2 of importing trafficable quantities of heroin in June and November 1984 respectively, inciting 2 other persons to import heroin, and conspiracy to supply heroin. They were sentenced to concurrent terms of imprisonment in respect of the first 4 mentioned offences which was effectively 10 years with a non-parole period of 6 years, and to a cumulative term of 10 years with a non-parole period of 6 years in respect of the offence of conspiracy to supply heroin. The aggregate sentence was therefore 20 years imprisonment with a combined non-parole period of 12 years. Hardes was sentenced to a term of 11 years imprisonment with a non-parole period of 7 years.

The DPP appealed against the sentences imposed on both the Currys and Hardes. In respect of the Currys, while the sentence of 10 years with a non-parole period of 6 years imposed in respect of the conspiracy to import heroin was not challenged, it was submitted that the overall sentence was manifestly inadequate as there was no element of accumulation in respect of the sentences for the specific importations which had not only earned the Currys a total of $60 000 as their fee for acting as couriers but had resulted in substantial quantities of heroin being imported. The Court of Criminal Appeal agreed. Neither was a user of drugs but simply, in the words of Street CJ, 'cold-blooded drug traffickers'. The Court substituted an effective sentence of 26 years imprisonment with a non-parole period of 16 years.

The Court also allowed the DPP's appeal against the sentence imposed on Hardes. Although he had only been convicted in respect of his involvement in the ultimately unsuccessful conspiracy to import heroin in early 1984, he had occupied a significantly higher position than the Currys in the drug trafficking ring, and he had played a much more active role in that conspiracy. The Court increased his sentence to one of 15 years imprisonment with a non-parole period of 10 years.

Trudgeon - In September 1987, after a 2 week trial in the New South Wales Supreme Court, Trudgeon was found guilty of conspiring to supply heroin. The case arose out of the importation into Australia of some 9 kilograms of high grade heroin from Thailand in October 1984. Federal

Police had detected the importation and, with the co-operation of the couriers, had substituted plaster of Paris for most of the heroin, leaving only a small quantity of the drug. A number of Asian men who had contacted the couriers were kept under surveillance by the police and eventually the 'heroin' was collected from the couriers by these men, including one Kam Hung Cheung. The 'heroin' was in the course of being distributed when those involved were arrested. Police had observed Cheung take a block of the 'heroin' into Trudgeon's premises and emerge with $35 000 in cash. Both Cheung and Trudgeon were then arrested.

Trudgeon was sentenced to 12 years imprisonment with a minimum term of 9 years. Four others, including Cheung, were convicted in other proceedings and sentenced to similar terms.

Operation Oyster - In late 1986 the AFP commenced a lengthy investigation of McLean, a customs officer, who was suspected of involvement in the importation of illegal narcotics. The investigation culminated in the arrest on 9 March 1987 of McLean, Carlo and Patricia Razzi, Lorenzelli and Postiglione shortly after the importation into Australia of approximately 5.5 kilograms of heroin concealed in soccer balls. McLean, Carlo Razzi and Lorenzelli had also been involved in the importation of 5 kilograms of heroin on 1 November 1986 which was not recovered. Following his arrest McLean made extensive admissions in relation to 3 earlier importations of narcotics, the earliest in 1982, as well as one planned importation that had not proceeded.

McLean pleaded guilty before committal and was sentenced on 7 August 1987 to 10 concurrent terms of imprisonment, the longest being 24 years with a minimum term of 16 years, which was the effective sentence.

After lengthy committal proceedings, and shortly before their trial was due to commence, Carlo Razzi, Lorenzelli and Postiglione pleaded guilty before Roden J in the Supreme Court. Razzi and Lorenzelli were each sentenced on 28 June 1988 to 2 terms of imprisonment of 18 and 22 years. Postiglione was sentenced to life imprisonment having regard to a prior conviction for heroin trafficking in Italy and his essential role in the importation, including the provision of contacts and the purchase of the heroin in Pakistan. No bill of indictment was presented against Patricia Razzi.

This case, like Operation Lavender mentioned in last year's Annual Report, demonstrates that with the commitment of adequate resources, hard work from experienced officers, patience and innovation, the police can achieve notable victories in the fight against organized crime. It was a great credit to the Organized Crime Unit of the Sydney AFP that it was

able to conduct such a long investigation concerning criminal conduct on the part of a senior law enforcement officer, and involving a number of agencies, while still maintaining security. That pleas of guilty were entered in respect of such serious offences was a clear indication that the case prepared by the AFP for prosecution was virtually unassailable.

Drummond - On 10 August 1987 Drummond was charged under the *Crimes (Foreign Incursions and Recruitment) Act 1978* with making preparations for entering the Republic of the Seychelles to engage in hostile activity against that country's Government. Although Drummond had devised an elaborate plan to take over the Government of the Seychelles, his plan was not put into effect due to his arrest. In due course Drummond pleaded guilty and was sentenced to 18 months imprisonment.

United Telecasters - Mention was made in last year's Annual Report of the prosecution of United Telecasters (Sydney) Limited, the licence holder of television station Channel 10, for an offence of televising an advertisement for cigarettes contrary to section 100(5A) of the *Broadcasting and Television Act 1942*. In this prosecution, which was the first of its kind under the Act, it was alleged that the 'Winfield Spectacular' which preceded the televising of the 1984 Sydney Rugby League Grand Final was an advertisement for cigarettes. Following a trial before a judge and jury United Telecasters was convicted on 16 September 1987 and fined $2000.

United Telecasters appealed to the Court of Criminal Appeal against the conviction. The appeal was upheld, the Court holding that the jury should have been required to make an objective assessment of the material televised without the assistance of extrinsic explanatory material such as a packet of Winfield cigarettes. An application has been made for special leave to appeal to the High Court against the Court of Criminal Appeal's decision.

Cornwell and Bull - These persons were extradited from the United Kingdom and Austria respectively on drug and passport charges at the instigation of the NCA. On 31 August 1987 they both pleaded guilty in the Supreme Court of New South Wales to charges relating to the importation of 2 tonnes of cannabis and the use of false passports. In addition, Cornwell pleaded guilty to a charge of conspiring to import a further 4 tonnes of cannabis. On 16 September 1987 Cornwell was sentenced to an effective 23 years imprisonment with a minimum term of 14 years. Bull was sentenced to 18 years imprisonment with a minimum term of 11 years. As it was considered that these sentences adequately reflected their criminality, further charges upon which they had been extradited to Australia were not proceeded with.

Operation Chicory - On 13 May 1988, following a 4 week trial in the Supreme Court, Carusi, Cassar and Slade were found guilty of conspiring to supply heroin.

The case arose out of the infiltration of an overseas drug syndicate by an undercover policeman, with the officer bringing 3 kilograms of heroin into Australia from Pakistan for the syndicate. The officer had made contact with the overseas principals of the syndicate but had no idea who was involved at the Australian end until his arrival in Sydney with the heroin. Upon his arrival in Australia the police removed most of the heroin from the consignment, substituting sugar. The officer was contacted by the Australian end of the syndicate and the 3 offenders were then arrested.

Carusi was categorised as an Australian principal by the trial judge and was sentenced to 14 years imprisonment with a 10 year non-parole period. Cassar was categorised as a minder/driver and was sentenced to 11 years imprisonment with a non-parole period of 7 years and 6 months. Slade was categorised as a lookout and driver and sentenced to 7 years imprisonment with a non-parole period of 4 years.

Treacy, Bond and Flanagan - On 28 March 1986 Treacy, Bond and Flanagan arrived at Sydney International Airport. At the time Bond had approximately 3 kilograms of cocaine concealed within his luggage while Flanagan had approximately 1.5 kilograms of cocaine concealed within the suitcase he was carrying. Bond was subsequently arrested by the AFP and a surveillance operation was conducted in relation to Flanagan and Treacy. Flanagan was arrested the next day in possession of the 1.5 kilograms of cocaine, and Treacy was later arrested at the Sydney International Airport after booking a seat on a Thai Airlines flight to London via Bangkok. The total amount of pure cocaine recovered from the suitcases of Bond and Flanagan was 3 518 grams. This amount of cocaine could realise, at a wholesale level, between $386 000 and $422 000. Evidence was given that at street level, with a purity of about 30%, this amount of cocaine could realise between $2 100 800 and $2 638 500.

The arrests of Treacy, Bond and Flanagan were the result of an extensive investigation and surveillance undertaken by officers of the United Kingdom Customs and Excise Division and the AFP commencing in March 1985. It is considered all 3 were involved in a major international cocaine smuggling operation.

Bond pleaded guilty to charges of possessing, importing and being knowingly concerned in the importation of a commercial quantity of

cocaine and was sentenced on 6 June 1986 to an effective term of 15 years imprisonment with a minimum term of 9 years.

Treacy was charged with being knowingly concerned in the importation of a commercial quantity of cocaine and with being knowingly concerned in the importation of a trafficable quantity of cocaine. Flanagan was charged with being knowingly concerned in the importation of a commercial quantity of cocaine, with importing a trafficable quantity of cocaine, and possessing a trafficable quantity of cocaine. Flanagan pleaded guilty to the charges and Treacy was convicted following a 2 week trial.

Treacy was sentenced on 28 August 1987 to an effective term of 18 years imprisonment with a minimum term of 12 years. Flanagan was sentenced to an effective term of 15 years with a minimum term of 9 years.

The joint investigation was the subject of 2 episodes of the U.K. documentary series 'The Duty Men' shown on ABC television early in 1988.

Rose and Spencer - As a result of information received from an informant, a chemistry student, the AFP were advised of a conspiracy between Spencer and Rose to import a quantity of ergotamine tartrate from Bombay. This chemical is used in the manufacture of LSD and the informant had been approached to assist in the manufacture of LSD from the ergotamine tartrate. The informant assisted the police by consenting to arrangements for him to record the subsequent conversations between himself, Spencer and Rose.

As a result of information provided by the informant the AFP ascertained that Rose had departed from Sydney Airport on 2 September 1986 to travel to Bombay in order to obtain the ergotamine tartrate. On his return to Australia he was found to be in possession of approximately 500 grams of ergotamine tartrate. A further 100 grams of the chemical were found at his premises. The total of 600 grams had an average purity of 98%. The street value of LSD that can be obtained from 600 grams of ergotamine tartrate with that purity is approximately $17m.

In respect of his involvement Spencer was sentenced after a 4 week trial to concurrent terms of 18 years imprisonment with a non-parole period of 12 years. After being committed for trial, but before the commencement of his trial, Rose pleaded guilty to the charges and was sentenced to concurrent terms of 12 years imprisonment with a non-parole period of 8 years.

Brifman - Following a trial in late 1987-88 Brifman was sentenced in the Supreme Court on 8 July 1988 to 16 years imprisonment with a minimum term of 9 years for being knowingly concerned in the importation of heroin.

On 20 April 1986 Brifman and a co-offender Turner had arrived at Sydney International Airport after a flight from Hong Kong. Acting on information received AFP officers were present at the airport and Turner was found to be in possession of 2.431 kilograms of white powder which after analysis was found to contain 1.878 kilograms of pure weight of heroin. The prohibited substance had been found strapped to Turner's body.

Turner was sentenced on 19 December 1986 to imprisonment for 14 years with a minimum term of 9 years for importing and possessing heroin. This sentence was reduced by the Court of Criminal Appeal to 9 years with a minimum term of 6 years in view of Turner's co-operation with the investigating authorities and, indeed, it was Turner who provided the most important evidence against Brifman at the latter's trial.

Turner gave evidence that she had met Brifman whilst working at an escort agency operated by Brifman at Ultimo. In early April 1986 she had been offered $20 000 if she would bring something into Australia on her person. Subsequently Brifman asked Turner to place various plastic bags believed to contain flour on various parts of her body apparently so as to test them 'for size'. According to Turner, Brifman also supplied her with an air ticket, $1000 in spending money and certain special clothing prior to both leaving Australia for Hong Kong in April 1986. Prior to their return to Australia, Brifman had taped a number of packages of the drug around Turner's body.

In sentencing Brifman the Court took into account evidence which had been given on her behalf which indicated that she had been subjected to a very considerable amount of abuse and cruelty as a young person. Nevertheless, the Court considered that the offence warranted a lengthy period of imprisonment.

Chow - On 30 April 1984 David Chow was arrested and charged with a number of offences relating to the importation of 28 kilograms of heroin into Australia. The actual importation had been carried out with the knowledge of the authorities who, after importation, effected a substitution of the bulk of the heroin. Having been committed for trial, Chow was indicted in the Supreme Court of New South Wales on the following counts:

- being knowingly concerned in the importation of heroin;
- possession of heroin;
- conspiracy to supply heroin (N.S.W. State charge)

Chow was acquitted on the first count and convicted on the remaining 2. On the possession charge he was sentenced to imprisonment for 20 years with a minimum term of 14 years, and on the conspiracy charge to 6 years with a minimum term of 3 years. Yeldham J ordered that the sentences be served concurrently.

On an appeal against his convictions to the Court of Criminal Appeal it was unsuccessfully argued on Chow's behalf that the importation, having been carried out with the knowledge of the authorities, had not been 'in contravention of the Act' as required by section 233B(1)(c) of the Customs Act (under which Chow had been charged). Accordingly, it was argued, the heroin was not a prohibited import.

Both arguments were rejected, the Court relying on its previous judgment in **R v Johnson** (unreported 11 March 1982). However, the Court quashed the conviction for conspiracy to supply: because of the definition of 'supply' under the *Poisons Act 1966* (NSW), the indictment was defective. The Court also reduced the minimum term in respect of the possession count from 14 years to 12 years.

MELBOURNE OFFICE

Milosevic - This prosecution illustrates some of the complexity and technicality in the offence of stealing under the *Crimes Act 1914* which continues to rely on common law principles.

On 2 October 1986 Milosevic, who was employed by the Commonwealth Bank as a casual cafeteria attendant, was paid $4210 by direct credit to her savings account at a branch of the Bank for wages due. In fact, Mrs Milosevic had been 'overpaid' by $4000 as a result of an error on the part of the bank. On the same day Mrs Milosevic withdrew $210 from her local branch of the bank. This withdrawal should have resulted in her passbook showing a credit of only 32¢. However, upon the return of the passbook it showed a credit balance of just over $4000. In the space of the next 1.5 hours Mrs Milosevic, with the assistance of her husband, made 4 separate withdrawals each of $1000 at 4 separate branches of the Bank. In respect of those withdrawals Mr and Mrs Milosevic were charged with offences of imposition contrary to section 29B of the *Crimes Act 1914* and, in the alternative, with offences of stealing contrary to section 71(1).

At the close of the prosecution case the magistrate upheld a defence submission that there was no case to answer on any of the charges and dismissed the informations. The imposition charges were dismissed on the ground that, once the mistaken payment had been credited to her account, it became Mrs Milosevic's property, and accordingly the submission of the various withdrawal forms could not constitute an untrue representation. The stealing charges were dismissed on much the same ground, namely that as property in and possession of the money had passed to Mrs Milosevic when it had been paid into her account neither defendant could be convicted of stealing what was Mrs Milosevic's.

On appeal the Supreme Court accepted in respect of the charges of imposition that the magistrate had erred in holding as a matter of law that the money had belonged to Mrs Milosevic. An account holder who deposits money in a bank account does not continue to own that money but rather acquires a chose in action, namely a right to recover from the bank the balance standing to his or her credit. Once the true credit to Mrs Milosevic had been exhausted there was not even a subsisting chose in action. As she had no entitlement to the $4000, the court held that the presentation of each withdrawal slip was capable of constituting a representation that she was entitled to the amounts appearing on the slips, and that there was evidence from which it could be inferred that was known by each of the defendants to be untrue.

As to the dismissal of the charges of stealing, does a person commit larceny at common law who receives property as a result of a mistake on the part of the owner and converts that property aware of the other's mistake? While such a person clearly has acted dishonestly, the taking is not trespassory and is with the consent of the owner. Accordingly, on principle it would seem that 2 of the requirements for the offence of larceny at common law are absent. Authority on the question is conflicting but the English courts, motivated perhaps by considerations of policy, have tended to favour a modification of what has been referred to as the 'primitive simplicity of the crime of larceny' to ensure that the dishonesty in at least some such cases does not go unpunished. However, Australian authority, of which the leading case is **R.v.Potisk** [1973] 6 SASR 389, has tended to adopt a more purist approach.

In the present case the Court held that the mistake by the bank had been of so fundamental a character as to negate the apparent consent and therefore to prevent ownership in the money passing to Mrs. Milosevic. Accordingly, the Court also allowed the prosecution's appeal in respect of the stealing charges.

It should be noted in conclusion that the above shortcoming in the common law offence of larceny has been substantially overcome in a number of Australian jurisdictions which have reformed their property offences along the lines of the Theft Act 1968 (UK) - see, for example, section 95(4) of the *Crimes Act, 1900 (NSW) in its application to the ACT*. It is expected that similar reforms will be made in the Commonwealth arena as a result of the work of the Review of Commonwealth Criminal Law.

Powell, Hawkins and Lesser - On 21 August 1987 Powell, aged 65, arrived at Melbourne airport from San Francisco with 1.156 kilograms pure weight of cocaine strapped to her body. She was arrested together with her defacto spouse, Hawkins, and her son in relation to the importation of the cocaine as well as the possession of a small quantity of heroin found buried in the backyard of their premises. The principal behind the importation of the cocaine, Lesser, was subsequently arrested. The arrests followed a joint Commonwealth/State investigation and involved many hundreds of hours of taped conversations obtained through the use of listening devices and telephone intercepts.

On 6 May 1988 all 4 defendants pleaded guilty to various offences relating to the importation of the cocaine and were sentenced to terms of imprisonment, the most severe being that of 10 years imprisonment with a minimum term of 7 years in the case of Lesser. In addition, the Powells and Hawkins pleaded guilty to possession of the heroin for which they received concurrent terms of imprisonment.

Wescombe - This person was convicted by a jury on 23 October 1986 of one count of imposition contrary to section 29B of the *Crimes Act 1914* and released upon his entering into a recognizance in the sum of $350 to be of good behaviour for 3 years. His application for leave to appeal against conviction was dismissed by the Court of Criminal Appeal in May 1987, and he then applied to the High Court for special leave to appeal against that decision. The application was heard on 31 May 1988 with the Director appearing as counsel for the Crown.

The charge rose out of the use by Wescombe of a cab charge voucher to obtain a taxi ride from his place of employment, the ABC, to his residence. The voucher had been made out for use by a Mr Jones for travel from the ABC to a different destination and Wescombe had signed the voucher in the name of Jones. In essence Wescombe's defence was that when Mr Jones failed to attend the ABC for his scheduled interview he decided as a matter of convenience to use the voucher himself. He claimed that he was entitled to be paid for the use of a taxi as he was carrying heavy equipment with him.

The application for special leave centred on the trial judge's direction to the jury as to the meaning of the words 'to impose' in section 29B. Criticisms can certainly be levelled at the imprecision of the expression 'to impose' upon the Commonwealth in the section. However, the High Court stated that it was not persuaded that the direction to the jury had been capable of giving rise to any miscarriage of justice, and it was therefore not an appropriate case for the grant of special leave.

Cisco's Meats Pty. Ltd. - This company pleaded guilty to 6 charges of applying a false trade description contrary to section 15(1)(a)(i) of the *Export Control Act 1982* in relation to the substitution of poorer quality cow meat for bull meat in 412 cartons of beef for export to the United States. The company was fined $1000 on each of the 6 charges and was ordered to pay costs.

The matter came to light when a Commonwealth meat inspector detected a discrepancy in the number of cartons of bull and cow meat transferred from the defendant company's premises in comparison with the production figures for the respective species. This was the first Victorian prosecution for irregularities connected with meat exports since the Woodward Royal Commission into the export meat industry in 1982.

Nelson - The defendant was a Telecom employee who stole approximately $13 000 from public telephone boxes over a 7 year period during the course of his employment with Telecom. His duties had involved the collection of coin tins from public telephone boxes and he had committed the offences in the course of performing those duties. While sentenced to a term of 6 months imprisonment, the court ordered that the sentence be suspended upon Nelson entering into a recognizance in the sum of $1000 to be of good behaviour for 2 years. It was considered that the sentence was manifestly inadequate and an appeal was lodged against the sentence. That appeal was successful with the court ordering that the sentence imposed at first instance be varied by omitting that part of the order suspending the sentence. The court remarked that the sentence initially imposed had been wholly inappropriate in the light of the fact that Nelson had deliberately stolen money from his employer over a substantial period thereby breaching a position of trust. The court also considered that Nelson's actions had been motivated solely by greed and took account of the fact that the amount stolen had been substantial.

Maio - This defendant was convicted after a trial of possession of a commercial quantity of heroin and sentenced to a term of 18 years imprisonment with a minimum term of 15 years. Because the offence involved a commercial quantity of heroin, namely 1.9 kilograms, it was punishable by a maximum penalty of life imprisonment.

The accused had been under surveillance for 2 days following his arrival in Melbourne from Perth on 11 April 1987. He had been observed at various meetings with 2 accomplices, Lik Huang Chan and Choon Hoe Lee, who had arrived in Australia on 3 April 1987 from Malaysia. The accused was apprehended in a vehicle with Chan and Lee and found to be in possession of the 1.9 kilograms of heroin in 5 clear plastic bags. In imposing sentence the judge stated that he had no doubt that Maio had come to Melbourne to buy heroin from Chan and Lee and that his role was a very vital link in the distribution of the heroin. The accomplices Chan and Lee had previously pleaded guilty and were each sentenced to 15 years imprisonment with a minimum term of 12 years.

An appeal by Maio was heard in the Court of Criminal Appeal in June 1988. When apprehended Maio had had one of the plastic bags containing heroin on his lap, with the remainder contained in a bag beside him. The question raised by the appeal was whether he had been in possession of the latter quantity of heroin. If not, it was submitted that the sentence would have to be reviewed as the former quantity of heroin was a trafficable quantity only, and accordingly punishable by 25 years imprisonment - not life imprisonment.

The appeal was dismissed. While earlier cases such as **Moors v. Bourke** (1919) 26 CLR 265 had advanced a test of possession which required that the accused have exclusive control over the thing in question, the court held that the requirement for exclusivity of possession was only appropriate in the so called 'container' cases, not in cases involving manual possession such as the present one.

Brott - On 7 June 1984 Brott, a solicitor, gave evidence before the Costigan Royal Commission. The manner in which he conducted himself during the giving of his evidence resulted in the Commissioner referring the transcript of his evidence for consideration that he be prosecuted for contempt of the Royal Commission contrary to section 60 of the *Royal Commissions Act 1902*. Proceedings were in fact instituted against Brott for contempt and the matter came on for hearing in the Magistrates' Court at Melbourne in July 1986.

Prior to the charge being read senior counsel for Brott raised 3 preliminary submissions, one of which was that the Royal Commissioner had made an order pursuant to section 6D(3) of the *Royal Commissions Act* prohibiting publication of evidence given before it. Accordingly, pursuant to that section the informant in the contempt proceedings could not 'publish' the transcript to the Magistrates' Court to support the charge. This submission was accepted by the magistrate. Brott then entered a plea of not guilty to the charge, whereupon counsel for the

informant indicated that he was not in a position to lead any evidence in support of the charge as the transcript of Brott's evidence had been ruled inadmissible. The information was then dismissed for want of prosecution.

An order *nisi* to review the magistrate's decision was obtained on the ground, *inter alia*, that he had erred in ruling that, in declaring the proceedings 'be confidential' at the outset, the Royal Commissioner had made an order pursuant to section 6D(3) preventing publication of Brott's evidence. In a judgment delivered on 3 June 1988 the Supreme Court of Victoria agreed. The Court held that the Royal Commissioner had made no order under section 6D(3) prohibiting publication as that section is concerned with retrospective and not prospective evidence. Further, the court found that the reference by the Royal Commissioner to 'confidentiality' was suggestive of a direction that the evidence be given in private, and was not a direction in the terms of section 6D(3).

The court also rejected an argument on behalf of the respondent Brott that the transcript of his evidence before Commissioner Costigan was inadmissible pursuant to section 30 of the *Evidence Act 1958* (Vic) (Commissioner Costigan had been appointed under separate Commonwealth and State letters patent). In **Giannarelli v R** (1983) 154 CLR 212 the High Court had ruled that, although statements the subject of perjury charges laid under Victorian law had been made before Commissioner Costigan in the exercise of both his State and Commonwealth letters patent, section 6DD of the *Royal Commissions Act* operated to render evidence given before him inadmissible in any subsequent proceedings in any Commonwealth or State court other than for an offence against the *Royal Commissions Act*. The argument on behalf of Brott was essentially that the reverse also applied, i.e. section 30 of the Victorian *Evidence Act* operated to render such evidence inadmissible in proceedings for an offence under the Commonwealth Act.

Although the order *nisi* was made absolute and the information and summons remitted to the Magistrates for hearing according to law, Brott has since applied for special leave to appeal to the High Court. The application submits that there is an inconsistency between the provisions of the *Royal Commissions Act 1902* and the *Evidence Act* 1958 (Vic) justifying the grant of special leave. No date has yet been fixed for the hearing of that application.

BRISBANE OFFICE

Baxter - In relation to offences of obtaining property by deception based upon the Theft Act (UK) it has been held that to constitute a deception some person must have been deceived, and that it is not possible to deceive

a machine. The question raised by this appeal was whether an untrue representation for the purposes of the offence of imposition under section 29B of the *Crimes Act 1914* similarly required that the untrue representation must have been made to a person.

The case against Baxter was that he was a party to the depositing of forged cheques to certain keycard accounts with the Commonwealth Bank. Those keycard accounts were computerised with the result that immediately upon the deposit of each cheque a credit was raised in the account. Although the paying Bank would be expected to dishonour the forged cheques on presentation, until that occurred the credit remained. However, prior to dishonour of the cheques Baxter withdrew funds from the keycard accounts using the Bank's automatic teller machines.

Although convicted of a number of offences arising out of his involvement in this matter, Baxter appealed only against his conviction on 7 counts of imposition which related to the withdrawal of the funds from the keycard accounts. The jury had been directed that in each case of imposition the allegation was that by putting the keycard into the automatic teller machine and keying in the personal identification number Baxter was holding out that there were funds in the account to meet the amount which he sought to withdraw. The jury was directed that as a matter of law there need not be an untrue representation to a real person for the purposes of section 29B, and that it was sufficient if the representation was made to the Commonwealth Bank through the automatic teller machine. It was submitted on Baxter's behalf on appeal that that direction was wrong in law.

On 3 July 1987 the Court of Criminal Appeal unanimously dismissed the appeal. In discussing section 29B Connolly J remarked that the section 'does not involve the representation having any effect upon the mind of the bank acting by one of its proper officers. It does not resemble, in this respect, situations in which it must be shown that a deceit has induced a course of action'.

Buist - This prosecution demonstrates the responsibilities of those involved in the management of corporations for taxation offences committed by those corporations. Buist was a director of 10 companies and the public officer of 7 of them. After a summary hearing in the Brisbane Magistrates Court Buist was convicted of seventeen offences against section 8C of the *Taxation Administration Act 1953* relating to the failure of those 10 companies to lodge taxation returns when required to do so by a final notice from the Australian Taxation Office. Buist had been served with copies of the final notices to the companies, and had been informed of the provisions of section 8Y of the *Taxation Administration*

Act which deemed him liable for any breaches by the companies. He was fined $13 575 and in addition was ordered to pay court and professional costs.

Buist appealed against the convictions to the Full Court of the Supreme Court of Queensland on the ground that he was not a party to the breaches by the companies as he had made all reasonable and necessary arrangements to ensure the returns were furnished. He said he had not been made aware by his accountant that the returns could not be furnished within the required time.

In dismissing the appeal the Court found that Buist had known that final notices had issued requiring the lodgment of returns for a number of the companies for a number of years. He had had one telephone conversation with his accountant when he asked if the situation was being addressed, but did nothing further, leaving the matter entirely in his accountant's hands. The Court held that his failure to take any further steps to ensure the notices were complied with indicated that he had acted recklessly with no concern as to whether the returns were lodged. He had taken no steps to ensure that the deadlines were met, and had done nothing to check on the rate of progress or the effectiveness of his accountant's efforts. Even though Buist had passed over the control of the performance of his obligation to another, he could not rely upon that person's omission, and his lack of knowledge of it, to show that he was not a party to the breach. Although he had not had actual knowledge of the omission, the Court found that in the circumstances he did have constructive knowledge of the omission and was therefore guilty of the offences.

Duncan - This was the first prosecution for an offence under section 54 (2) of the *Torres Strait Fisheries Act 1984*. The Act gives effect to the treaty between Australia and Papua New Guinea concerning sovereignty and maritime boundaries in the area between the 2 countries, including the Torres Strait. The treaty recognises the importance of protecting the marine environment and evidences a desire on the part of the 2 countries to co-operate in the conservation, management and sharing of fisheries resources.

Duncan is an Australian citizen who was intercepted by officers of the Queensland Boating and Fisheries Patrol whilst on surveillance duties in the Torres Strait Protected Zone. He was found to be trawling for prawns in an area under PNG jurisdiction near Pearce Cay without the appropriate licences. He told investigators that he believed his vessel had been licensed to fish in the Torres Strait Protected Zone. After a summary hearing the defendant was fined $500 and in addition was ordered to pay approximately $950 costs.

Hinton - On 23 November 1987 Hinton, a member of the Queensland Parliament, was convicted following a plea of not guilty of an offence of making the signature of another person on an electoral paper contrary to section 336 (3) of the *Commonwealth Electoral Act 1918*. It is understood that this was the first prosecution for an offence under that section.

The circumstances surrounding the offence were that in July 1986, while canvassing votes in Middlemount in central Queensland, Hinton had offered to assist various persons to enrol for the forthcoming election. Upon being told that a Ms Jenny Storen was intending to live in the area in the near future and that her name did not appear on the electoral roll for that area, Hinton suggested that a friend of hers complete the enrolment form on her behalf. Upon the friend declining to do so, Hinton completed the form himself, signing Storen's name on the form and also purporting to witness her signature. The claim for enrolment form was subsequently lodged with the Australian Electoral Commission and Storen's name was placed on the Electoral Roll. Upon conviction Hinton was fined $400 and ordered to pay costs of approximately $800.

Manassakis - In last year's Annual Report reference was made to the practical difficulties that can arise where an offender is before a court for sentence in respect of both State and Commonwealth offences. These difficulties are illustrated by this case. On 24 February 1987 Manassakis was sentenced by the District Court at Brisbane to a total of 2.5 years imprisonment in respect of a number of State offences, with the Court making a strong recommendation that he be considered for release on parole after serving 10 months of his sentence. Eight days later Manassakis again appeared before the District Court for sentence in respect of a number of Commonwealth offences. He was sentenced to 18 months imprisonment with the Court ordering that the Commonwealth sentence be served cumulatively on the earlier State term.

Section 63 of the *Offenders Probation and Parole Act 1980* (Qld) deems a prisoner released on parole to be serving a sentence of imprisonment. It followed here that if released on parole after serving 10 months of his State sentence as recommended by the Court, or at some later time, Manassakis could not commence to serve his Commonwealth term of imprisonment until the nominal expiration of his State term. Clearly it was undesirable that a person be required to commence service of another sentence after an extended period of release on parole. Accordingly, an appeal was instituted by the DPP to regularize the order of service of the sentences. In allowing that appeal the Queensland Court of Criminal Appeal agreed with the submission of the appellant that the situation occasioned by the terms of the sentence in respect of the Commonwealth offences was impractical and unacceptable. The Court ordered that the

Commonwealth sentence commence upon the expiration of the deprivation of liberty of the prisoner in respect of the earlier State sentence. The effect of this order is that Manassakis will commence service of his Commonwealth sentence as soon as he would nominally have gained his release on parole in respect of his earlier State sentence.

Tardrew - In 1985 the DPP handled extradition proceedings under the *Extradition (Commonwealth Countries) Act 1966* following a request by Papua New Guinea for the extradition of Tardrew. Those proceedings were successful and Tardrew was returned to Papua New Guinea to face a number of charges. He pleaded guilty to those charges and was sentenced to 5 years imprisonment with the Court ordering that he be released after serving 6 months upon entering into a recognizance. After serving 6 months less remission Tardrew was released on 1 April 1986, just prior to the hearing of an appeal by the Public Prosecutor against the order for the suspension of the balance of his sentence. However, immediately upon his release Tardrew, a champion yachtsman, left Papua New Guinea by boat, travelling to Australia.

The appeal by the Public Prosecutor to the Supreme Court of Papua New Guinea was upheld, with the Court ordering that Tardrew serve the full 5 year sentence. Thereupon a warrant issued for his arrest, and the Papua New Guinea Government again requested Tardrew's extradition from Australia. On 22 December 1987 a magistrate made an order committing Tardrew to prison to await the Attorney-General's warrant for his surrender to Papua New Guinea. Although Tardrew applied for a review of that decision, that application was dismissed.

Melihar - The defendant was charged with 4 breaches of the *Copyright Act 1968* after she was found exposing for hire 'pirated' copies of video tapes. The successful prosecution demonstrated the value of the amendments to the Act brought about by the *Copyright Amendment Act 1986* which, inter alia, imposes liability on a person who ought reasonably to have known that the work was an infringing copy of a work subject to copyright.

Pincham - This offender had been the subject of an investigation by a team of AFP and Queensland police officers. The joint investigation covered the following matters -

- the receipt of benefits under the *Social Security Act 1947* while receiving income from various businesses he operated which he did not declare to Department of Social Security,

- the obtaining of services and credit, and carrying on businesses and paying debts by cheque, while an undischarged bankrupt without disclosing his bankruptcy to any of the persons with whom he was dealing.

- the misappropriation of approximately $45 000 from the savings accounts of 2 pensioners for his own use or for the use of a private company owned by his family.

Pursuant to an arrangement between this Office and the Queensland Director of Prosecutions, the DPP prosecuted all aspects of the matter, including the charges of misappropriation which had been laid under the *Queensland Criminal Code 1899*.

Pincham pleaded guilty and was sentenced to an effective term of imprisonment of 3.5 years.

PERTH OFFICE

Indonesian Fishing Vessels - In early 1988 DPP Perth was involved in the prosecution of the masters of 13 Indonesian fishing vessels for offences relating to fishing for trochus shells in Australian waters. Trochus is highly sought after in South-East Asia for making buttons, ornaments and jewellery. Most of the masters pleaded guilty, although several denied the charges. This required a prosecutor from DPP Perth to travel to Broome, some 1600 kilometres away, to prosecute the matters. Convictions were obtained in all cases. The usual penalty imposed by the court was a recognizance to be of good behaviour with a condition that the defendant not enter Australian waters for, in most cases, 5 years. Forfeiture of the fishing vessels was ordered in all but one case. The successful prosecutions were made possible by the combined efforts of Customs and Fisheries officers, the Navy and Coastwatch.

Harriman, Martin, Lisk and Mulic - These 4 persons were convicted of offences relating to their involvement in the importation by post of some 270 grams pure weight of heroin. Martin had mailed the heroin from the United Kingdom to Australia after having obtained it in Thailand. He pleaded guilty to an offence of importation contrary to section 233B (1) of the *Customs Act 1901* and was sentenced to a term of 6 years imprisonment, with a minimum term of 3 years. Lisk and Mulic pleaded guilty to being knowingly concerned in the importation (they had provided postal addresses to which the heroin was to be mailed) and each was sentenced to a term of 2 years imprisonment with a minimum term of 8 months.

Martin had identified one Harriman, his partner in a mining venture, as the principal behind the importation. Following a trial, at which Martin, Lisk and Mulic testified for the Crown implicating Harriman, he was convicted of being knowingly concerned in the importation and sentenced to an effective term of 12 years imprisonment, but without a minimum term. At the time of writing the Court of Criminal Appeal has reserved its decision on Harriman's appeal against both conviction and sentence.

Chedzey - In last year's Annual Report reference was made to the conviction of Chedzey in relation to a bomb hoax call. Although he had yet to be sentenced at the time of publication, he was subsequently placed on a good behaviour bond and fined a substantial amount.

On 17 December 1987 the Court of Criminal Appeal upheld Chedzey's appeal against conviction, and declined to order a retrial. The Court held that the trial judge had misdirected the jury in relation to the meaning of the phrase 'beyond reasonable doubt'.

Richardson - In the discussion in last year's Annual Report of the prosecution of Breuer and 4 others reference was made to the extradition proceedings that had been instituted in respect of a sixth person involved in this matter, one Richardson. His challenge against the order for his extradition from Hong Kong was unsuccessful and he was returned to Australia where, in December 1987, he pleaded guilty to being knowingly concerned in the importation of 1775 kilograms of cannabis into Australia in March 1986. He was sentenced to a term of 6 years imprisonment with a minimum term of 3 years.

George Wills & Co. Ltd. - George Wills & Co. Ltd., a wholesaler of clothing, was prosecuted for 3 offences under the *Trade Practices Act 1974* relating to the wholesale supply of children's nightdresses. They had not been labelled warning of their danger as a fire hazard as required by the relevant consumer product safety standard. The nightdresses had instead borne a label 'styled to reduce fire danger'. While the fault for this mislabelling had been that of an unrelated manufacturer, liability under the *Trade Practices Act* for a misrepresentation contained on a label that has been affixed by a manufacturer can be nevertheless ascribed to a wholesaler when the latter supplies the article to a retailer and when the article is displayed for purchase and purchased by a customer. Both George Wills & Co. Ltd. and the manufacturer were fined following conviction.

First Home Owners Act Prosecutions - Seventeen persons were prosecuted during 1987-88 under the *First Home Owners Act 1983* for offences relating to the fraudulent obtaining of money under the First

Home Owners Scheme. All prosecutions were successful and resulted in fines ranging from $200 to $1500. Only one prosecution had been instituted under the Act in the previous year. The increased activity in this area was a result of the appointment by the Department of Community Services and Health of a full-time investigator.

Asciak - This person was charged following an investigation by the National Crime Authority with having conspired with Kevin Barlow and Geoffrey Chambers to import heroin into Australia. Barlow and Chambers were apprehended in Malaysia carrying approximately 180 grams pure weight of heroin and were executed in Penang in July 1986. Asciak was convicted following a 3 day trial and sentenced to 10 years imprisonment but without a minimum term. That sentence is to be served cumulatively on a term of 5 years imprisonment Asciak is at present serving for an offence involving the possession of heroin. Available information suggests that Asciak was a low to medium rung member of a Perth based heroin ring. He was instrumental in recruiting Barlow to travel to Malaysia with Chambers for the purpose of smuggling the heroin into Australia.

DLS ADELAIDE

Agil - In this matter the Malaysian Government sought the extradition of Agil on 4 charges of 'criminal breach of trust' in respect of approximately $5.8m belonging to the Perwira Habib Bank of Malaysia, of which Agil was the Executive Director. After a magistrate made an order that Agil was liable to be surrendered, he applied to the Federal Court for a review of that decision.

D'Angelis - In this matter D'Angelis was charged with offences against the *Copyright Act 1968* and the *Trademarks Act 1955*. The defendant was the proprietor of a video shop and had approximately 150 unauthorised copies of tapes and 30 non-genuine video cassette dust covers. The defendant was convicted and fined $2750 plus costs.

Viney - This defendant was charged with multiple offences against section 8(c) of the *Taxation Administration Act 1953* relating to his failure to furnish income tax returns. In respect of a total of 42 charges relating to 14 legal entities Viney was convicted and fined a total of $56 000. The total fine was so large principally because he had 40 previous convictions for similar conduct. However, on appeal to the Supreme Court the amount of the fines was reduced to $33 500.

Prosecutions under the Commonwealth Electoral Act 1918 - The Electoral and Referendum Regulations contain provisions which are designed to reduce the amount of prosecutorial effort that needs to be

applied to secure convictions in respect of a failure to vote by enabling such prosecutions to be dealt with *ex parte*, that is *ex parte* the prosecuting officer. Upon the institution of a prosecution the prosecuting officer from the Australian Electoral Commission may lodge with the Court a statutory declaration in accordance with the prescribed form. The prosecuting officer is thereafter excused from attending the hearing and the Court is required to hear and determine the case in his or her absence.

When confronted with a number of these matters earlier this year a Port Adelaide magistrate exhibited some difficulty in deciding what approach she should take in terms of penalty. Upon donning the prosecutorial hat in the absence of the prosecuting officer she indicated that she viewed the offending most seriously and considered that nothing less than a significant fine would be appropriate to deal with the offences before her. However, when she removed the prosecutorial hat and donned the judicial hat she failed to see what the prosecutor was making such a fuss about, and could not agree with any suggestion that a deterrent fine was appropriate. Notwithstanding the views of the prosecutor she proceeded to dismiss the complaints pursuant to section 19B of the *Crimes Act 1914*.

The Australian Electoral Commission was somewhat indignant at this result and sought the views of DLS Adelaide on the prospects of an appeal. However, the difficulty was that the prosecutor had failed to adequately record the details of her submission to the Court, and it was felt that in the absence of those details the prospects of an appeal were slight.

Spiers - This defendant, having avoided the imposition of a death sentence in Sri Lanka, agreed to return to South Australia to be tried in respect of a conspiracy to import 40 kilograms of cannabis resin. Spiers had been committed for trial in respect of this offence in the early 1980's but had fled South Australia in 1982 before his trial commenced. On his return, Spiers pleaded guilty and was sentenced to 10 years imprisonment with a non-parole period of 5.5 years.

DLS DARWIN

Bird - Mention was made in last year's Annual Report of the committal for trial of one Bird on charges involving the misuse of over $2m from his employer, the Aboriginal Development Commission, of which he kept $618 000.

Bird pleaded guilty to an indictment containing 25 counts of uttering a forged document contrary to section 67(b) of the *Crimes Act 1914*. After taking into account, pursuant to section 21AA of that Act, 207 further offences Bird was sentenced in late 1987 in the Northern Territory Supreme Court to concurrent terms of 7 years imprisonment, to

commence from 30 January 1987, the date he had been taken into custody. However, the Court ordered that he be released forthwith on his own recognizance to be of good behaviour for approximately 4 years on certain conditions.

The circumstances of the offences were that Bird was employed as a clerk in the Commission's accounts section at Alice Springs where part of his duties was to send out the Commission's cheques to payees. Bird was a compulsive gambler and in November 1984 he misappropriated his first cheque. Having gambled away the proceeds of that cheque in the following month he misappropriated 3 further cheques to pay the proper recipient of the first cheque as well as to continue his gambling. Thereafter he was on a roller coaster of crime which quickly gathered speed, for it was necessary to misappropriate ever larger amounts to 'reimburse' the increasing number of proper recipients of the cheques as well as to feed his gambling habit. In respect of 131 of the cheques Bird wrote 'please pay cash' and forged the initials of the 2 proper signatories. He then simply presented the cheques at the Alice Springs Branch of the Commonwealth Bank, which paid him in cash notwithstanding that in a few instances the amounts involved were over $100 000. By this means Bird obtained over $2 250 000. In addition, a total of over $73 000 was obtained simply by presenting a total of 101 cheques at the Bank who paid him in cash at his request notwithstanding that cheques were made out to other persons. As the Court of Criminal Appeal was to later observe in commenting on the ease with which Bird was able to obtain such a large sum of money, 'it is hardly credible, but it was so'. Bird was also in the fortunate position that he was the officer of the Commission designated to deal with complaints by persons who should have received payments from the Commission, and it was not until some 2 years later that his criminal activities were discovered. By that time the Commonwealth had been defrauded of a net amount of some $618 000.

An appeal was immediately instituted by the DPP against that sentence on the grounds, in general terms, that the effective head sentence of 7 years imprisonment was manifestly inadequate, and that the order for conditional release should not have been made. In a decision delivered on 29 March 1988 the Northern Territory Court of Criminal Appeal agreed, and substituted an effective sentence of 10 years imprisonment, to date from 30 January 1987 with a minimum term of 4 years. The Court observed that this sentence was a more lenient one than it would have imposed at first instance.

Prosecutions arising from demonstrations at Pine Gap - During the year DLS Darwin was involved in the prosecution of 164 persons who were arrested and charged with offences arising from demonstrations at Pine

Gap between 14 and 19 October 1987. The charges included trespass on prohibited Commonwealth land contrary to section 89(1) of the *Crimes Act 1914* and wilful damage of Commonwealth property contrary to section 29 of that Act.

Of these matters 161 had been completed at the time of writing, 155 of which were heard in the Alice Springs Court of Summary Jurisdiction and the remaining 6 in the Darwin Court of Summary Jurisdiction. Of the 3 others, one is on appeal to the Supreme Court of the Northern Territory against conviction and the other 2, which are being defended, have yet to be heard.

Although most defendants pleaded guilty, acknowledging that their actions constituted offences, they offered the explanation that they were morally justified in resorting to civil disobedience to underscore their opposition to the Joint Defence Space Research Facility.

However, a number of demonstrators defended the trespass charges, asserting that they had a lawful excuse. The 2 most usual excuses articulated were based on the defence of necessity and a defence based on the 'Nuremburg Principles'. In respect of the former, it was submitted by the defendants that their illegal actions were necessary in order to draw attention to the Joint Defence Space Research Facility so that public opinion might cause its closure and ultimately, it was hoped, save Alice Springs from the 'imminent peril' of nuclear devastation.

In respect of the 'Nuremburg Principles' defence, defendants relied on principles formulated by the International Law Commission which impose individual responsibility on all persons who engage in activities which are declared by the principles to be international crimes, such as crimes against peace, war crimes and crimes against humanity. The demonstrators extended these principles to an obligation upon citizens to interfere with their government by civil disobedience when they perceive that it is acting contrary to the Nuremburg Principles.

In each case these defences were rejected and upon conviction defendants were fined, with the usual fine ranging between $100-$250.

MEDIFRAUD

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

The 1985-86 Annual Report highlighted the 3 major difficulties facing the prosecution in the medifraud area. First, it is necessary to lay a separate charge in relation to each alleged offence. Each offence generally involves only a small sum of money. An offender may have committed many offences, but there is a limit to the number of charges that can be effectively dealt with at committal and trial. Consequently, the charges laid often do not reflect the full extent of the alleged criminality. Secondly, the Health Insurance Act is beneficial in nature and was not drafted with the purpose of prosecution in mind. In many areas the legislation is vague and ambiguous. As a general principle criminal courts will read ambiguities in favour of the defendant. Thirdly, the prosecution often depends upon evidence from patients on matters such as the length of a consultation or who was present. Often the patients are unwell or infirm and, unless the patient concerned has a particular reason to remember the consultation, his or her memory of it may not be reliable by the time the matter comes to trial (often 2 or more years after the event). Those problems remain and continue to make prosecution action a difficult task. While prosecution has an important deterrent effect in this area, we remain of the view that control of medifraud must primarily rest with the administrative procedures designed to make it difficult to perpetrate fraud, to enable the ready detection of fraud and the curtailment of payment once that is done.

Nevertheless, despite those difficulties, considerable success was achieved in this area during the year with 11 doctors being successfully prosecuted for medifraud offences. In one matter the offender was sentenced to a lengthy term of imprisonment. The remaining 10 matters resulted in a total of $73 000 in fines and $15 271 in costs. The offenders were also ordered to pay a total of $365 142 in restitution. The following table sets out the details.

	NSW	VIC	QLD	WA	SA	NT	TAS	ACT	TOTAL
Matters before the Courts as at 30/6/88	6	4	2	0	0	0	1	0	**13**
Matters dealt with by the Courts during this year	2	4	0	3	1	0	1	0	**11**
Matters with DPP for advice as at 30/6/88	8	0	3	0	1	1	2	0	**15**
Matters under investigation by the AFP as at 30/6/88	10	5	3	0	1	0	1	0	**20**

Perhaps the most significant matter dealt with by the courts involved a medical practitioner who was sentenced to a lengthy term of imprisonment for medifraud offences. On 7 April 1988 **Dr Walsh** pleaded guilty to defrauding the Commonwealth of $303 423.78. The offender did this by submitting false medicare and Department of Veterans' Affairs claims in relation to some of his patients. Between 1 February 1984 and 22 December 1987 the offender's routine was to spend from 8.00 am to 8.50 am and half an hour at lunch time each day filling out false claims. He also pleaded guilty to billing State authorities for false claims to the value of $20 000. On 29 April 1988 he was sentenced in the District Court in Perth to a total of 4 years and 9 months imprisonment. He was also ordered to pay reparation to the Commonwealth of $303 428. While this is not the first case in which a doctor has been sentenced to a term of imprisonment for medifraud offences, it is a significant case and the sentence imposed is likely to be used as a benchmark for other cases involving like conduct.

Another case of note concerned **Dr McGoldrick** who conducted a general practice which included surgical treatment for weight reduction. On 12 February 1988 he pleaded guilty to 31 offences of presenting for payment medicare assignment forms which were false or misleading in a material particular. The false claims fell into several categories. The majority involved the defendant claiming for weight reduction treatment at the specialist rate using a false referral from another general practitioner when he was only entitled to payment at the general practitioner rate. The defendant was qualified to practice as a specialist in obstetrics and gynaecology but was not in fact practising those skills when he performed the weight reduction surgery. In addition, it was alleged the defendant had made false claims for post operative after-care which in fact was included in the fee for the operation itself and for which payment had already been claimed. It was also alleged that the defendant had claimed for professional attendances when in fact no attendance as defined in the legislation took place. He was fined $100 on each of the 31 charges to which he pleaded guilty, a total of $3100. Reparation of $714 was ordered to be paid to the Health Insurance Commission and professional costs and disbursements of $1449 were ordered to be paid to the DPP.

TABLE 1

MATTERS DEALT WITH SUMMARILY IN 1987-88(i)

State	No. of Defendants	No. of Convictions(ii)	No. of Acquittals	Other(iii)
N.S.W.	981	840	17	124
Vic.	1339	1238	36	65
Qld.	770	702	7	61
W.A.	928	876	4	48
S.A.	1165	1112	8	45
Tas.	95	61	2	32
N.T.	354	309	10	35
TOTAL	5632	5138	84	410

Notes (i) See Tables in Chapter 5 for details of matters dealt with summarily in the ACT.
(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) Eg. all charges against a defendant withdrawn or no evidence offered by the prosecution in respect of any charge.

TABLE 2

LEGISLATION: MATTERS DEALT WITH SUMMARILY IN 1987-88(i)

	Crimes Act	Social Security Act	Customs Act	Health Insurance Act	Taxation Legislation	Bankruptcy Act	Other(ii)
N.S.W.	240	403	49	3	46	12	228
Vic.	336	495	34	10	14	6	444
Qld.	162	420	35	-	16	-	137
W.A.	228	302	33	2	34	12	317
S.A.	143	381	42	7	14	3	575
Tas.	9	41	4	2	3	2	34
N.T.	191	80	4	-	11	1	67
TOTAL	**1309**	**2122**	**201**	**24**	**138**	**36**	**1802**

Notes(i) See note (i) to Table 1.
(ii) Includes a number of prosecutions for breaches of the *Commonwealth Electoral Act 1918* following the 1987 Election.

TABLE 3

MATTERS DEALT WITH ON INDICTMENT IN 1987-88

	No. of Defts	Pleas of Guilty	Outcome of Trials				
			No. of Trials	No. of Defendants (i)	No. of Convictions (ii)	Acquittals	Other(iii)
N.S.W.	236	132	71	104	88	12	4
Vic.	41	29	10	12	9	3	-
Qld.	72	57	15	15	10	5	-
W.A.	56	49	6	7	7	-	-
S.A.	32	29	3	3	2	1	-
Tas.	4	1	3	3	2	1	-
A.C.T.	73	28	38	45	26	14	5
N.T.	1	1	-	-	-	-	-
TOTAL	515	326	146	189	144	36	9

Notes

(i) At defended trials, ie, those in which a plea of not guilty was entered even if it was changed before jury verdict.

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

(iii) Eg. 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 1987-88 (i)

State	Crimes Act	Customs Act	Health Insurance Act	Taxation Legislation	Bankruptcy Act	Other
N.S.W.	101	113	4	-	3	15
Vic.	13	25	-	-	1	2
Qld.	53	7	-	-	2	10
W.A.	31	22	-	-	-	3
S.A.	12	14	3	-	3	-
Tas.	3	-	-	-	1	-
N.T.	1	-	-	-	-	-
TOTAL	214	181	7	-	10	30

Notes (i) See Chapter 5 for the categories of cases dealt with in the Supreme Court of the ACT in 1987-88.

TABLE 5

PROSECUTION APPEALS AGAINST PENALTY IN 1987-88

State	No. of Appeals	Type of Proceeding		Type of Matter			Outcome of Appeal		
		Summary	Indictment	Drugs	Social Security	Other	Upheld	Dismissed	Undecided
N.S.W.	11	-	11	9	-	2	6	5(i)	-
Vic.	1	1	-	-	-	1	1	-	-
Qld.	5	-	5	-	2	3	3	-	2
W.A.	6	4	2	-	6	-	5	1	-
S.A.	10	8	2	1	1	8	9	1	-
Tas.	-	-	-	-	-	-	-	-	-
A.C.T.	2	-	2	-	-	2	1	1	-
N.T.	2	1	1	-	-	2	1	1	-
TOTAL	37	14	23	10	9	18	26	9	2

Note(i) In 2 matters the Court of Criminal Appeal indicated that, while the sentences imposed at first instance were on the light side, it was not disposed to disturb them because of extenuating circumstances.

TABLE 6

OTHER PROSECUTION APPEALS IN 1987-88

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.	4	-	1	3	3	-	1
Vic.	-	-	-	-	-	-	-
Qld.	8	-	-	8	8	-	-
W.A.	-	-	-	-	-	-	-
S.A.	6	-	-	6	6	-	-
Tas.	-	-	-	-	-	-	-
A.C.T.	1	1	-	-	-	1	-
N.T.	-	-	-	-	-	-	-
TOTAL	19	1	1	17	17	1	1

TABLE 7

APPEALS BY CONVICTED PERSONS IN 1987-88

State	No. of Appeals	Type of Proceedings		Decision Appealed From		
		Summary	Indictment	Conviction	Sentence	Conviction & Sentence
N.S.W.	249	213	36	2	195	52
Vic.	71	58	13	-	56	15
Qld.	32	21	11	3	23	6
W.A.	17	8	9	6	10	1
S.A.	8	8	-	-	7	1
Tas.	5	5	-	-	5	-
A.C.T.	38	13	25	16	12	10
N.T.	1	1	-	-	1	-
TOTAL	421	327	94	27	309	85

TABLE 8

SOCIAL SECURITY OFFENDERS: AMOUNT DEFRAUDED IN CHARGES FOUND PROVED IN 1987-88(i)

N.S.W	$7 632 916
Vic.	5 453 424
Qld.	3 431 024
W.A.	2 284 299
A.C.T.	310 362
S.A.	1 580 000(ii)
Tas.	82 000(ii)
N.T.	237 269
Total	$21 011 294

(i) While most social security offenders are prosecuted under the *Social Security Act 1947*, the more serious cases are prosecuted under the *Crimes Act 1914*.
(ii) An approximation.

TABLE 9

DISTRIBUTION OF HEARINGS ON INDICTABLE MATTERS IN THOSE JURISDICTIONS WHICH HAVE AN INTERMEDIATE SUPERIOR COURT (DISTRICT COURT, COUNTY COURT, ETC.)

	Intermediate Superior Court	Supreme Court
N.S.W.	194	42
Vic.	31	10
Qld.	66	6
W.A.	53	3
S.A.	20	12

TABLE 10

***CRIMES ACT 1914*: MATTERS DEALT WITH ON INDICTMENT IN 1987-88(i)(ii)**

	NSW	VIC	QLD	WA	SA	TAS	NT
Damage Prop. (s.29)	-	-	2	1	-	-	-
False Pretences(s.29A)	14	-	3	1	-	-	-
Imposition (s.29B)	31	4	29	18	6	1	-
False Statements(s.29C)	1	-	-	-	-	-	-
Fraud (s.29D)	11	-	2	3	-	-	-
Offs. relating to Admin. of Justice (Part III)	-	-	-	-	-	-	-
Forgery (ss. 65-69)	16	1	13	1	2	2	1
Stealing or Receiving (s.71)	18	1	15	4	-	-	-
Falsification of Books(s.72)	2	-	-	-	-	-	-
Bribery (ss. 73&73A)	-	2	-	-	-	-	-
False Returns (s.74)	-	-	-	-	-	-	-
Conspiracy (ss.86 & 86A)	9	5	1	1	-	-	-
Other	12	-	2	2	5	-	-

Notes
(i) A defendant may have been charged with offences under more than one provision of the *Crimes Act 1914*.
(ii) The only Crimes Act prosecutions on indictment conducted in the ACT were for conspiracy under section 86(1)(a) to commit an offence against a law of the ACT.

4. MAJOR FRAUD

Approximately 75% of the prosecutions conducted by the DPP are in respect of fraud upon or within government. In terms of numbers a large percentage of those prosecutions involve what might be described as the more 'traditional' property offences, such as stealing Commonwealth property or the obtaining of property (in the form of welfare payments, government grants and the like) by deception.

However, a number of the prosecutions conducted by the DPP are for revenue related fraud, i.e. the dishonest evasion of monies due to the Commonwealth in the form of taxation, duties, levies, charges and the like. They are very significant because of the amounts of money involved. While the average welfare fraud offence, for example, may involve an amount in the order of $10 000 - $15 000, revenue frauds commonly involve the evasion of millions of dollars in revenue due to the Commonwealth. They are also significant because of the considerable call on DPP resources if they are to be successfully prosecuted. Last year's Annual Report briefly outlined the difficulties facing the DPP and other law enforcement agencies in the investigation and prosecution of revenue frauds.

The Major Fraud branches were established initially to take over responsibility from Special Prosecutor Gyles for the investigation and prosecution of the 'bottom of the harbour' cases. While those cases have now practically been completed in Queensland and Western Australia, there are still 21 'bottom of the harbour' defendants in New South Wales and Victoria who have yet to be tried, although at the time of writing almost all have been committed for trial. Apart from the usual difficulties in preparing these cases for trial arising from their sheer complexity, the position in both States has been exacerbated by such matters as inadequate court facilities, unavailability of transcripts and insufficient court time. In addition, a number of these defendants have not been backward in taking advantage of every conceivable opportunity to delay the prosecution, principally by means of applications under the *Administrative Decisions (Judicial Review) Act 1977* (the AD(JR) Act).

However, the work of the Major Fraud branches is not by any means confined to 'bottom of the harbour' matters. As noted in last year's Annual Report, the Major Fraud branches now handle a myriad of matters that are revenue related, such as schemes to evade payment of sales tax. In this regard, a relatively new aspect of the DPP's work concerns frauds on customs.

Only a few of the non-narcotic offences under the *Customs Act 1901* are criminal offences in the traditional sense. They are limited to such matters as assembling for unlawful purposes, collusive seizures, bribery and assaulting officers. The remainder of the non-narcotic offences are enforceable by proceedings for the recovery of a pecuniary penalty where the applicable procedure is more civil than criminal in nature.

A person who commits a fraud on customs by, for example, presenting false invoices for the purpose of evading customs duty will normally contravene one of the quasi-criminal provisions and be liable to proceedings for the recovery of a pecuniary penalty. However, he or she will often also commit an offence against one of the fraud provisions of the *Crimes Act 1914* and be liable to prosecution under that Act.

Until recently very few customs offenders had been prosecuted under the Crimes Act, and then only where there was some difficulty in proceeding under the *Customs Act*. In the context of the *Review of Systems for Dealing with Fraud on the Commonwealth,* the DPP raised its concerns that criminal sanctions had not been used in cases of major fraudulent activity involving customs duty.

The Report of that Review, which was tabled in the Parliament on 6 October 1987, noted (at para 1.1.12) that 'while it is acknowledged that remedies which are traditional in the customs area (civil proceedings resulting in pecuniary penalties and, possibly, forfeiture and condemnation of goods) can be effective deterrents to fraudulent activity, the Report notes the very different and arguably more salutary consequence which may follow a prosecution for tax fraud of identical scale - i.e. imprisonment'. The Report recommended that 'the Comptroller-General of Customs and the DPP consider the use of criminal sanctions in appropriate cases involving fraud against Customs programs and prepare a joint report on the matter to the Attorney-General and the Minister for Industry, Technology and Commerce.'

The report recommended by the Review was submitted to Ministers in April 1988. It noted that there was no reason why resort to the pecuniary penalty provisions of the Customs Act should not continue in the great majority of cases. The advantages were that a known course was followed, only the civil standard of proof needed to be satisfied, and the financial consequences to malefactors can be severe. There were, however, disadvantages. Such cases are generally dealt with in the civil lists of the various courts, they tend to be protracted, and only financial consequences flow. The report stated that there had been discussions between the Director and the Comptroller-General of Customs, from which emerged agreement that 'more should be done to utilise full

criminal sanctions, with imprisonment as a likely final outcome, in the case of major fraudulent activity causing or calculated to cause loss to the Commonwealth by way of customs duty. The advantage of following this course in a selected number of cases is that it will serve to remind and warn major fraudsters, and those inclined to behave in that manner, that the consequence can be loss of liberty. A small number of successful prosecutions should send a very powerful message to flagrantly dishonest importers and customs agents'.

The Australian Government Solicitor has the responsibility for conducting proceedings under the Customs Act for the recovery of a pecuniary penalty. As the agreement between the DPP and Customs envisages that most evasions of customs duty will continue to be dealt with under the Customs Act, liaison arrangements have been established between the 2 organisations with a view to identifying those cases where it would be more appropriate for proceedings to be instituted under the *Crimes Act 1914*, and to ensure that matters are properly dealt with. The underlying premise is that the evasion of customs duty involves criminal conduct, and accordingly it should be the *degree* of criminality involved which will determine whether the matter should be dealt with by way of recovery of a pecuniary penalty or a criminal prosecution. There is also a need for a continuing review of matters to deal with situations where, by reason of any change of circumstances, a re-evaluation is required whether the matter should continue to be dealt with by way of a criminal prosecution or the recovery of a pecuniary penalty.

As mentioned later in this Chapter, charges have been laid in a number of cases involving alleged customs fraud, and there are others currently under investigation.

The following are details of certain of the major fraud prosecutions conducted by the DPP during the year.

SYDNEY OFFICE

Ditfort - This person was indicted on 6 counts under section 5 of the *Crimes (Taxation Offences) Act 1980*. It was alleged that, using companies he controlled, Ditfort had bought the shares of 6 companies each with current year profits and stripped those companies of their assets so that each was unable to pay its tax liability. It was alleged that the total tax liability from those companies was nearly $6.5m.

On 16 August 1987, after a 3 week trial, Ditfort was convicted by a jury on 4 of the counts. In respect of the 2 remaining counts the trial judge had directed verdicts of acquittal essentially on the basis that a person who uses a corporate vehicle to enter the transaction proscribed by the Act

cannot be charged as a principal under section 5, but should be charged under section 6 or 7 as an aider or abetter. The counts upon which Ditfort was convicted represented a loss to the revenue of approximately $425 000.

Between 30 January 1981 and 21 May 1981 Ditfort, using companies he controlled, bought the shares of companies which had current year profits and a contingent tax liability. For each company purchase Ditfort received a fee calculated as a percentage of the current year profits. In each case the shares of the target companies were purchased by 2 of 3 companies controlled by Ditfort. The shareholding of those 'acquisition companies' was so arranged that each owned the other's shares and the ultimate ownership lay in the 'primary acquisition company', Trazant Pty. Ltd. That company, which owned the shares in the 6 acquired companies, was sold with all its subsidiaries on 29 June 1981 to fictitious purchasers. The taxation liability of the 6 acquired companies and Trazant Pty. Ltd. was not discharged.

Ditfort used the traditional method to effect the company strips. In each case the purchase price of the shares in the target company was determined as the value of the assets, including current year profits, shown in the balance sheet attached to the sale agreement but less an agreed fee. Prior to settlement the business carried on by the target company was transferred to a new entity controlled by the vendor shareholders, and at settlement the assets of the target company were purportedly handed over in the form of a bank cheque as part of a round robin of cheques. In each case Ditfort received a commission representing the difference between the purchase price of the shares and the asset value of the target companies. The sale of the shares in each of the target companies was completed within a day by means of round robin transactions which were financed by a bank as a 'daylight advance'. At the end of the day Ditfort had gained control of the target company, and had repaid the daylight advance from the assets of that company through a series of 'loans' through his 'conduit' companies, leaving the target company denuded of its assets and without any funds to meet its contingent tax liability.

On 26 August 1987 Ditfort was sentenced to concurrent terms of 3 years imprisonment on each of the 4 counts. Pursuant to section 12 of the *Crimes (Taxation Offences) Act 1980* Ditfort was also ordered to pay an additional penalty to the Commonwealth in the sum of $273 109.

Ginges - On 25 August 1987 Ginges pleaded guilty to one count under section 6(2) of the *Crimes (Taxation Offences) Act 1980*. He was fined $25 000 and released upon entering into a recognizance to be of good

behaviour for 3 years. Ginges had been employed by Ditfort as a consultant and the charge against him was that he had been an accomplice in the stripping of assets resulting in a loss to the revenue of $1 200 625 in primary income tax. Evidence showed that Ginges had received a fee of $10 000 for his involvement.

Young - On 11 March 1988 Young, who had been a solicitor practicing in Queensland, was found guilty by a jury on one count of conspiracy to defraud the Commonwealth contrary to section 86(1)(e) of the *Crimes Act 1914*. He was sentenced to 18 months imprisonment with a minimum term of 8 months. The Crown case was that Young had been a participant in a 'bottom of the harbour' tax evasion scheme between 1979 and 1981 in which a total of 11 'target companies' had been stripped of their assets resulting in the evasion of approximately $850 000 in tax. That amount was later recovered.

Committals - Mention was made in last year's Annual Report of 4 defendants who had been charged in November 1986 with offences under sections 86(1)(e) and 86A of the *Crimes Act 1914* for conspiracy to defraud the Commonwealth of sales tax. At that stage one of the defendants had pleaded guilty while another defendant had been committed for trial. The 2 remaining defendants were committed for trial on 12 November 1987 on 2 charges of conspiracy to defraud the Commonwealth. It will be alleged at their trial that approximately $300 000 in sales tax was evaded as a result of the conspirators' fraud which involved the obtaining of blank videos by the unauthorized quotation of another person's sales tax number.

In July 1987 4 persons were committed for trial on charges of conspiracy to defraud and conspiracy to defeat or prevent the enforcement of a law of the Commonwealth. It is expected that the trial of the 4 defendants will commence early in 1989. It will be alleged that they agreed to deprive the Commonwealth of sales tax revenue due to it from a large number of trading companies by means of an artificial scheme which the accused devised, promoted and conducted under which goods attracting sales tax in the hands of traders participating in the scheme were made to appear to have a 'sale value' for the purposes of the relevant Sales Tax Assessment Acts of only 4.95% of their actual sale value.

On 4 December 1987 one person was committed for trial on charges of conspiracy to defraud the Commonwealth contrary to section 86(1)(e) of the *Crimes Act 1914* and fraudulent application by a director of property of a body corporate contrary to section 173 of the *Crimes Act, 1900* (NSW). All charges relate to an alleged 'bottom of the harbour' tax

evasion scheme involving the evasion of approximately $21m in taxes, with the defendant receiving approximately $3.7m in scheme fees.

The Sydney Office has a number of other matters in which committal proceedings are currently under way or have yet to commence. In one matter, where the committal proceedings are expected to conclude in August 1988, it has been alleged that 5 defendants were involved in a 'bottom of the harbour' tax evasion scheme involving the stripping of approximately 1,300 companies and the evasion of approximately $126m in tax. This case is indicative of the time consuming nature of many revenue fraud prosecutions, with the prosecution completing its evidence after 113 hearing days.

In another matter charges were laid against 4 defendants in January 1988 in which it is alleged that the defendants agreed to promote a scheme whereby the Commonwealth was deprived of approximately $8m in sales tax.

Customs Fraud - Reference is made earlier in this chapter to the agreement between the Director and the Comptroller General of Customs that more should be done to utilize full criminal sanctions, with imprisonment as a possible final outcome, in the case of major fraudulent activity caused or calculated to cause loss to the Commonwealth by way of customs duty. At the time of writing the Sydney Office has 6 matters involving an alleged evasion of customs duty. While 4 of those matters are still in the investigation stage, they are complex and generally involve a large volume of documents, and the involvement of the DPP at an early stage has assisted the investigators in the preparation of briefs of evidence upon which criminal proceedings can be instituted without encountering undue delay and wasting resources.

Charges have been laid in the remaining 2 matters, in one of which it is alleged approximately $4.7m was lost to the revenue. The other matter involves an alleged evasion of $850 000 in customs duty by means of forged/false invoices. In this matter arrangements are currently being made to obtain evidence from Singapore pursuant to orders made under Part IIIB of the *Evidence Act 1905*.

MELBOURNE OFFICE

During the year the NCA referred a number of preliminary briefs of evidence for the Office's consideration as to the sufficiency of evidence. Because of the large number of documents and their overall complexity these matters have required the NCA to allocate a great deal of time and resources to the preparation of the briefs of evidence in accordance with the *Magistrates (Summary Proceedings) Act 1975* (Vic). This is

principally to ensure that the briefs stand on their own in establishing the grounds to commit for trial, thus avoiding the necessity to obtain leave to call witnesses at the committal hearing unless that is required by the defendants.

The DPP has liaised with the NCA during the brief preparation stage and regular meetings have been held at all levels to discuss progress and future action. The matters relate to large scale fraud committed predominantly in Victoria. It is anticipated that the NCA investigations will be completed in the near future and at that stage a decision will be made whether prosecutions should be instituted.

Sales Tax - In accordance with guidelines agreed between the DPP, the Australian Taxation Office (ATO) and the AFP, the Melbourne Office has been assisting in the preparation of briefs of evidence relating to 10 sales tax based frauds referred by the ATO. The matters range from $80 000 to $2.5m in lost sales tax revenue. At the time of writing it is anticipated that charges will be laid in a majority of the cases under either the *Crimes Act 1914* or the *Crimes (Taxation Offences) Act 1980*, and that committal hearings will commence in the next 12 months.

Many of these current investigations, while involving a large number of documents, concern relatively straightforward frauds by understating the 'sales value' of goods during a specific period. However, several of the matters under investigation involve far more elaborate frauds. The persons involved in these matters relied upon the manipulation of corporate entities already subject to large unpaid sales tax liabilities that were placed into either liquidation or receivership with the result that the main unsecured creditor, the ATO, was left unsatisfied although a new operating entity continued without the previous debt burden.

Committals - On 23 December 1987 2 defendants were committed for trial in respect of offences of conspiracy to defraud the Commonwealth and conspiracy to prevent or defeat the execution or enforcement of a law of the Commonwealth contrary to sections 86(1)(e) and (b) respectively of the *Crimes Act 1914*. The charges relate to current year profit stripping activities conducted in the year ending 30 June 1979 in respect of 45 target companies with current year profits totalling approximately $5.5m. It will be alleged that the loss of taxation revenue resulting from those activities amounted to some $2.5m.

The committal proceedings commenced on 12 May 1986 but were interrupted when in July 1986 the 2 defendants, in tandem with the defendants in other committal proceedings being conducted by the Office, applied to the Federal Court under the AD(JR) Act seeking to review a

decision of the magistrate in the course of the committal proceedings. Although the defendants were successful at first instance, on 15 October 1987 the Full Federal Court upheld the DPP's appeal and the committal proceedings concluded on 23 December 1987.

The trial has been set down to commence in September 1988 in the Victorian Supreme Court. Although it is expected to last between 10 to 12 weeks, this is not overly long given that the prosecution case relies on approximately 46 000 original exhibits. The prosecution will make extensive use of computerized exhibit description lists, sample company narratives with supporting documentation and financial and secretarial spreadsheets setting out the pertinent details of each of the companies involved. In addition, the Office will be using a video monitor system to assist in the reproduction before the judge and jury of the complex and intricate transactions involved in the schemes implemented by the defendants and their associates. This has required the creation of computer based colour graphics to illustrate the various steps involved in the implementation of the schemes by the defendants.

In another matter 6 defendants have been charged with conspiracy to defraud and conspiracy to prevent or defeat the execution or enforcement of a law of the Commonwealth contrary to sections 86(1)(e) and (b) respectively of the *Crimes Act 1914*. In addition, one of the defendants has also been charged with incitement pursuant to section 7A of the *Crimes Act 1914*.

The committal proceedings commenced on 27 August 1985 with the prosecution closing its case on 3 April 1986. However, during the course of the committal proceedings the defendants made an application under the AD(JR) Act seeking to review a decision of the magistrate in the course of the committal proceedings. Although that application was successful at first instance, on 15 October 1987 the Full Federal Court allowed the DPP's appeal. An application by the defendants for special leave to appeal to the High Court was heard and dismissed on 18 March 1988. On 1 August 1988 all but one of the defendants were committed for trial in the Victorian Supreme Court. That trial is likely to be set down for hearing in mid-1989, almost 4 years after the committal proceedings commenced! The remaining defendant has indicated that he will plead guilty to the charge under section 86(1)(e) if he is successful in his application to have the charge dealt with summarily.

The committal proceedings in this matter are indicative of the time consuming nature of many revenue fraud prosecutions. The committal proceedings occupied 150 sitting days with 164 witnesses called and approximately 50 000 exhibits tendered. Although one of the defendants

called a number of witnesses to give character evidence, no evidence was called or given by the other defendants.

In another matter committal proceedings commenced on 28 June 1988 against 3 persons charged with conspiracy to defraud contrary to section 86(1)(e) of the *Crimes Act 1914* and common law conspiracy to defraud. The 3 defendants were involved in 1981 in the promotion and execution of a tax minimization scheme involving the importation of an aircraft and its lease to an investment partnership. It is alleged that a number of misrepresentations were made with respect to the aircraft, the most significant of which was that it was a new aircraft and therefore eligible for the investment allowance available under paragraph 82AB of the *Income Tax Assessment Act 1936*. The committal proceedings are due to be completed early in September 1988.

BRISBANE OFFICE

Sales Tax Fraud - On 18 March 1988 a company director was committed for trial on 34 charges, 17 of defrauding the Commonwealth contrary to section 29D of the Crimes Act and 17 of imposing upon the Commonwealth contrary to section 29B of that Act. All charges relate to the lodgment with the Australian Tax Office in 1984 of 17 sales tax returns containing statements of sales values and net tax payable in respect of imported boats. The trial is listed to commence in the District Court at Brisbane in September 1988.

Ahern - Application for special leave was argued before the High Court on 19 and 20 April 1988, the applicant having been convicted on 19 December 1986 on 1 count of conspiracy to defraud the Commonwealth and sentenced to 18 months imprisonment. It was submitted on his behalf before the High Court that the issue for the jury was whether Ahern had known that the Maher organisation was dumping companies without attempting to apply some so-called legitimate tax minimisation scheme. His counsel submitted to the Court that in deciding that question the jury had been allowed to consider evidence which was not admissible for that purpose. The Court has reserved its decision.

PERTH OFFICE

Briggs and Cornelius - In this matter following a 15 week trial both defendants were found guilty of conspiracy to defraud the Commonwealth. Each was sentenced on 17 December 1987 to a term of 18 months imprisonment with a minimum term of 8 months. Appeals by both Briggs and Cornelius were dismissed by the Court of Criminal Appeal on 14 April 1988. However, Briggs has since applied to the High Court for special leave to appeal. At the time of writing that application had not been heard.

DLS ADELAIDE

Aston and Burnell - Reference was made to this matter in the 1986-87 Annual Report at page 64 where it was noted that both offenders had applied to the High Court for special leave to appeal. Their applications were heard on 31 August 1987 and, by majority, the High Court refused special leave insofar as their applications related to their convictions. The High Court unanimously refused special leave to appeal in respect of the sentences imposed.

Other Matters - Committal proceedings commenced in mid-October 1987 against 4 persons for an alleged conspiracy to defraud the Commonwealth contrary to section 86(1)(e) of the *Crimes Act 1914* relating to the gifting of redeemable preference shares to a charity. The committal proceedings concluded on 18 December 1987 with all 4 defendants being committed for trial. That trial is due to commence on 29 August 1988.

Committal proceedings have been completed against 4 persons in relation to a number of alleged offences against both Commonwealth and State law. The matter involves the use of allegedly false airline tickets in making travel claims in applications for grants under the *Export Market Development Grants Act 1974* and also for interim loans which are available from the State Bank. DLS Adelaide is prosecuting both the Commonwealth and State charges. A joint indictment has been filed and the trial is due to commence on 24 October 1988.

5. PROSECUTIONS IN THE A.C.T. AND EXTERNAL TERRITORIES

CANBERRA OFFICE

The Canberra Office is unique within the DPP. Prosecutions for offences against Commonwealth law represent only a small part of the work undertaken by the Office and the range of offences which may be dealt with summarily in the A.C.T. is very wide. It extends to offences which are punishable by terms of imprisonment up to 10 years and, in the case of offences relating to money or other property, by imprisonment up to 14 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, most cases prosecuted by the Canberra Office are heard and determined summarily in the Magistrates Court or the Childrens Court.

During the period under review the range of work undertaken by the Office was increased. A Criminal Assets section was established to deal with matters arising under the *Proceeds of Crime Act 1987* and to take civil remedies where appropriate. A financial analyst was recruited for this Branch. In addition, as more and more complex matters were referred to the Office by the National Criminal Investigation Bureau it became necessary to establish a position within the Office dealing with fraud matters.

Several matters involved allegations against Commonwealth employees in respect of minor concreting works in the A.C.T. In essence, the charges allege that works supervisors in collusion with contractors inflated the costs of concreting jobs carried out in Canberra suburbs and divided the payments received from the Commonwealth. A number of Commonwealth employees was convicted of offences in respect of their involvement in the fraud during the period under review.

During the year the Office accepted responsibility for welfare fraud prosecutions in southern New South Wales. The Office's area of responsibility now extends from Bega in the south to Griffith in the mid-west to Dubbo in central New South Wales. During the period under review there were 21 prosecutions for social security offences in the A.C.T., Queanbeyan and Cooma regions, involving a total of $310,362 defrauded from the Commonwealth.

A continuing source of concern in the A.C.T. is court delays, particularly in the Magistrates Court. Although court delays are not peculiar to the A.C.T., and the problem is not as acute as in some other jurisdictions, it is something which all concerned in the criminal justice system in the

A.C.T. are anxious to remedy. At the time of writing there is a delay of approximately 10 months in summary and committal matters being set down for hearing in the Magistrates Court. This is clearly unsatisfactory.

The position is somewhat brighter in the disposal of indictable matters in the Supreme Court. At the time of writing the average length of time between committal and trial for persons in custody is 3.38 months, and for persons not in custody the period is 6.28 months. This represents a slight increase on the equivalent periods for the last 2 years.

Throughout the year there were increasing demands by Magistrates for the prosecution to hand to the defence the whole of its brief of evidence well before the hearing date. There are good reasons in many cases why this should not be done. However, in the vast majority of cases neither the police nor the DPP has any objection to providing the defence with copies of witnesses' statements at a time proximate to hearing dates.

This Office has had consultative meetings with the various sections of the Australian Federal Police who are affected by the handing over of briefs. In the main the brief and the individual documents contained within it are covered by legal professional privilege. That privilege is the privilege of the referring body and it can only be waived by that body. The AFP has, after consultation, decided that each case is to be considered on its merits. When a request is made, and if it is deemed appropriate, the documents will be handed over on a date proximate to the hearing date. This position has been explained by the DPP and the AFP to a committee presided over by the Chief Magistrate which meets occasionally to consider means of reducing court delays. Some have suggested that the practice of handing over witnesses' statements would reduce the areas of dispute and thereby cut court time. While generally this has not been the experience of prosecutors, there are positive indications that it is starting to have this effect.

The DPP and the police have co-operated fully in the implementation of 'Case Status Inquiries', which fulfill the role of directions hearings well before the dates of both summary and committal hearings. The Case Status Inquiries should go some way towards reducing delays in the Magistrates Court, but the solutions for those delays may in fact be found elsewhere.

In the Magistrates Court (including the Childrens Court) a total of 39 623 charges was laid during the year but this by no means reflected the number of defendants. In some matters defendants were charged with several offences. Further, in some matters 'second leg' or 'back up' charges were laid but in respect of which no evidence was offered where

the principal charges were proved. In fact, there were 28 152 defendants. This figure, however, includes 10,260 parking prosecutions (which yielded $406 295 in fines and $164 180 in costs) and 9070 pleas by post in respect of traffic matters. Another 6444 persons were prosecuted for traffic breaches, details of which are set out in Table 6. The remaining 2378 defendants were dealt with as set out in Tables 2 - 6 and Table 7.

Drug offences throughout the year involved 85.882 grams of heroin, 9.189 grams of cocaine, 37.093 grams of amphetamines, 1.26 kilograms of cannabis plant, 184.4 grams of cannabis resin and 61.4 grams of cannabis seed.

DPP officers also assisted Coroners in coronial inquiries. During the period under review there were inquiries into 235 deaths and 245 fires. Of the 235 deaths there were 32 suicides. The most common methods of committing suicide were by hanging and by carbon monoxide poisoning with figures of 9 and 10 respectively.

Committals - During the year under review committal orders were obtained in respect of 82 persons, with 59 persons being committed for trial and 23 persons being committed for sentence.

Indictable matters - During the year 73 persons were indicted in the A.C.T. Supreme Court, of whom 29 pleaded guilty. There were 39 trials in respect of the other 45 accused persons; 26 were convicted and 14 were acquitted. This was a conviction rate of 65% in defended trials which compares favourably with those State DPPs which have a similar 'indictable' practice to the Canberra Office. In the case of the remaining 5 persons the trials were not concluded. Two accused did not appear on the dates set for their trials, 1 committed suicide during the course of his trial and in respect of another accused the Director decided not to proceed with a third trial in the circumstances where 2 previous juries had been unable to agree. In the remaining matter the accused successfully sought a permanent stay of his trial for the reasons set out later in this Chapter.

The indictments presented in the Supreme Court were in respect of the following categories of offences.

Murder	4
Rape	6
Kidnapping	1
Robbery	14
Arson	4
Indecent assault	4
Malicious wounding	3

Possession of drugs for sale or supply	17
Theft	13
Assault	2
Conspiracy to supply heroin	3
Conspiracy to commit armed robbery	2

Set out below are descriptions of some of the important or otherwise interesting cases dealt with by the Canberra Office during the year. The prosecution of Toh and Chong in respect of a murder committed on Christmas Island, referred to later in this Chapter, was also conducted by the Canberra Office with assistance in the later stages from the Perth Office.

Hagen - Hagen was convicted by a jury of murder and sentenced to 15 years imprisonment with a non-parole period of 9 years.

The DPP appealed against the sentence imposed on Hagen, who in turn cross-appealed against his conviction.

The appeals came before the Federal Court of Australia on 9 and 10 July 1987. The basis of the DPP's appeal was that the sentence was inadequate when account was taken of the horrendous circumstances in which the murder had been committed and Hagen's criminal antecedents.

The Court agreed that the case had involved a murder of a defenceless woman by a person with a bad criminal record. However, the Court considered that it had not been demonstrated that any error of principle had occurred as to the matters within the discretion of the sentencing judge. The Court dismissed both the Crown's appeal and the appeal by Hagen. The decision is reported at (1987) 75 ALR 635.

Trenholme - On 3 March 1988 a jury returned a guilty verdict against Andrew Paul Trenholme on a charge of arson. It was alleged by the Crown that during the early hours of 31 July 1985 Trenholme, either by himself or in the company of another person, set fire to premises upon which he conducted in partnership a business known as Floyds Bar and Bistro. The fire caused more than $30 000 worth of damage to the building.

The Crown case was that Trenholme, who was a part owner of Floyds, set the fire to extricate himself from financial difficulties by claiming on an insurance policy; in 6 months of operation Floyds had amassed liabilities totalling $47,000 and the lease on the premises was due to expire.

A legal point of interest in the case was an illustration of the rules concerning an allegation of recent invention. A co-owner of Floyds, Martin Kubitzky, gave evidence of 2 incriminating conversations which he had with Trenholme prior to the fire. The defence alleged that Kubitzky had fabricated these conversations to deflect suspicion from himself. The Crown was granted leave to call evidence that Kubitzky had related these conversations to his then fiancé (now his wife) either immediately or shortly after they actually occurred.

On 11 March 1988 Gallop J sentenced Trenholme to be released on a recognizance in the sum of $2,000 to be of good behaviour for a period of 2 years and directed that Trenholme perform 200 hours of community service. His Honour declined to make a restitution order in favour of the insurance company which had paid for repairs to the building. The DPP appealed to the Federal Court against the the sentence and Trenholme cross-appealed against his conviction. The matter has been argued, with the Director appearing for the Crown, and a decision is awaited.

Kenta - On 4 May 1988 Kenta was sentenced to 6 years imprisonment with a non-parole period of 3 years for the manslaughter of Grant Andrew Cameron on 31 October 1987. Kenta had been committed for trial on a charge of murder, but following a consideration of the evidence the Crown had indicted on a manslaughter charge. This decision attracted some adverse public comment which caused the sentencing judge, Miles CJ, to express the view that the course followed in proceeding with the manslaughter charge was entirely appropriate in the circumstances of the case.

The deceased, aged 16 at the time of his death, had been assaulted by Kenta, aged 17, at a school fête. Kenta had walked up to Cameron at the fete and without warning punched him twice to the face causing Cameron to fall to the ground. Kenta then kicked Cameron to the neck causing the fatal injuries. The evidence did not support beyond reasonable doubt a conclusion that Kenta intended to kill or cause grievous bodily harm to Cameron. It appears that Kenta assaulted Cameron because of the latter's style of dress. It is difficult to imagine a sadder case.

Goia - On 17 June 1981 a robbery occurred at the Hume site of a building company, Transfield Pty. Ltd. The company's payroll of $14,040.00 was stolen when 2 armed and masked persons broke into the office of the company and held up the pay clerk. Although one of the persons involved in the robbery was successfully prosecuted in 1983, it was not until 29 August 1986 that Goia was charged before the A.C.T. Magistrates' Court with armed robbery in relation to the matter. Goia first came under suspicion as one of the robbers early in 1983, and was identified by a co-

accused in June 1983. From June 1983 until mid-1986 police enquiries centred upon finding corroborating evidence against Goia. Although his whereabouts were known, he was not approached until July 1986 when he was arrested in Sydney and extradited to the A.C.T.

Goia was committed for trial which was listed to commence on 10 November 1987. However, on 6 November 1987 he made an application in the A.C.T. Supreme Court for a permanent stay of proceedings alleging that any further conduct of the proceedings would be an abuse of process. The basis of his application was that his defence was an alibi and that the delay in proceeding against him had denied him the opportunity of identifying and locating certain alibi witnesses. On 10 November 1987 Kelly J made an order permanently staying the further prosecution of the case against Goia, and ordered the Crown to pay Goia's costs. The Crown has instituted an appeal against that part of the order requiring it to pay Goia's costs. The judgment has been reserved.

Brown - As noted in last year's Annual Report the DPP appealed against the sentence of 14 years with a non-parole period of 8 years imposed by Spender J on Brown in respect of his conviction for having murdered Daryl Tony Burgess on 25 July 1986. Brown also appealed against both his conviction and sentence.

On 18 December 1987 the Federal Court, comprising Fox, Pincus and Miles JJ, gave judgment dismissing Brown's appeal against conviction and sentence and allowing the DPP's appeal against sentence. The trial judge's sentence was set aside and in lieu a sentence of 16 years was substituted with a non-parole period of 10 years. In giving his reasons for judgment Pincus J made the following comments concerning the DPP's appeal against sentence:

> 'In essence, the question here is what is the proper sentence, in the circumstances of the case, for a brutal and apparently motiveless killing ... I cannot be persuaded that the sentence is sufficient for beating a man to death in such a way. It might have been if there were reasons to think that there was some shadow of excuse for the murder. I think that no lesser period of imprisonment than 16 years, should be fixed by way of sentence, and I would allow the cross-appeal accordingly.'

Tomici, Kaimonoff and Roche - On 29 June 1988 Kaimonoff and his defacto wife Roche were convicted by a jury on a charge under section 86(1)(a) of the *Crimes Act 1914* of conspiring with Tomici and another person to supply heroin. Tomici had earlier pleaded guilty to a charge

under section 4(3) of the *Poisons and Narcotic Drugs Ordinance 1978* (A.C.T.) of possessing 6.98 grams of heroin for the purpose of supply. The trial of the other alleged co-conspirator (who was granted a separate trial) commenced on 1 July 1988. He was acquitted.

The Crown case against Roche and Kaimonoff was that on 16 December 1987 they had travelled by car to Canberra from Sydney with Tomici and one other person for the purpose of selling heroin brought in the car by Tomici. Kaimonoff and Roche were heroin addicts who were formerly residents of Canberra and as such had contacts in the heroin scene. Tomici and Roche agreed that Tomici would supply heroin to Roche on credit so that she could then use part of the heroin to satisfy the heroin habits of both Kaimonoff and herself and then (with assistance from Kaimonoff) sell the other part to enable her to repay Tomici.

One particularly striking fact about the case was that Roche and Kaimonoff had gone to the Methadone Maintenance Progamme at the Woden Valley Hospital and attempted to sell heroin to at least one former heroin addict acquaintance who was undertaking the program. The main evidence against Roche consisted of a signed record of interview which was conducted with her in the Watchhouse shortly before court on Monday morning 21 December 1987 but after she had been formally charged on Sunday morning, 20 December 1987. It was submitted on her behalf that the police had no power to interrogate a person in custody after having been formally charged as that signalled the commencement of the judicial, as opposed to the investigation, process. However, Kelly J held that the custody of Roche between 20 and 21 December 1987 was lawful and that the police interrogation was not improper and therefore it was not unfair to Roche to admit into evidence her voluntary record of interview, especially given her apparent familiarity and experience with her rights during the record of interview.

Tomici, who was not a heroin user and was the acknowledged principal in the matter, was sentenced to a period of 5 years and 3 months imprisonment with a non-parole period of 33 months. Roche was sentenced to a period of 3 years imprisonment with a non-parole period of 18 months and Kaimonoff was sentenced to 4 years imprisonment with a non-parole period of 30 months.

Pike - Pike was indicted on 14 March 1988 on a charge of murder. He had been arrested on 2 June 1987 following the finding of the body of a woman in her flat in the suburb of Lyons. When arrested Pike participated in conversations with the police in which he said that he had met the victim some days previously and that he had gone to her flat on 30 May 1987 and remained there that evening talking with her until she fell

asleep. When she was asleep he had smashed her head with a whisky bottle and then strangled her by placing his right knee across her throat to crush her windpipe. He told the police that he had to kill her as he had seen some 'dossiers' in her flat relating to him and some of his friends. He believed her to be a member of an organisation who was going to eliminate him and his friends and he had no option but to kill her.

When sentencing the accused on 13 July 1988 His Honour observed that the manner of killing was particularly horrific, and that the Crown's submission that the accused killed a defenceless sleeping woman without any triggering mechanism and in a violent and brutal fashion, without emotion and without any form of provocation whatsoever, was obviously correct. His Honour found that his mental disorder was such as to preclude any feeling of emotion about what he had done or the slightest sign of any remorse. Pike had not had a disturbed childhood which might explain his personality disorder and he was a person of high intelligence but totally lacking in morals. His Honour found that the accused had not been affected by alcohol or drugs, was not out of control or enraged but that he had made up his mind some time earlier to kill the girl; it was not a 'thrill killing' but killing for killing's sake. His Honour further found on the evidence that the accused was an obvious danger to the community and that he would likely kill again if released and that he remained a danger to himself unless kept under supervision.

His Honour found that the accused's mental abnormality made him a grave danger to society. He sentenced him to life imprisonment. The accused was 17 years of age at the time of the murder.

TABLE 1

MATTERS DEALT WITH SUMMARILY IN THE ACT IN 1987-88(i)

	No. of Defendants	No. of Charges	Pleas of Guilty	Outcome of Hearings: Pleas of Not Guilty	Outcome of Hearings: Conviction	Outcome of Hearings: Acquittals
Commonwealth legislation	569	1185	548	637	560	77
Poisons & Narcotic Drugs Ordinance 1978	203	230	191	39	35	4
Crimes Act, 1900 (N.S.W.) in its application to the ACT	1365	2378	1619	759	666	93
Miscellaneous ACT legislation	241	343	288	55	40	15
Traffic offences	6444	6485	5927	558	493	65
TOTAL	8822	10621	8573	2048	1794	254

Note (i) Table does not include pleas by post and parking prosecutions.

TABLE 2

***CRIMES ACT 1900 (NSW) IN ITS APPLICATION TO THE ACT*: MATTERS DEALT WITH SUMMARILY IN THE ACT 1987-88 (i)**

	No. of Defendants	No. of Charges	Pleas of Guilty	Outcome of Hearings		
				Pleas of Not Guilty	Conviction	Acquittal
Abduction	2	2	1	1		1
Assault	135	158	77	81	64	17
Assault occ. actual bodily harm	16	18	6	12	9	3
Burglary	27	37	24	13	11	2
Blackmail	1	1	1			
Dishonest use of computer	2	2	2			
Damage property	74	83	62	21	15	6
Escape	14	14	8	6	5	1
Harbour escapee	1	1	1			
Handle stolen property	35	55	31	24	23	1
Indecent assault	3	7	5	2	1	1
Indecent behaviour	2	4	4			
Indecent exposure	5	6	5	1		1
Indecent language	1	1	1			
Make false instrument	23	150	104	46	42	4
Offensive behaviour	100	104	74	30	22	8
Offensive manner	178	179	132	47	39	8

Offer bribe	1	1	1			
Obtaining by deception	5	19	7	12	12	
Possess stolen goods	15	24	11	13	12	1
Possess offensive weapons	11	11	7	4	4	
Possess false instruments	1	1	1			
Possess article with intent to destroy property	2	2	1	1	1	
Possess housebreaking implements	2	3	2	1	1	
Receiving	18	32	14	18	17	1
Robbery	2	2	1	1	1	
Rape	1	1		1		1
Stealing as a servant	1	1		1	1	
Trespass with intent	102	160	88	72	68	4
Theft	359	766	494	272	248	24
Unlawful damage	5	5	3	2	2	
Use false instrument	25	145	114	31	27	4
Unlawful possession of property.	17	22	9	13	12	1
Warrants of apprehension	127	254	243	11	11	
Take and use motor vehicle	42	97	76	21	18	3
Other	10	10	9	1		1
TOTAL	1365	2378	1619	759	666	93

Note (i) A defendant may have been charged with offences under more than one provision of the Act.

TABLE 3

COMMONWEALTH LEGISLATION: MATTERS DEALT WITH SUMMARILY IN THE ACT 1987-88 (i)

Act	No. of Defendants	No. of Charges	Pleas of Guilty	Outcome of Hearings		
				Pleas of Not Guilty	Conviction	Acquittal
Australian Federal Police Act 1979	131	154	88	66	50	16
Bankruptcy Act 1966	2	12	11	1	1	-
Crimes Act 1914	292	847	309	538	484	54
Census & Statistics Act 1905	1	1	-	1	-	1
Commonwealth Electoral Act 1918	61	61	57	4	-	4
Insurance Act 1973	1	1	1	-	-	-
Migration Act 1958	9	9	8	1	1	-
Postal Services Act 1975	2	2	2	-	-	-
Public Order (Protection of Persons & Property) Act 1971	36	37	28	9	8	1
Radiocommunications Act 1983	1	1	1	-	-	-
Social Security Act 1947	8	29	29	-	-	-
Taxation Legislation	11	15	-	15	14	1
Telecommunications Act 1975	14	16	14	2	2	-
TOTAL	569	1185	548	637	560	77

Note (i) A defendant may have been charged with offences under more than one Act.

TABLE 4

CRIMES ACT 1914: MATTERS DEALT WITH SUMMARILY IN THE ACT 1987-88(i)

Provision	No.of Defendants	No.of Charges	Pleas of Guilty	Outcome of Hearings		
				Pleas of Not Guilty	Conviction	Acquittal
Damage Property.(s.29)	36	44	29	15	15	-
False Pretences(s.29A)	2	5	5	-	-	-
Imposition(s.29B)	29	199	45	154	127	27
False Statement(s.29C)	5	6	6	-	-	-
Fraud(s.29D)	2	2	2	-	-	-
Offencess.relating to Admin. of Justice(Pt.III)	1	1	1	-	-	-
Forgery(ss 65-69)	65	390	121	269	269	-
Stealing(s.71(1))	10	27	6	21	8	13
Receiving(s.71(3))	-	-	-	-	-	-
Falsification of Books (s.72)	-	-	-	-	-	-
Bribery(ss 73&73A)	-	-	-	-	-	-
False Returns(s.74)	-	-	-	-	-	-
Conspiracy(ss 86&86A)	-	-	-	-	-	-
Other	142(ii)	173	94	79	65	14
TOTAL	292	847	309	538	484	54

Notes (i) A defendant may have been charged under more than one provision of the Crimes Act 1914.
(ii)129 defendants were charged with resisting a Commonwealth Officer (police) contrary to section76 of the Crimes Act 1914.

TABLE 5

***POISONS & NARCOTIC DRUGS ORDINANCE 1978*: MATTERS DEALT WITH SUMMARILY IN THE ACT 1987-88 (i)(ii)**

Offence	No. of Defendants	No. of Charges	Outcome of Hearings			
			Pleas of Guilty	Pleas of Not Guilty	Conviction	Acquittal
Possess Cannabis	123	130	110	20	17	3
Possess Heroin	18	21	17	4	4	
Possess Cannabis Resin	14	17	12	5	5	
Possess Amphetamine	11	11	10	1	1	
Administer Amphetamine	3	3	2	1	1	
Possess Methadone	1	1	1			
Possess Morphine	1	1	1			
Possess Pethedine	1	1	1			
Supply Cannabis	16	29	24	5	4	1
Administer Heroin	15	16	13	3	3	
TOTAL	203	230	191	39	35	4

Note (i)Reference is made earlier in this chapter to drug offences prosecuted by the Canberra Office involving, inter alia, 9.189 grams of cocaine. That quantity of cocaine was the subject of a charge which was determined outside the ACT.
(ii)A defendant may have been charged with offences under more than one provision.

TABLE 6

TRAFFIC OFFENCES : MATTERS DEALT WITH SUMMARILY IN THE ACT 1987-88(i)

Offence	No. of Defendants	No. of Charges	Pleas of Guilty	Outcome of Hearings		
				Pleas of Not Guilty	Conviction	Acquittal
Drive while licence cancelled	104	110	78	32	30	2
Drive Manner Dangerous	129	129	99	30	26	4
D.U.I.	17	17	10	7	5	2
Drive contrary to special licence	25	25	21	4	4	
Negligent Driving	401	402	349	53	40	13
Failing to report accident	52	54	45	9	8	1
Failing to stop after accident	58	58	49	9	8	1
Driving without third party insurance	1696	1714	1649	65	58	7
Driving unregistered vehicle	1696	1714	1649	65	58	7
P.C.A.	838	838	755	83	80	3
Speeding	319	320	259	61	51	10
Speeding in a manner dangerous	11	11	10	1	1	
Driving without a licence	445	448	413	35	34	1
Culpable driving	2	2	2	-	-	-
Other	651	653	539	104	90	14
TOTAL	6444	6495	5927	558	493	65

Note (i) A defendant may have been charged with offences under more than one provision.

TABLE 7

MISCELLANEOUS ACT LEGISLATION: MATTERS DEALT WITH SUMMARILY IN THE ACT 1987-88(i)

Legislation	No. of Defendants	No. of Charges	Pleas of Guilty	Outcome of Hearings		
				Pleas of Not Guilty	Conviction	Acquittal
Hawkers Ordinance 1936	13	17	17			
Classification of Publications Ordinance 1959	2	12	12			
Nature Conservation Ordinance 1980	2	3	3			
Remand Center Ordinance 1976	1	2	2			
Sale of Motor Vehicles Ordinance 1977	1	3		3	1	2
Weights and Measures Ordinance 1929	1	4		4	4	
Workmen's Compensation Ordinance 1951	2	2	2			
Public Health Ordinance 1929	4	4	4			
Co-operative Societies Ordinance 1939	1	1		1		1
Prevention of Cruelty to Animals Ordinance 1959	2	2	2			
Domestic Violence Ordinance 1986	27	33	27	6	4	2

(Table 7 continued)

Legislation	No. of Defendants	No. of Charges	Outcome of Hearings: Pleas of Guilty	Pleas of Not Guilty	Conviction	Acquittal
Transport Regulations	13	13	11	2	1	1
Crimes Act 1900 (NSW)	2	2	2			
Inebriates Ordinance 1938	5	5	5			
Dog Control Ordinance 1975	42	76	62	14	13	1
Landlord & Tenant Ordinance 1949	1	5	5			
Liquor Ordinance 1975	37	41	31	10	3	7
Gun Licence Ordinance 1937	74	106	97	9	8	1
Gaming and Betting Ordinance 1945	2	2	2			
Machinery Ordinance 1968	1	1	1			
Litter Ordinance 1977	1	1	1			
Motor Traffic Ordinance 1936	5	6		6	6	
Police Offences Ordinance 1927	2	2	2			
TOTAL	241	343	288	55	40	15

Note (i) A defendant may have been charged with offences under more than one provision.

PROSECUTIONS ON CHRISTMAS ISLAND

The Magistrates Court of Christmas Island normally convenes twice a year with a Magistrate from the Perth Court of Petty Sessions sitting as the Christmas Island Magistrate. Prosecutions before the Court are conducted by a representative from Perth DPP.

A matter dealt with by the Court in 1987 involved an offence which will not be found in Archbold; roaming chicken allowed to graze. In this matter the defendant was generally accepted by the community as being the owner of the finest chickens on the Island. However, he refused to keep them penned in as this would curtail their right to freedom. It was this somewhat altruistic attitude that put the owner at odds with the law, for it is an offence under the *Minor Offences Ordinance* of Christmas Island for owners to allow animals, which includes fowl, to graze on Crown land or land in the possession of any public institution. While no one was greatly perturbed with the chickens being loose, the line was drawn when they decided to graze in the grounds of the Christmas Island Hospital, and proceeded to defecate in, amongst other places, the waiting room. Despite warnings the defendant continued to allow his chickens to graze unpenned in the Hospital grounds. Ultimately the defendant was charged, he pleaded guilty and a nominal fine was imposed together with the appropriate warning.

The March 1988 sittings of the Court dealt with 18 prosecution matters. Although the majority of prosecutions were for traffic offences, a number dealt with offences under legislation protecting wildlife and for lighting fires. The Court also dealt with two prosecutions under the *Dangerous Drugs Ordinance* of Singapore in its application to Christmas Island which related to 9 fully grown cannabis plants found on the property of 2 residents.

Prosecution of Toh and Chong - On 14 May 1987 the body of Tan Soo Cher was discovered at his residence on Christmas Island. He had multiple stab wounds. On 25 May 1987 the accused (Toh and Chong) surrendered themselves to the police. The accused admitted that one had killed the victim with the assistance of the other, but they claimed that they had acted in self-defence. On 26 May 1987 both accused were charged with murder contrary to the *Penal Code* of Singapore in its application to Christmas Island, and on 10 August 1987 both were committed for trial at the next sitting of the Supreme Court of the Territory of Christmas Island.

On 16 November 1987 the trial of the accused for murder commenced on Christmas Island. The defence immediately sought a change of venue on the ground it would not be possible to obtain an impartial jury. Later that day, after hearing evidence the trial judge (Gallop J) decided that the trial

should not commence on Christmas Island as he was not confident that a fair and proper trial was achievable there. As his Honour had no power at the time to change the venue of the trial to the mainland, he adjourned the trial pending passage of the necessary legislation by the Commonwealth Parliament.

When that had happened Gallop J ordered that the trial take place in Perth. This trial, before a locally empanelled jury, commenced on 11 April 1988. On 19 April 1988 the jury returned a verdict of guilty of murder in respect of both accused and each was sentenced to life imprisonment. Both accused have since lodged appeals to the Full Court of the Federal Court.

The Office of the Singapore Public Prosecutor gave great assistance to the DPP in the provision of advice and background material relating to various relevant technical aspects of Singapore's substantive and procedural criminal law.

The criminal laws applying on Christmas Island - The prosecution of Toh and Chong identified a number of deficiencies in the laws applying on Christmas Island. By way of background, the Island became an Australian external territory when it was transferred from the United Kingdom to Australia on 1 October 1958. Pursuant to section 7 of the *Christmas Island Act 1958* the laws in force in the Colony of Christmas Island immediately before 1 October 1958 were continued in force in the new Territory, although they may be altered, amended or repealed by an Ordinance or laws made under an Ordinance. The laws in force on Christmas Island immediately before 1 October 1958 were principally Ordinances of the Colony of Singapore, although there have been some minor amendments to those laws over the years.

The first deficiency identified by this prosecution was that trial by jury had been abolished on Christmas Island in 1958. Apparently it was felt the population of Christmas Island was so small that no jury could be realistically empanelled from the inhabitants of the Island. While it was decided to reintroduce trial by jury, and to do so in sufficient time to enable the trial of Toh and Chong to be held before a jury, this Office was concerned at the time whether it would be realistically possible for that particular prosecution to be heard on the Island. There were a number of reasons for that concern. First, most of the 2,200 persons on Christmas Island are Chinese and Malays, most of whom do not understand or speak English, or do so with great difficulty. Of necessity a trial must be conducted in English. While it was initially thought that the pool of potential jurors could be as low as 230, in fact this assessment proved to be overly optimistic. The jury list that was prepared for the trial consisted of

some 148 persons, one third of whom were married to another person on the list.

Secondly, and more importantly, with such a small pool of potential jurors the DPP doubted whether it would be possible to empanel an impartial jury given the nature of the offence and the effect it had had on the island community.

The concerns of the DPP were met in part by the amending legislation enabling the Supreme Court of Christmas Island to order that a trial be heard on the mainland where it is satisfied that that is required in the interests of justice. However, it remains to be seen whether a court can be so satisfied in any future case without going to the considerable expense of first travelling to Christmas Island to at least try to empanel a jury, no matter how forlorn the prospect of being able to do so.

As has been mentioned earlier, the operative law is Singapore law as it was in 1958 with a few minor amendments. There are significant differences between that law and the law applying on the mainland which can have the result that evidence obtained in accordance with accepted law and practice on the mainland could be inadmissible in proceedings for a Christmas Island offence.

Further, from a practical viewpoint, that foreign law is simply not readily available. In the instant prosecution, for example, it was necessary to consider Singaporean, Singhalese and Indian case law which was only 'unearthed' with the assistance of a large number of law libraries in various parts of Australia. It must surely be a cardinal principle of any criminal justice system that the applicable law is readily ascertainable. For Christmas Islanders that can only be possible if Australian law applies to the Territory. No doubt the retention of Singapore law when the Territory was transferred to Australia was justified on the ground of convenience. However, that justification can no longer apply 30 years later.

The criminal laws of Singapore, in so far as they apply on Christmas Island, should be repealed and replaced by one of the laws in operation on the mainland. This, of course, would not be a novel situation. In the case of the Territory of Heard Island and McDonald Islands, and the Australian Antarctic Territory, the law of the Australian Capital Territory applies. Two options appear best suited to Christmas Island -

- apply the Criminal Code of Western Australia together with Western Australian evidence and criminal procedural law; or

- apply the criminal law, together with the evidence and criminal procedure law, of the ACT.

Although ACT law has in the past been applied to external territories, due to the fact that Christmas Island is closest to Western Australia, and is served by the Western Australian legal infrastructure (for example, by WA Magistrates, criminal jury trials held in WA) to apply Western Australian law is certainly worthy of consideration.

What is said above applies equally to the Territory of Cocos (Keeling) Islands where similarly the criminal laws in force are principally the criminal laws of Singapore as at 1956.

Recommendations to the effect of the above have been made to the responsible departments.

6. CRIMINAL ASSETS

INTRODUCTION

Traditionally prosecuting authorities have had little involvement in recovering the profits of crime, other than seeking reparation orders where they have been available. However, it is now generally recognized that prosecution alone is an inadequate response to large scale criminal activity of the type that occurs in the Commonwealth sphere. The primary motive for much crime is profit. Indeed, many offenders are prepared to run the risk of prosecution and imprisonment if their ill gotten gains will be available on their eventual release.

The Criminal Assets initiative is designed to attack the profit motive for Commonwealth crime by stripping offenders of the fruits of their criminal activity. This can be an extremely effective deterrent against crime. It also removes from criminals some of the money needed to finance future operations.

In the period of 3 years since 1 July 1985 DPP lawyers have played a major role in the recovery of over $50m as an adjunct to their prosecution work. As detailed more fully later in this chapter, a small part of that sum comprises monies recovered under the *Proceeds of Crime Act 1987*. It is particularly gratifying that there have been actual receipts under the new legislation, which is conviction based. When the DPP was given responsibility under the Act it was thought that little or no monies would be actually recovered for the first 2 or 3 years. It is also gratifying that the total amount recovered by way of criminal assets over the last 3 years greatly exceeds the cost by way of additional resources.

There are 3 main avenues open to the DPP to pursue the profits of crime. They are by traditional civil remedies, by action under the Proceeds of Crime Act, and in narcotics cases by seeking a pecuniary penalty under section 243B of the *Customs Act 1901*. Each avenue has its own advantages and disadvantages and, accordingly, each case must be assessed to determine what course of action is the most appropriate in the circumstances.

Whichever avenue is pursued, success in this area depends very much on co-operation between the DPP and the other agencies involved in this area, most notably the Australian Federal Police (AFP), the Directors of Legal Services (DLS) and the Australian Taxation Office (ATO). The DPP has established good working relations with all agencies concerned and the results that have been achieved reflect the success of a co-operative effort.

As at 30 June 1988, there is a Criminal Assets branch in each regional office of the DPP, and in DLS Adelaide. The branches in Canberra and Adelaide only became fully operational towards the end of the year under review. The DLS Offices in Hobart and Darwin undertake only a small amount of criminal assets work at present.

The total number of staff dedicated to criminal assets work as at 30 June 1988 was 79. This included 10 financial analysts. The employment of financial analysts represents a major development for the DPP. It gives us greater capacity than before to unravel the complex financial arrangements of those we pursue and to follow the money trails to their source.

The Criminal Assets branches are making increasing use of ADP facilities in all large cases. Without computer support it would be virtually impossible to pursue some of the more complex document-intensive cases.

The rest of this chapter describes the work of the Criminal Assets branches. Details of some of the matters dealt with appear in the last section.

CIVIL REMEDIES

The DPP has had a civil remedies function since its establishment in 1984. Under section 6(1)(h) of the DPP Act, as originally enacted, the Director was empowered to take, or co-ordinate or supervise the taking of, civil remedies on behalf of the Commonwealth in relation to matters connected with or arising out of a prosecution and in respect of which the Attorney-General had signed an instrument.

The function was extended by the *DPP Amendment Act 1985* which enacted section 6(1)(fa) and amended section 6(1)(h). It is no longer necessary for the Attorney-General to sign an instrument before the DPP can act in respect of taxation liabilities, and the DPP can now act in respect of matters being considered with a view to prosecution without waiting until a prosecution has actually commenced. However, the function is still a limited one. In particular, it is important to note that the *DPP Act* creates no new rights of civil recovery. All the DPP is empowered to do is to ensure that existing rights of recovery are pursued effectively.

While the DPP has power under section 6(1)(fa) and 6(1)(h) to take civil remedies itself, it has been the practice in these matters to act through the DLS, with the DPP exercising a supervisory and co-ordinating role. While the disadvantages in having 2 sets of lawyers involved in each case are obvious, benefits have flowed from a pooling of expertise and resources. However, there is nothing to prevent DPP lawyers taking a

more active role, indeed doing the whole job, and the present arrangement is to be reviewed.

Under section 3(2) of the 1985 amending Act, the DPP was required to report on the exercise of civil remedies 2 years after the passing of that Act. The *Civil Remedies Report* was tabled in Parliament on 16 September 1987.

The total amount recovered under the civil remedies initiative between July 1985 and July 1987 totalled just over $37.5m. The cost, by way of extra resources for the DPP and the Attorney-General's Department, was about $5.8m with some additional costs accruing to other agencies, particularly the ATO. On a cost benefit analysis the civil remedies initiative had clearly been shown to work.

Recovery of Taxes- Co-ordinating the recovery of unpaid taxes still forms the bulk of the DPP's civil remedies work. Very few criminals pay tax on the profits they make. The raising and enforcement of default assessments has proven to be an effective and cost efficient way of recovering some of the profits of crime.

Tax continues to be the most important source of civil remedies recovery. However, the amounts recovered are lower than in some previous years. This reflects a number of factors, one being a slowing in 'bottom of the harbour' litigation. Another is the enactment of the Proceeds of Crime Act.

The following tables illustrate the tax recovery work over the past year. It should be borne in mind when reading the tables, and all tables that follow, that the Criminal Assets branches in Canberra and Adelaide only became operational during the latter part of the year under review.

Table (i)
Court Orders in section 6(1)(fa) matters 1987-88

	Judgments entered	Injunctions obtained
Sydney	8	5
Melbourne	4	1
Brisbane	2	7
Perth	5	-
Canberra	-	-
Adelaide	-	-
TOTAL	19	13

Table (ii)
Recovery Action in section 6(1)(fa) matters 1987-88

	Judgments entered or leave to enter judgment	Amounts secured by injunctions or otherwise	Amounts received
Sydney	$10 625 132	$5 935,269	$3 575 293
Melbourne	6 274 385	7 474 618	6 210 927
Brisbane	4 316 253	2 030 208	2 352 353
Perth	1092 117	-	613 000
Canberra	-	-	-
Adelaide	-	-	-
TOTAL	**$22 307 887**	**$15 440 095**	**$12 751 573**

The above tables do not include 27 test cases in which the Commissioner of Taxation has issued amended assessments to former shareholders of companies involved in current year profit stripping schemes relying on section 260 of the *Income Tax Assessment Act 1936*. The Commissioner has sought to assess the profits made by the shareholders from the sale of their shares. The Director has exercised his civil remedies function in respect of those matters, and the DPP has done a substantial amount of work, although much work has also been performed by the DLS and the ATO.

The 27 cases have the potential to affect up to 10,000 assessments involving up to $703m, although some of that figure involves double assessments which the Commissioner of Taxation has announced will not be enforced. $29m has already been recovered by ATO, including $195 400 in respect of the test cases.

The first test case to come before the Full Federal Court was **FCT v. Gregrhon Investment Pty. Ltd.** (1987) 76 ALR 586. At first instance the Supreme Court had upheld the taxpayers' objection to the assessments. However, the Full Federal Court overruled that decision and upheld the assessments. The taxpayers sought special leave to appeal to the High Court but leave was refused. That case can properly be regarded as a landmark decision and it seems likely that the majority of the affected taxpayers will now seek to settle the outstanding assessments.

Recovery of Non-Tax Debts- The Director's power to act in respect of non-tax debts is dependent upon the Attorney-General signing an instrument in respect of a matter or class of matters.

The Attorney-General has signed 3 generic instruments which give the DPP standing authority to act to recover monies improperly obtained under the *Social Security Act 1948*, the *Health Insurance Act 1973* and the *National Health Act 1953* in respect of nursing homes. In all other matters the DPP must seek a specific instrument before it can pursue civil remedies. The first 2 generic instruments were signed prior to 1987-88. The third was signed during the course of the year.

The Attorney-General also signed 5 specific instruments during the year. All related to monies improperly obtained under the National Health Act and all were signed before the Attorney-General signed the generic instrument. There were a further 7 cases pending under the National Health Act and the Attorney-General was satisfied that there was a case for a generic instrument.

In these matters, as with section 6(1)(fa) matters, the DPP acts through the DLS, exercises a supervisory and co-ordinating role, and does asset tracing and case preparation work as necessary, but does not carry the litigation through to completion. In fact almost all cases are disposed of without trial. Success, once again, depends upon co-operative effort between agencies.

Results in matters under section 6(1)(h) are shown in the following tables:

Table (iii)
Court Orders in section 6(1)(h) matters 1987-88

	Judgments entered	Injunctions obtained
Sydney	6	-
Melbourne	1	-
Brisbane	1	-
Perth	-	-
Canberra	-	-
Adelaide	3	1
TOTAL	11	1

Table (iv)
Recovery Action in section 6(1)(h) matters 1987-88

	Judgments entered or leave to enter judgment	Amounts secured by injunction or otherwise	Amounts received
Sydney	$659 504	$93 162	$74 660
Melbourne	-	-	86 657
Brisbane	16 739	24 739	18 583
Perth	-	-	-
Canberra	-	-	-
Adelaide	128 000	376 516	75 000
TOTAL	**$804 243**	**$494 417**	**$254 900**

It was recommended in the Civil Remedies Report that the requirement for the Attorney-General to sign an instrument before the DPP can exercise civil remedies in non-tax matters be omitted.

It is important that the DPP be in a position to exercise a co-ordinating role whenever civil and criminal proceedings arise from a single course of conduct. There is an obvious potential for one set of proceedings to impinge upon the other. It must also be borne in mind that DLS lawyers act on instructions and that those who instruct in these matters often have little experience of the prosecution process. There is a risk that, without DPP involvement, the instructing officers will lose sight of the fact that they are dealing with criminal offenders and the profits of crime.

To require a written instrument in each case not only imposes an unnecessary administrative burden on the DPP and the Attorney-General but also leaves room for the impression when an instrument is signed that the purpose of the instrument is to compel co-operation which might not otherwise be forthcoming. This is antipathetic to the co-operative basis of the function.

It should be recognized that the DPP always has a role when civil proceedings are or may be brought in respect of closely associated criminal conduct, and the DPP remains of the view that section 6(1)(h) should be brought into line with section 6(1)(fa).

PROCEEDS OF CRIME ACT 1987
The Proceeds of Crime Act came into force on 5 June 1987. Its main purpose is, as the title suggests, to deprive offenders of the proceeds derived from the commission of offences against Commonwealth law.

The Proceeds of Crime Act is conviction based, and accordingly no substantive orders can be made under it unless a person has been convicted, or had a case found proven, in respect of an indictable offence against Commonwealth or Territory law.

There are 2 types of substantive orders available under the Proceeds of Crime Act; forfeiture orders, which may be made against 'tainted' property, and pecuniary penalty orders.

'Tainted' property is defined to mean property that was used in or in connection with an offence or the proceeds of an offence. A pecuniary penalty order, on the other hand, can be enforced against any assets of the defendant, whether or not they were purchased with the proceeds of crime. In some cases a pecuniary penalty order may be enforced against the assets of third parties if they are under the effective control of the defendant.

In the case of 'serious offences', there is a rebuttable statutory presumption that all property of the defendant is the proceeds of crime. If a restraining order is made against the defendant's property, and if the order is still in force 6 months after the date of conviction, then by virtue of section 30 all property covered by the restraining order is automatically forfeited to the Commonwealth. In order to avoid the consequences of section 30, the defendant must show that his or her property was not used in, or in connection with, any unlawful activity, was not derived, directly or indirectly, from any unlawful activity and that his or her interest in it was lawfully acquired. A 'serious offence' is defined to mean a narcotics offence involving more than a trafficable quantity of drugs, an organized fraud offence against section 83 of the Proceeds of Crime Act or a money laundering offence involving the proceeds of a serious narcotics offence or an organized fraud offence.

There is provision in the Proceeds of Crime Act for restraining orders to be made over property to ensure that assets are not improperly dissipated before substantive orders can be made. The court can, if it considers it appropriate, direct the Official Trustee in Bankruptcy to take care and control of some or all of the defendant's assets. The courts have power to make provision for defendants to meet their reasonable living and business expenses from restrained assets and to meet their reasonable legal expenses in defending the criminal charges against them. There is also provision in the Act for search warrants, production orders and monitoring orders to facilitate the identification and location of property.

The Proceeds of Crime Act also contains extensive provision to protect the rights of third parties and of defendants who are acquitted of criminal

charges against them. In particular, the DPP can be required when seeking a restraining order to give an undertaking on behalf of the Commonwealth to meet the defendant's costs and damages in the event of an acquittal. Such undertakings have been sought, and given, in every matter that has arisen to date.

The Act creates 3 new types of offence; money laundering under section 81, possessing property reasonably suspected of being the proceeds of crime under section 82, and organized fraud under section 83.

It is important to note that the Proceeds of Crime Act does not duplicate the DPP's civil remedies function and, indeed, there are a number of situations where action under that Act is either not available or would be inappropriate. To give some examples :

- cases where substantial numbers of small frauds are committed on a systematic basis, for example, medifraud. Usually only a small representative selection of such frauds are prosecuted which would not form the basis of a meaningful application for a pecuniary penalty;

- cases which are investigated by the AFP or other Commonwealth agency but, due to the state of the evidence, State rather than Commonwealth charges are laid, thus denying access to the Proceeds of Crime Act. The investigation might disclose a substantial accumulation of undisclosed wealth that is not subject to attack by the lesser scope of State legislation, but can be the subject of taxation assessment;

- cases in respect of which the Proceeds of Crime Act is an inappropriate recovery mechanism both on public policy grounds and by reason of the cost and complexity of proceeds of crime proceedings, for example, those involving small frauds on the Department of Social Security;

- cases where the prosecution fails to win a conviction, albeit that the evidence clearly demonstrates a substantial undisclosed tax liability or other deprivation of the revenue. In such cases civil remedies action forms an appropriate 'backup' to proceeds of crime action and the criminal prosecution;

- cases where a matter is worthy of prosecution action although based wholly or substantially upon circumstantial evidence. In such cases the DPP may calculate that the risk involved in seeking a restraining order over a volatile continuing business may be too

great. The Director may consider that an undertaking as to damages might expose the Commonwealth to an inordinate monetary risk and, accordingly, that civil remedies action is preferable;

• cases which pre-date the commencement of the Proceeds of Crime Act such as the current section 260 actions by the Commissioner of Taxation to recoup unpaid tax from the participants in bottom of the harbour taxation schemes. Such cases, although a diminishing source of civil remedies work, are likely to occupy some of the time of the DPP's criminal asset branches and the DLS for several years to come;

• finally, and arguably most importantly, cases involving tax related offences. Under the present arrangements with the Commissioner of Taxation, soon to be formalised by amendments to the Income Tax Assessment Act, taxation information will only be available as evidence in Proceeds of Crime Act proceedings after conviction.

Operations - The Proceeds of Crime Act has been in force for a little over a year and it is too early to judge its effectiveness. Because the legislation is conviction based, final orders cannot be made until prosecution action has been finalized. That may be several years after restraining orders were first put in place. In addition, much of the past year was taken up in administrative and other preparation needed to undertake this new function. There was little substantive work done in the first half of the 1987-88 year.

The DPP recognises that the Proceeds of Crime Act is novel legislation, and that it has the potential to work injustice if it is used indiscriminately or imprudently. The DPP has exercised restraint in its dealings under the Act and will continue to do so. It will be some time before we will be in a position to assess the full potential of the legislation.

The following tables should be read in the light of these comments.

Table (v)
Proceeds of Crime Act: Restraining Orders 1987-88

	Number of restraining orders	Estimate of potential confiscation orders	Value of property restrained
Sydney	29	$8 300 000	$ 11 600 000
Melbourne	5	170 000	170 000
Brisbane	7	385 000	397 000
Perth	4	750 000	925 000
Canberra	3	43 000	23 000
Adelaide	1	36 000	100 000
TOTAL	**49**	**$9 684 000**	**$13 215 000**

There were also 5 matters during the year in which applications were made for confiscation orders without prior application for a restraining order, including one matter arising in the Northern Territory and dealt with by DLS Darwin.

Table (vi)
Proceeds of Crime Act: Recoveries 1987-88

	Judgments	Settlements	Amounts received
Sydney	$18 000	$32 110	$10 000
Melbourne	132 677	10 290	35 636
Brisbane	-	93 925	67 874
Perth	-	-	-
Canberra	-	-	-
Adelaide	-	-	-
TOTAL	**$150 677**	**$136 325**	**$113 510**

The Act is complex and its effective implementation is dependent upon co-operation between the DPP and the other agencies involved, most notably the AFP, who has the primary investigative role, and the Official Trustee in Bankruptcy, who has the responsibility of preserving assets in many of the larger cases.

It is also essential that all agencies at risk from fraud are aware of the Act and the nature of its provisions. Clearly the investigation of an offender's

assets should be carried out at the same time as the criminal investigation to ensure the DPP is in a position to take effective recovery action.

Officers of the DPP, and DLS Adelaide, have undertaken an extensive programme of seminars and lectures to explain the Act to government agencies and other bodies affected by it.

SECTION 243B, *CUSTOMS ACT 1901*

Division 3 of Part XIII of the Customs Act empowers the Federal Court to order a person who has engaged in a prescribed narcotic dealing to pay a pecuniary penalty in respect of the proceeds of that dealing.

The Customs Act provisions were the forerunner to the Proceeds of Crime Act and mirror that legislation in a number of respects. There are, however, important differences. Most notably, the provisions in the Customs Act are not conviction based. The Federal Court may make a pecuniary penalty order against a person irrespective of whether criminal proceedings have been instituted, although there has only been one action taken against a person who has not been charged with a narcotic related offence. There have, however, been cases where action has been taken under section 243B against a person charged with an offence against State law.

Proceedings under section 243B are taken in the name of the Commissioner of the AFP and any undertaking as to costs and damages is given by the Commissioner.

The DPP has conduct of proceedings under section 243B by virtue of an instrument signed by the Attorney-General under section 6(1)(h) of the DPP Act.

At at 30 June 1988, there were proceedings in progress in 12 matters involving a total of 38 defendants. Nine of these matters (involving 16 defendants) were in Sydney, 2 (involving 12 defendants) were in Melbourne, and one (involving 10 defendants) was in Brisbane. Six of the 12 matters were commenced during 1987-88. The remaining 6 were commenced prior to 1 July 1987. The total value of assets restrained in the 12 matters was $13.15m.

These are long and complex cases, and there was only one matter in which a final order was made in 1987-88. In that case the defendant, *Harry Lahood*, who had previously been convicted of drug trafficking offences, was ordered to pay a pecuniary penalty of $180 400 in respect of the benefits derived from his drug activities. The defendant was also ordered to pay the Commonwealth's costs of the pecuniary penalty proceedings.

Assets worth in excess of $180 400 have been restrained under section 243E of the Customs Act and are available to satisfy the pecuniary penalty order. However, the defendant has lodged an appeal against the order and no further action can be taken until the appeal has been resolved.

THE DISSIPATION OF SECURED ASSETS

One of the unresolved issues under the Proceeds of Crime Act and section 243B of the Customs Act is how best to prevent the dissipation of secured assets in the payment of unwarranted legal expenses.

There is provision in section 43(3) of the Proceeds of Crime Act for a court to allow a defendant access to restrained assets to meet 'reasonable expenses' in defending a criminal charge. There is a similar provision in the Customs Act, (section 243E(4)(c)), which although worded differently has been interpreted in the same way. The courts readily make such orders and, indeed, the DPP often consents to an order if there is no reason to believe that the defendant has other assets available to meet legal expenses.

The difficulty is that there is little or no effective means of controlling expenditure once money has been released. Many defendants seem to take the view that they would rather use their funds to mount legal challenges than see them go to the Commonwealth. There have been cases in which substantial secured assets have been exhausted in funding ill-founded legal challenges or lengthy committal proceedings. While it is of some comfort to know that in such cases the secured assets will at least not be returned to the defendant, the Act was not intended to be a device for enriching the legal profession.

The courts have shown an understandable reluctance to interfere in the relationship between defendants and their lawyers, and the Official Trustee has accordingly been limited in what he can do to control expenditure on legal spending by defendants.

The Proceeds of Crime Act seeks to draw a balance between the public interest in ensuring that assets alleged to be the proceeds of crime are not improperly dissipated before a court can rule upon their fate, and the interests of defendants in ensuring that they are able to properly fund their defence. The balance may not have been properly drawn, and if present trends continue it may need to be adjusted.

CASE REPORTS

Details of some of the cases dealt with in 1987-88, not referred to elsewhere in this Chapter, now follow.

In a matter in Queensland involving *Ahern* the Director exercised his civil remedies function to co-ordinate action to enforce income tax assessments that exceeded $3.4m in tax and penalties. Ahern, an accountant, had been convicted and sentenced to a term of imprisonment on charges arising from his tax activities. His application to the High Court for special leave to appeal was dismissed in August 1988.

Ahern had engaged in a series of transactions involving foreign and Australian companies, trusts and individuals to transfer his assets, which consisted mainly of real property in Queensland, from a company he controlled to one with which he was less closely connected. In this case unravelling the money trail was a major project. Recovery proceedings were delayed because Ahern twice sought judicial review of a decision by the Commissioner of Taxation not to grant an extension of time for payment. Although the first application was successful, the second was not and ultimately judgment was entered against him for approximately $4m, and injunctions were extended in aid of execution. There then followed extensive litigation in which Ahern sought to resist enforcement of the judgment and pursued appeals against the assessments on which that judgment had been based. However, the matter was eventually settled.

In another matter in Queensland, involving a person charged with tax-related offences, the Director exercised his civil remedies function to supervise and co-ordinate the enforcement of assessments against the person and several related companies. Although the defendant was ultimately acquitted, the Director decided to continue to exercise his civil remedies function.

Only one entity, a trustee company, appeared to have sufficient assets to satisfy the assessments. Liquidators were appointed for that company in October 1986 and were indemnified for any costs incurred in pursuing the trust assets. The defendant eventually entered into negotiations with the Commissioner of Taxation and has settled the tax liabilities of himself and his companies. An amount in excess of $1.1m has already been paid, and a further $370 000 is to be paid on or about 31 December 1988.

In a matter in Adelaide a caveat was placed over the property of an alleged offender to secure the payment of a costs order obtained in favour of a Commonwealth agency. At the time the offender was outside Australia and it appeared unlikely that he would return. However, subsequently an officer in DLS Adelaide received a telephone inquiry from a person who, he suspected, was in fact the offender. That officer reported the matter to the AFP who arrested the offender a short time later. It appears he had returned to Australia for the purpose of finding out why a caveat had been placed on his property.

In a matter in Perth the defendant, *Dr Walsh*, was convicted on charges arising from the completion of false medicare claim forms and sentenced to a term of imprisonment. The fraud is estimated to have involved a total of at least $370 000. Restraining orders have been obtained under the Proceeds of Crime Act over 3 parcels of property owned by companies controlled by Dr Walsh. The value of the secured property is sufficient to satisfy the potential pecuniary penalty order. It was initially thought that the matter could be settled, with Dr Walsh voluntarily liquidating some of the property and repaying the amount defrauded. However, that now appears less likely and further litigation is anticipated.

In a matter in Canberra the DPP has applied for a restraining order under the Proceeds of Crime Act against real property belonging to a Commonwealth officer charged with accepting bribes from a company. The amount involved is $23 300. The defendant has resisted the making of a restraining order on the grounds that the police already hold $22 800 belonging to him. However, that amount is the subject of separate charges. Judgment on the application has been reserved.

In a matter in Queensland 10 persons, 9 of whom are foreign nationals, have been charged with offences arising from the alleged importation of 2 boatloads of cannabis resin into Australia. The defendants have been committed for trial on the charges. Proceedings were commenced under section 243B of the Customs Act seeking pecuniary penalties against the defendants. Within 3 days of the arrest of the defendants orders were obtained under section 243E restraining all property of the defendants in Australia. Those orders were later extended to include property outside Australia.

Funds exceeding $1.2m were identified in bank accounts in Singapore, Hong Kong and the Republic of Vanuatu and, after extensive litigation both in Australia and overseas, those funds were repatriated to Australia and are at present held by the Official Trustee. The funds included an amount in excess of $1m that was traced from a bank account in the names of companies under the defendants' control to an off-shore bank account in the name of another company under the control of one of the solicitors acting for the defendants.

Subsequently the Federal Court made an order allowing the 9 foreign defendants access to the restrained assets to meet their legal expenses in both the pecuniary penalty proceedings and the prosecution. Following lengthy committal proceedings the value of the secured assets has been reduced to approximately $600 000.

A matter in Victoria has illustrated the need for arrangements under which any criminal assets recovered as a result of co-operation between law enforcement agencies can be shared. This is the subject of a separate note in Chapter 8. That case also illustrates the potential that exists for the use of section 243B of the Customs Act to recover the proceeds of crime, even though the defendants have been charged under State rather than Commonwealth law.

7. WAR CRIMES

If and when the *War Crimes Amendment Bill 1987* (WCAB) passes into law a new dimension will be added to the work of the DPP. The prosecution of war crimes under the proposed legislation will raise novel and complex issues, including questions of municipal and international law hitherto largely unexplored in Australian jurisprudence. This chapter outlines the involvement of the DPP in the development of this proposed legislation, as well as the role of the DPP in any prosecutions that may be authorized if it is enacted.

BACKGROUND

Effectively the WCAB will replace the *War Crimes Act 1945*. That Act provides for the trial and punishment before military courts of persons accused of war crimes committed in any war in which Australia has been engaged since 2 September 1939. War crimes are defined as violations of the laws and usages of war, or any war crime within the meaning of the instrument of appointment of the Board of Inquiry appointed on 13 September 1945. Upon conviction war crimes are at present punishable by a term of imprisonment up to life.

Australia conducted about 269 war crimes trials under that Act, the last in April 1951. Most of the trials were held in northern Australia and the Pacific region, although Australia also participated in the International Military Trials conducted in Tokyo after World War II.

On 22 March 1961 the then Attorney-General, Sir Garfield Barwick, in explaining the Australian government's decision to refuse a request from the USSR for the extradition of an alleged war criminal, stated in the House of Representatives that it was time for Australia 'to close the chapter'. He referred to the thousands of migrants who had come to Australia since World War II and who had enriched Australian national life. Furthermore, he stated, those people should be allowed to live in the security of their new lives under the rule of law in Australia (See *Hansard.* for 22 March 1961 at 451-452).

However, in April and May 1986 allegations were made on ABC radio and television programmes to the effect that a number of war criminals had entered Australia after World War II and that some of them were still living here. Similar allegations were also made in the Commonwealth Parliament and the New South Wales Legislative Assembly. On 25 June 1986 the then Special Minister of State asked Mr. A.C.C. Menzies OBE, a former deputy secretary in the Attorney-General's Department, to conduct a review of material relating to the alleged entry into Australia of suspected war criminals. This was done and a report entitled *Review of Material Relating to Entry of Suspected War Criminals into Australia* (the

'Menzies Report') was presented to the Special Minister of State on 28 November 1986. That report was tabled in the Senate on 5 December 1986 and in the House of Representatives on 17 February 1987.

The Menzies Report concluded that it was more likely than not that a significant number of persons who had committed serious war crimes during World War II had entered Australia and that some of them were now resident in Australia. It recommended, *inter alia*, that the Government take appropriate action under the law to bring to justice those persons who had committed serious war crimes. At the same time the Government was given a list of persons together with a recommendation that those persons should be the subject of further investigation.

As part of the Government's response to the Menzies Report the WCAB was introduced into the Parliament in October 1987. The proposed legislation is briefly outlined immediately below. In addition, in early 1987 the Government established within the Attorney-General's Department a Special Investigations Unit ('SIU') headed by Mr. Robert Greenwood QC to conduct investigations into allegations of various war crimes committed by persons now residing in Australia. The SIU is in the process of conducting investigations into those matters it has determined require full examination.

As noted earlier, the WCAB if enacted will effectively replace the *War Crimes Act 1945*. While the earlier legislation provided for trials of war crimes by military tribunals, it is proposed under the WCAB that war crime trials take place before the ordinary courts of Australia. It provides for the prosecution of Australian citizens and residents only who are alleged to have committed war crimes during World War II. An offence against the WCAB may only be prosecuted in the name of the Attorney-General or the Director of Public Prosecutions. This alleviates the possibility of vexatious or malicious prosecutions being instituted.

The WCAB provides that certain offences, called serious crimes, are deemed to be war crimes if committed in certain war time situations. These serious crimes include offences well known to Australian municipal law, such as murder, manslaughter, and rape. It also provides that certain crimes under international law (namely deportation of persons to, or internment in, death or slave labour camps or similar places) are serious crimes. The WCAB also extends criminal liability for complicity in serious crimes.

Under proposed section 7(1) a serious crime is deemed to be a war crime if it was committed -

(a) in the course of hostilities in a war;
(b) in the course of an occupation;
(c) in pursuing a policy associated with the conduct of a war or with an occupation; or
(d) on behalf of, or in the interests of, a power conducting a war or engaged in an occupation.

Proposed section 7(3) provides a second set of criteria. Under that section a serious crime is a war crime if it was -

(a) committed:
    (i) in the course of political, racial or religious persecution; or
    (ii) with intent to destroy in whole or in part a national, ethnic, racial or religious group, as such; and
(b) committed in the territory of a country when the country was involved in a war or when territory of the country was subject to an occupation.

While it is considered that proposed sections 7(1) and 7(3) should be construed disjunctively, there is sufficient doubt about the matter to warrant an amendment to clarify their disjunctive construction.

A war crime under the WCAB is an indictable offence, punishable, in the case of an offence involving the wilful killing of a person, to imprisonment for life or for a lesser term, and in any other case to imprisonment for not more than 25 years.

In recognition of the novel and complex issues of a practical nature that could arise in prosecutions under the WCAB the DPP has been consulted by the Attorney-General's Department at various stages in the development of the Bill.

SENATE COMMITTEE REPORT

On 15 December 1987 the Senate referred the following matters relating to the WCAB to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report by the first day of sittings in 1988:

(a) whether the general nature of the evidence and related material believed to be available in foreign states, in particular the Soviet Union and eastern European countries, is likely to be of sufficient evidentiary value to warrant the institution of any prosecutions (in inquiring into this matter the Committee shall not encompass the facts of particular identified cases);

(b) if so, what procedures should apply to the collection of evidence in foreign states;

(c) the most appropriate procedures for presentation of that evidence in an Australian trial; and

(d) the most appropriate procedures for instituting and conducting war crimes trials, having regard to the need to ensure that there is no diminution of the normal standards of justice applicable in Australia.

The Senate Committee sat in Canberra on 8-9 February 1988 and received both oral and written submissions from interested parties. At the invitation of the Senate Committee the DPP provided a detailed written submission, and this was supplemented by oral evidence given by the Director during the course of the hearing. Following are the main points made by the DPP in its submission to the Senate Committee.

The circumstances in which prosecutions may be instituted under the WCAB are unique. They will be brought under an enactment introduced to deal with a specific group comprising a very small number of persons. They will relate to events which occurred more then 45 years ago and which took place in parts of occupied Europe. Crimes alleged will have been committed in a wartime context and under conditions which have no parallel in domestic Australian history. Finally, the prosecution of war crimes will constitute a proceeding which is novel to municipal courts under the Anglo-American system of law, for the only connection the allegations the subject of a charge will have with Australia is that the defendant is now an Australian citizen or resident. The process of trying war crimes is one more familiar to international tribunals and some European state jurisdictions.

The unprecedented character of such prosecutions as may be brought does not, however, justify any avoidable departure from the normal prosecution process; indeed the interests of justice dictate that as far as possible those charged under the WCAB be subject to the same procedures and standards of justice ordinarily available in Australia.

It is logical to assume that much of the documentary and witness evidence available for the prosecution case will be located in what are now areas of the Soviet Union or Soviet bloc states. Some have expressed reservations about the reliability of Soviet source evidence, fearing that such evidence may be manufactured to discredit former nationals of Soviet bloc states who are now resident in Australia and who oppose the USSR government. However, the experience of the United States in this area is both relevant

and instructive. There Soviet source evidence has been used in denaturalization and deportation proceedings against suspected war criminals. While the response of the US courts to such evidence has been mixed, the criticisms made in those cases where it has been assessed negatively related primarily to procedural irregularities apparent in the taking of evidence. In a number of other US cases, however, Soviet source evidence was admitted and its credibility accepted. West German courts have also rejected arguments in war crimes trials that Soviet evidence is unreliable and inadmissible because of the risk of coercion and manipulation of witnesses.

The fact that courts in other jurisdictions have refused to reject Soviet source evidence out of hand in the conduct of war crimes prosecutions must be accorded recognition in the Australian context. Further, as foreign witnesses will generally appear in person at any proceedings in Australia many of the procedural irregularities that attended deposition evidence given in US cases will not arise. In any event, in accordance with its usual practice it will be incumbent on the DPP to ensure as far as is possible that witnesses for the prosecution in any proceedings under the WCAB are truthful and their evidence reliable.

Reliance on evidence in the form of depositions should be avoided as far as possible, particularly in the context of proceedings under the WCAB where available evidence may be otherwise subject to attack for its unreliability. It is therefore highly desirable that witnesses appear in person in any proceedings under the WCAB. Further, as most witnesses will be non-English speakers, and their testimony will have to be given through interpreters, it is important that the latter be, and be seen to be, impartial.

As any offences allegedly committed under the WCAB will be at least 43 years old, some have queried the advisability of instituting prosecutions in such circumstances. It has been suggested that proceedings under the WCAB may be an abuse of process and thereby susceptible to an application that they be stayed or struck out.

It is undoubted that excessive delay in prosecuting a matter will prejudice the interests of the defendant, and recent decisions of the N.S.W. Court of Appeal (most notably **Herron v. McGregor** (1986) 6 NSWLR 246) have held that the Supreme Court has a power to stay proceedings on the ground that their institution or continuation is harsh and oppressive. In **Herron v. McGregor** it was primarily for reasons of delay that the Court exercised its powers to stay the proceedings. However, Parliament is in the course of enacting legislation which relates specifically to crimes committed more than 40 years ago, and in doing so it will clearly indicate

its intention that the passage of time, of itself, is not a bar to the prosecution of such crimes. Thus, in relation to war crimes prosecutions in general, the fact of the pending legislation (assuming its passage and proclamation) and the timing thereof will speak for themselves. However, that proposition may be modified in individual cases. For example, if a particular accused can prove to the satisfaction of the court that the presentation of his or her case is materially and irredeemably prejudiced by the lapse of time it is conceivable that a court would consider the prosecution of that case an abuse of its process, and accordingly order that it be permanently stayed, notwithstanding that the legislation is so recent.

The DPP submitted to the Senate Committee that the question of legal aid should be given particular consideration, as overseas experience has shown that the expense and complexity involved in war crimes prosecutions necessitates special provision for legal aid in appropriate cases. There may well be instances where defendants are ineligible under the relevant State or Territory legal aid scheme and yet will not have sufficient means to properly defend their cases. In such cases adequate assistance should be provided by the Commonwealth either under the existing non-statutory Commonwealth scheme or otherwise. The DPP considers it important that the community be satisfied that all steps are taken to ensure that trials are conducted in a fair and proper manner.

The Senate Committee noted the DPP submission on this point and recommended that special provision be made in the WCAB ensuring that any person charged with having committed a war crime should be given legal aid in appropriate cases. At the time of writing it is understood that the Government intends to introduce an amendment to the Bill to this effect whereby the Attorney-General, where the interests of justice require, will grant legal or financial assistance.

ROLE OF THE DPP

On receipt of a brief of evidence from the SIU the Director or a senior DPP officer will assess the evidence and decide whether or not a prosecution should be instituted. If so, the DPP will conduct the ensuing prosecution.

Liaison has been established with the SIU with the intention that DPP lawyers become acquainted with the evidence of the most serious cases during the concluding stages of the SIU's investigation. The purpose of this initiative is to enable the DPP to obtain knowledge well beforehand of those cases, and therefore avoid unnecessary delay in assessing evidence and in the institution of any proceedings. It is considered important that the most serious and most promising cases proceed first. The liaison that has been established with the SIU will facilitate that, and will also ensure

the economical use of resources in the prosecuting process. In addition, a small unit has been established within DPP Head Office which already has conducted extensive research on a number of novel issues that are likely to arise in any WCAB prosecution.

War crimes prosecutions are likely to be lengthy and expensive. The normal rules of criminal practice and procedure must apply, and the proper interests of the accused must be protected, to the greatest extent practicable. However, these cases by their very nature have the potential to be a heavy drain upon the criminal justice system. Clearly the desirability of a speedy trial and the convenience and financial saving of overseas witnesses attending only at a trial would favour proceeding by way of an *ex-officio* indictment. Nevertheless, such considerations must be balanced against the detriment that may result to an accused from adopting such a course. In the absence of detailed knowledge of the cases under investigation the DPP at present cannot envisage circumstances where a trial could properly proceed upon an *ex-officio* indictment without the consent of the accused person. Nevertheless the power to do so resides in the Attorney-General, although in practice it is exercised only on the recommendation of the DPP.

The preparation of cases for prosecution requires the co-operation of relevant overseas authorities in gathering evidence. However, any arrangements or agreements with overseas authorities should ensure that defendants will have the same opportunities as the prosecution to have access to evidence and information located overseas. The defence should be seen to occupy neither a greater nor a lesser position for the purposes of case preparation with respect to overseas evidence than it has with respect to gathering evidence available in Australia.

Although the DPP has yet to receive any cases for consideration from the SIU, some meaningful predictions as to the resources required for the prosecution of war crimes can now be made. These predictions are based upon knowledge of overseas experience in war crimes prosecutions, current liaison with the SIU, and analysis of the WCAB. As has been stated above, war crimes trials in Australia will be conducted in accordance with the ordinary rules of criminal practice and procedure in the relevant jurisdiction. The trials will be complex, lengthy and expensive, and will generate wide public interest both at home and abroad. In some respects they will be unique in Australian legal jurisprudence and will require legal expertise commensurate with their complexity and sensitivity.

The DPP already has considerable experience in conducting large and complex prosecutions. Logistically war crimes prosecutions will be no

different from those cases and each case will require a team of dedicated lawyers and support staff. The cases will require a substantial period of time for preparation, and the committal and trial stages will each take months rather than weeks to complete. Overseas experience confirms this assessment.

8. SOME OPERATIONAL ISSUES

PUBLICATION OF REASONS FOR 'NO-BILL' DECISIONS

The last Annual Report (at pages 102 - 104) canvassed whether there should be a change in the DPP's policy relating to the publication of 'no bill' decisions. As noted in that discussion, 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. On the other hand, those who make decisions in the prosecution process should be accountable in the sense that they can be called on to explain and justify their actions. This is particularly so where, although a magistrate has found that there is a case fit to go to a jury, Crown law authorities have decided not to proceed with a trial on indictment.

Following discussion of the issues involved at a Deputy's Conference in the latter half of the financial year the Director issued guidelines on the matter to DPP lawyers and to offices of the Director of Legal Services (DLS) who act for the DPP. The terms of the Guidelines are set out in Appendix 1. Broadly speaking, the Guidelines provide that the victim (if any) of the alleged offence (or his or her family) as well as any other person or body who may have a special interest in the particular case will now be informed as a matter of course of the decision to 'no bill'. While those persons will not be provided with the reasons for that decision as a matter of course, reasons will be provided on request. Reasons will also be made available on request to the media and concerned members of the public.

The Guidelines also deal with the circumstances which may require that reasons not be provided. Generally speaking, this will be where the public interest in reasons being made available are outweighed by national security considerations, the prejudice that may result to the administration of justice or the legitimate interests of individuals.

The Guidelines will be kept under review and, as with all guidelines issued by the DPP, will be modified should that prove necessary in the light of experience.

CO-OPERATION IN LAW ENFORCEMENT: THE SHARING OF CRIMINAL ASSETS

The effective enforcement of criminal law is becoming increasingly dependant on co-operation between law enforcement agencies. The same is true of measures to recover criminal assets.

A matter arising in Victoria has illustrated the scope that exists for co-operation between State and Commonwealth agencies. There is a need to consider implementing arrangements under which any criminal assets recovered as a result of such co-operation can be shared.

The matter involves the activities of an alleged drug syndicate based in Victoria that was involved in distributing heroin and other drugs in a number of States. It is estimated that the syndicate was distributing approximately 10 kilograms of heroin each month. At the time the alleged offenders were arrested police seized heroin with a street value of approximately $9m together with $50 000 in cash and a number of firearms including a sub-machine gun. The investigation was conducted mainly by the Victoria Police and the National Crime Authority, although the Australian Federal Police, the Western Australian Police and the NSW Police were also involved. The success of the investigation shows what can be achieved by co-operation across State boundaries.

Although the alleged offenders have all been charged with offences against Victorian law, and the Victorian DPP has carriage of the prosecution, there was consultation at an early stage between the Victorian DPP and our Melbourne Office concerning the possible recovery of the proceeds of the alleged offences. It was decided that action would be taken for the recovery of pecuniary penalties under section 243B of the *Customs Act 1901*. A substantial part of the alleged offenders' known assets are located in Western Australia. This Office has carriage of the proceedings under the Customs Act. On 20 February 1988 orders were made under section 243E of the Customs Act directing the Official Trustee to take control of all the assets of the defendants. Assets under the control of the Official Trustee have an estimated value of $1.9m.

If the proceedings under the Customs Act are successful the defendants will be ordered to pay pecuniary penalties to the Commonwealth. In the circumstances of this case, however, it might be thought inappropriate for the Commonwealth to retain all the money that may be recovered. The Victorian Police incurred considerable expense in the investigation of the alleged offences, and the Victorian authorities have foregone their rights of recovery under the Victorian legislation.

JURY VETTING IN COMMONWEALTH TRIALS

In all Australian jurisdictions there are legislative provisions and in some places administrative practices which operate to reduce the 'pool' of potential jurors. Apart from persons who are exempt from jury service by reason of such matters as their employment, or who can be excused from jury service, there are persons who are disqualified from jury service on account of having a prior criminal record. However, many

convictions do not disqualify the relevant person from jury service, for example, because the conviction resulted in a non-custodial sentence which has been complied with, or the person has completed service of any prison sentence outside a specified period.

While sheriffs are responsible for preparing the jury list, the jury legislation in each jurisdiction usually provides that the sheriff may call on the assistance of the police to identify those who are disqualified. In some places it is the practice for the police to also check persons on the jury list for convictions which, although not disqualifying the person from jury service, may be considered to render that person unsuitable to be a juror in a particular case. The details are passed to the Crown, although in some places the information provided may be nothing more than a mark against the potential juror's name on the jury list to indicate that the person has been previously convicted of some offence, but without any details indicating the nature of the conviction.

Just such a practice in Victoria came under scrutiny in a State prosecution in early 1988 of one 'D'. In that case Vincent J ruled that it was contrary to the provisions of the *Juries Act 1967* (Vic) dealing with unauthorized access to the jury list for the police to provide information to the Crown concerning any non-disqualifying conviction recorded against persons on the jury list. Vincent J also concluded, in the alternative, that the Victorian practice of jury vetting was so fundamentally unfair and contrary to the principles upon which jury trials are conducted in Victoria that it should not be permitted.

However, within a matter of months the question of the lawfulness and/or propriety of the practice of jury vetting in Victoria again came before the courts in the matter of **R v Robinson** (Court of Criminal Appeal, unreported, 28 June 1988). The Court there was unanimously of the view that there was nothing unlawful in the practice, and that the ruling by Vincent J to the contrary should not be followed. In this regard, in a joint judgment O'Bryan and Marks JJ stated that the Victorian legislation implicitly authorized the Chief Commissioner of Police to pass on information available to him concerning whether a person was unsuitable to serve as a juror by reason of convictions recorded.

O'Bryan and Marks JJ also came to the opposite conclusion to Vincent J on the question whether the Victorian practice was unfair. Their Honours observed that 'the concept of ensuring a fair trial contemplates fairness to both the accused and to the community represented by the Crown. It is not in the public interest that a juror unsuitable by reason of having acquired convictions, even though non-disqualifying, should be empanelled on a jury. An unsuitable juror may be one who, although not disqualified from

serving, might be so affected by prejudice as not to be an indifferent juror during the trial'.

In a separate judgment Nathan J came to a different conclusion on the issue of fairness. While the provision of a vetted list by the Commissioner to the State DPP was not itself objectionable, what in his Honour's view was objectionable was that the prosecution had apparently hitherto exercised its rights in a reflex manner. In his Honour's view a proper exercise of the right of the Crown to request a potential juror to stand aside required that the suitability of that person be assessed having regard to the nature of the conviction in the light of the facts of the matter about to be tried.

It was decided that some changes should be made to the Jury Selection Guidelines announced last year (see Appendix 1 to the 1986-87 Annual Report). The text of the amended guidelines are set out in Appendix 2 to this Report, with the main changes appearing at paragraphs 3.4 to 3.7. The changes made reflect the following propositions and, perhaps out of excessive caution, accord in the main with the views of Nathan J on the issue of unfairness :

- a previous conviction of a potential juror, although not such as to disqualify that person as a juror, may be such as to give rise to a reasonable apprehension that the person might not be an indifferent juror in the trial of a particular case;

- it is not inconsistent with the ideals of a representative jury that is randomly selected for the Crown to have regard to information supplied by the police concerning any prior convictions recorded against a potential juror in assessing the suitability of that person to try a particular case;

- however, a proper exercise by the prosecution of its rights requires that the suitability of the person as a juror be assessed having regard to the information provided in the light of the facts of the matter about to be tried;

- it follows from the last proposition that a prosecutor would not be justified in exercising his or her rights where the information provided is merely to the affect that the potential juror has been previously convicted of some offence, but no details are provided setting out the nature of that conviction;

- having regard to the greater resources available to the prosecution to ascertain non-disqualifying convictions, where practicable any

information made available to the prosecution should be made available to the defence.

There is one measure that could be taken which would largely remove the need for any pre-trial vetting of potential jurors - and that is to provide in all Australian jurisdictions for majority verdicts. Majority verdicts are rightly seen as a significant safeguard against the risk of biased or corrupt jurors. However, at present majority verdicts are only available in 4 of the 8 Australian jurisdictions.

TAX AMNESTY - LEAK

In early May 1988 a meeting was held between the Commissioner of Taxation and the Director at which details of the proposed tax amnesty in respect of persons who had not lodged taxation returns were discussed. The Commissioner requested appropriate steps be taken to ensure that details of the amnesty did not become public knowledge before the announcement of the amnesty, planned for late May. On 10 May a minute from Head Office containing comprehensive details of the amnesty was passed, under confidential cover, to DPP regional offices and certain DLS Offices.

On 24 May 1988 a front page story appeared in *The Herald*, Melbourne. It contained details of the proposed tax amnesty before any official announcement had been made. It was apparent from the material published that the reporter had obtained copies of the confidential minute of 10 May, together with copies of the attachments to that minute.

The Director personally conducted an investigation of the leak of this information, which caused grave concern. The investigation resulted in a conclusion that, on the balance of probabilities, although not as a matter of practical certainty, the source of the leak was within the Office of the DPP. The Attorney-General was informed, as was the Commissioner of Taxation (to whom formal apologies were extended).

The investigation into the leak was continued and was brought to a far more satisfactory conclusion than is usual in matters such as this. The outcome has been advised to the Attorney-General and the Commissioner of Taxation.

In conclusion, it is worth briefly stating the policy of the Office in relation to dealings with the media. We do not give out information concerning pending prosecutions unless that information is generally available as a matter of public knowledge. The reason is obvious. It would be wrong to try to obtain convictions, or give the appearance of trying to do so, through the media rather than through the courts. Subject to this

constraint, the Director and senior legal staff are prepared to advise the public through the media as to what the Office does, and how and why it does it.

INTERNATIONAL EXTRADITION

A relatively significant part of the DPP's functions under the DPP Act is to appear in proceedings under the *Extradition (Commonwealth Countries) Act 1966* and the *Extradition (Foreign States) Act 1966*. Most of this work involves appearances on behalf of overseas countries seeking the extradition of fugitives from Australia. It is very different work from the usual work of the DPP. While the DPP has a supervisory role in respect of the conduct of prosecutions for a Commonwealth offence such that it is ultimately this Office that determines whether or not a prosecution will proceed, in extradition matters the Office acts on behalf of the overseas country on instructions.

The Extradition (Foreign States) Act, which regulates Australia's extradition arrangements with non-Commonwealth countries, was amended in 1985 to remove the requirements that the extradition of a fugitive from Australia could only be granted for specific offences - the 'list approach' - and that the requesting country must provide evidence sufficient to warrant the fugitive's committal for trial had the offence for which extradition is sought been committed in Australia - the 'prima facie case' approach. These 2 requirements had been shown to be significant impediments in the maintenance of satisfactory extradition arrangements between Australia and other countries. These reforms have since been incorporated in the modernization of Australia's extradition laws effected by the *Extradition Act 1988*. At the time of writing that Act has not yet come into operation, although that is expected shortly.

There will, however, be some delay before these legislative reforms become effective in practice because treaties must be negotiated or renegotiated to reflect the changes in Australian legislation. At present almost all of Australia's extradition arrangements with foreign countries still contain the 'list' and 'prima facie case' approaches.

One exception is the Federal Republic of Germany where new extradition arrangements have abandoned the list and prima facie approaches. However, DPP experience in a number of cases since the establishment of Australia's new extradition arrangements with the FRG suggest that the abandonment of the 'prima facie case' approach is unlikely to result in significantly less work for Australian authorities, and in particular the DPP, in acting on requests for extradition. Previously the fugitive's attack on the request by the foreign country often centred on whether the material provided by the foreign country established a prima facie case. It

would appear that with the abandonment of the 'prima facie case' approach that attack is now directed at the more formal requirements of the Australian legislation which have been left largely untouched by the 1985 amendments and the new Act. For example, there is the requirement that the documents produced by the foreign country be 'duly authenticated'. There are at present a number of cases awaiting the results of court challenges which involve questions whether foreign documents have been duly authenticated, and hence are admissible in the proceedings in Australia. Further, in the matter of **Zoeller** it was held in the Federal Court that undertakings given by the Government of the FRG purportedly in compliance with section 13 of the Extradition (Foreign States) Act did not in fact comply with that section. In that case the fugitive was released but the decision had wider significance as there were a number of other cases involving requests by the FRG which were put seriously at risk because the undertakings in those cases were in almost identical terms.

The Extradition (Foreign States) Act and the Extradition (Commonwealth Countries) Act quite deliberately make no provision for a grant of bail pending a review or appeal by a fugitive against an extradition order by a magistrate. However, the practice has developed whereby fugitives make application for review of a magistrate's decision under both the extradition legislation and the *Administrative Decisions (Judicial Review) Act 1977*(AD(JR) Act). The Federal Court has held that the latter Act enables the Court to grant bail, and indeed bail has been granted in a number of cases. In a case in NSW the fugitives were on bail pending an appeal. When judgment was delivered in Sydney rejecting that appeal the fugitives had left NSW and it was some weeks before they were eventually located in Western Australia. This problem will not arise once the *Extradition Act 1988* is proclaimed as that Act has been excluded from the purview of the AD(JR) Act.

Despite the reforms in this area in recent years it is apparent that Australian authorities will need to ensure that requesting countries comply with all the requirements of Australian legislation, even those of a very formal nature, to ensure the smooth running of cases, and in particular to avoid fugitives being discharged on mere technicalities.

DISCLOSURE OF CERTAIN CONFIDENTIAL MEDICARE INFORMATION

On 24 March 1988 the DPP received from the AFP a brief of evidence that had been compiled as a result of allegations made in the Parliament that the Minister for Community Services and Health had breached the secrecy provision in section 130(1) of the *Health Insurance Act 1973*. The investigation had been initiated by the Minister for Justice following a request from the Minister for Community Services and Health.

The matter had been the subject of some public controversy. Government sought an opinion from the Solicitor-General which was tabled in the Parliament. In addition, an opinion had been obtained by the Australian Society of Orthopaedic Surgeons which was also tabled in the Parliament. The 2 opinions, which arrived at opposite conclusions, had been prepared prior to the police investigation into the matter. Consequently, and of necessity, they proceeded upon assumed facts and demonstrated the obvious dangers of so doing.

On 15 April 1988 the Director provided an opinion to the Attorney-General on the matter. The conclusions reached by the Director were that:

- section 130(1) of the *Health Insurance Act 1973*, which was the applicable provision, related only to 'officers' as defined in the Act;

- no officer as defined acted contrary to that section and there could not in those circumstances have been any offence;

- the section creates an offence which imports full mens rea (that is guilty intention) or (the less preferable view) one of strict, but not absolute, liability;

- accordingly, no prosecution could succeed unless the prosecution proved that the particular accused lacked an honest and reasonable, albeit mistaken, belief in the existence in a state of facts which if true would mean no criminal offence had been committed;

- this 'defence' of mistake could be availed of if necessary;

- in any event, no actual harm had been done because the information provided did not cause any person to be identified;

- so far as the Minister was concerned he had not done anything that was either unlawful or improper.

It was recommended to the Attorney-General that he table the opinion and that was done on 18 April 1988.

THE OBTAINING OF OVERSEAS EVIDENCE: SOME PROBLEMS

Following the report of the *Review of Systems for Dealing with Fraud on the Commonwealth Committee* and the continued crackdown on organized fraud in the Commonwealth sphere, the DPP has recently received a number of matters for prosecution involving alleged frauds on the revenue by the evasion of customs duty and sales tax in respect of

imported goods. The investigation and prosecution of these matters has thrown up a number of practical problems.

One of the features of this relatively new area of DPP activity is that there is usually a need to obtain evidence from overseas, which in some cases may be crucial to a successful prosecution. This is one of the matters that is being addressed by the Government in its endeavours to secure arrangements with other countries for the provision of mutual assistance in criminal matters. Under such arrangements Australia will be able to request that a person resident in another country be compelled to attend before a court in that country to give evidence and produce any documents relevant to criminal proceedings pending in Australia. To give effect to obligations arising under any such mutual assistance arrangement, Australia already has enacted the *Mutual Assistance in Criminal Matters Act 1987*. However, while it is understood that that legislation is soon to be proclaimed, it will be some time before Australian prosecutors and investigators will be able to rely on the provisions of that Act. In the first place, mutual assistance treaties with foreign countries have still to be negotiated. Further, while it is understood that any mutual assistance arrangements between Australia and other Commonwealth countries will not be by way of treaty, but rather by a reciprocal application of each country's domestic legislation, at the time of writing it is understood that only 2 other Commonwealth countries apart from Australia have enacted the necessary legislation.

Pending the Mutual Assistance in Criminal Matters Act coming fully into operation, resort has been had to the provisions of Part IIIB of the *Evidence Act 1905* to facilitate the obtaining of evidence from overseas. The provisions of that Part allow a superior court, if it appears in the interests of justice to do so, to make an order -

(a) for the examination of a person outside Australia before a judge or officer of the Court, or by such other person as the Court may appoint,

(b) for the issue of a commission for the examination of a person outside Australia, or

(c) for the issue of a letter of request to the judicial authorities of a foreign country to take, or to cause to be taken, the evidence of a person in that foreign country.

Experience to date has shown that many of the overseas witnesses in such cases (who, by and large, are the owners or operators of the businesses that supplied the goods imported into Australia) are not prepared to attend

Office is to avoid reliance only on section 16 if an entitlement to appear as counsel in DPP matters can be established by other means. In this regard, until 1 January 1988 only solicitors were required to hold practising certificates issued by the Law Society, and for years solicitors in the Sydney Office were issued such certificates. However, on 1 January 1988 the *Legal Profession Act 1987* (NSW) came into operation. In addition to the requirement that solicitors hold practising certificates, that Act introduced a requirement that barristers also hold practising certificates issued by the Bar Council. Nevertheless, the provisions of that Act appear to be in sufficiently wide terms to permit the issue of barristers' practising certificates to DPP lawyers who have been admitted to practise as barristers, and accordingly a small number of DPP lawyers applied under the Act for a barrister's practising certificate.

Very recently a response was received rejecting those applications, asserting that DPP lawyers 'are not entitled to practising certificates nor to appear as barristers'. In this regard, the response adopted an extremely narrow view of section 16. It was asserted that the section 'merely confers an entitlement to practice as a barrister in NSW, if the officer, being otherwise qualified, intends to fulfil the normal function of a barrister in this State namely to appear as an advocate in court on the instructions of a solicitor'.

The appropriate response to the rejection of the applications is being considered at the time of writing. One option is an amendment to section 16 to put it beyond doubt that any DPP lawyer may appear as counsel before the superior courts with all the attendant rights and privileges of a barrister although that person would otherwise not be entitled to do so. However, before adopting such a course it may be appropriate to test the ambit of section 16 in some way, for example, by appealing under the Legal Profession Act against the rejection of the applications.

SENTENCING OF COMMONWEALTH OFFENDERS

In successive Annual Reports this Office has expressed its concern at the lack of an arrangement under section 3B of the *Crimes Act 1914* with Queensland, NSW and Tasmania for those States to make their facilities available to enforce sentences and orders made under the *Crimes Act 1914*.

While the problem in those 3 States was initially confined to the unavailability of 'half-way' sentences or orders when sentencing a federal offender (such as community service orders), a relatively recent development is for the probation and parole authorities in Queensland and NSW to refuse to enforce any condition attaching to an order for release under section 19B or section 20 of the Crimes Act which relates to the

supervision of the offender. If a sentencing court is not able even to order conditional release under supervision, then the options available to it are very limited indeed. A fine will usually be an unsuitable option if the offender is impecunious (which is often the case with social security offenders, to give but one example,) and in that event the court is faced with the dilemma of choosing between unsupervised release or imprisonment, neither of which may be appropriate in the circumstances of the particular case.

An example is the case of **Blaire** who was sentenced at first instance for offences involving the defrauding of approximately $28 000 to a total of 18 months imprisonment with a non-probation period of 12 months. On appeal the NSW Court of Criminal Appeal took the view that the delay on the part of the Department of Social Security in referring the matter for prosecution, together with a number of other factors, warranted the substitution of something less than a full custodial sentence. While the Court considered that periodic detention would have been the most suitable disposition, that clearly was not available as there was no section 3B arrangement between NSW and the Commonwealth. Although it was then initially attracted to attaching what would have been in effect a community service order as a condition of release under section 20, the Court was subsequently informed by the NSW Probation and Parole Service that it was not prepared to co-operate in making available community service even on such an informal basis.

Fortunately in that case the Court was able to resolve its dilemma when a minister of religion learnt of the difficulties confronting the Court and offered to supervise and monitor the appellant in doing charitable work to benefit the community of Springwood. The Court made it a condition of the offender's release under section 20 that she perform 300 hours of voluntary service under the supervision of the minister and comply with his reasonable directions. It is a sorry reflection on the present state of affairs when justice can only be done with such assistance from private citizens.

In the course of its judgment delivered on 17 December 1987 the Court made another, now familiar, exhortation to the responsible authorities that the necessary section 3B arrangement be negotiated as soon as possible -

> 'It is a matter of great regret that the Commonwealth and State have not thus far been able to take steps permitting Commonwealth prisoners to be sentenced to periodic detention or community service. The absence of those valuable sentencing options results in persons suitable for one or other of them being either released

> without penalty or being sentenced to full time custody. The latter alternative encumbers yet further the overcrowded prisons of this State, quite apart from the harsher effect of full time custody in comparison with one or other of these sentencing options. It is desirable that whatever difficulties are standing in the way of these options being available for Commonwealth prisoners should be swept away at the very earliest time, and the Court commends yet again to those concerned that the necessary action be taken to ensure that this is achieved' (per Street CJ).

The position in so far as NSW is concerned has been exacerbated given that State's recent decision to discontinue imprisonment for fine defaulters, a sanction that the NSW Government has decided is no longer appropriate in the light of the well publicised assault upon a NSW fine defaulter whilst in prison. While the State Government is able to utilise community service orders as an alternative, the only sanction available to the Commonwealth in NSW to enforce payment of a fine remains imprisonment. The Sydney office of the DPP has adopted the practice of writing to all fine defaulters advising that a warrant will be sought if they do not arrange payment of the outstanding amount. However, that is all that can be done. If the letter is ignored, or no arrangement for payment is made, then there will usually be no alternative but to seek a warrant. Nevertheless, one must be apprehensive at the possibility of a Commonwealth fine defaulter being seriously injured, or perhaps even killed in prison.

The Attorney-General shares the DPP's concern on this matter and it is understood that steps are being taken to attempt to resolve the present impasse.

AFP-DPP LIAISON GUIDELINES

In December 1987 Guidelines were agreed between the AFP and the DPP which set out the liaison arrangements applying between the 2 organisations. In general terms the Guidelines are intended to ensure efficiency in the dealings each organisation has with the other. The primary point of contact between the 2 organisations on operational matters are the Regional Liaison Officers in each AFP regional area. Their responsibilities are to ensure that material provided to the DPP is complete and of a proper standard, and that requests of the AFP by the DPP are complied with promptly and efficiently. The Guidelines also set out the circumstances in which certain of the Director's powers under the DPP Act relevant to the AFP will be exercised. For example, the Guidelines provide that the Director will exercise the power under section 11 of the Act to give directions and guidelines to the Commissioner only after prior consultation.

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT 1977

In our Annual Reports for 1984-85 and 1985-86 reference was made to the problems being caused by the use of the AD(JR) Act to delay the prosecution of Commonwealth offences consequent upon the decision of the Full Court of the Federal Court in **Lamb v. Moss** (1983) 49 ALR 533. In that case it was held that a decision by a magistrate to commit for trial is reviewable under the AD(JR) Act.

The principle in **Lamb v. Moss** has been extended to apply to other decisions made by magistrates in the course of committal proceedings. Decisions by magistrates whether to admit or reject evidence are now subject to review under the AD(JR) Act (**Shepherd v. Griffiths** (1985) 60 ALR 176), as are decisions by a magistrate in relation to an application to permanently stay committal proceedings for an alleged abuse of process (**Emanuelle v. Cahill and Dau** (1987) 25 A Crim R 115). Further, decisions in the prosecution process made prior to a committal hearing are also subject to AD(JR) Act review. In **Buffier v. Bowen** (1987) 72 ALR 256 it was held that the Attorney-General's decision to *consent* to the institution of a prosecution was reviewable, and in the recent decision of **Newby v. Moodie** (unreported, 3 June 1988) the Full Court of the Federal Court found that a decision by the Director to institute proceedings for offences against the laws of the Commonwealth and decisions to carry on such proceedings under section 6 of the DPP Act are also decisions which are reviewable under the AD(JR) Act. The decision in **Newby v. Moodie** still leaves open the question whether or not the decision to present an indictment is reviewable under the AD(JR) Act, although in **Murchison v. Keating (No 1)** (1984) 54 ALR 380 the Commonwealth did not dispute that a decision by the Crown to proceed by way of indictment rather than summarily was subject to review.

While the Federal Court has consistently said that only in exceptional cases will it interfere in committal proceedings, the fact remains that once the jurisdiction of the Court has been properly enlivened by a sufficient application under the AD(JR) Act there is an obligation on the Court to entertain it. Experience has shown that the range of decisions which are now subject to review under the AD(JR) Act has provided fertile ground for defendants to delay, to their advantage, criminal proceedings against them. This is so even though the Federal Court has sought to list these matters quickly and has generally dealt expeditiously with applications.

While not strictly a criminal investigation, the recent decisions in the 3 **Sharp v. Deputy Federal Commissioner of Taxation** hearings ((1988) 88 ATC 4165, 88 ATC 4184 and 88 ATC 4259) graphically illustrate this point. All these decisions in that one case related to a matter which had little to do with the primary issue of whether the decision of the

Australian Tax Office to seek access to 'fax' books was properly made. Notwithstanding the expedition of the Federal Court the **Sharp** cases are a classic example of the potential for the AD(JR) Act to be used as a delaying tactic not only in tax investigations, but obviously also in criminal investigations.

It should also be borne in mind that the greater the resources of a criminal defendant the greater the use that can be made of AD(JR) Act applications as a delaying tactic. It does not go too far to say that the fact that these applications, as the law now stands, can be made at various stages of the prosecution process allows a defendant with sufficient resources to virtually negate the efficient operation of the criminal justice system. A large number of the prosecutions conducted by this Office in the major fraud and drug areas require significant court time at both the committal and trial stages. Because of the delays in the criminal justice system in certain States such as NSW it is often necessary to wait a considerable length of time 'in the queue' before such lengthy proceedings can be set down for hearing. However, an AD(JR) Act application can result in that court time being lost, and the matter not brought back on until very much later, in some cases at least a year later.

In one recent matter involving co-defendants in NSW a 4 week committal hearing was set down nearly a year beforehand. However, that court time was lost as a result of a late application under the AD(JR) Act seeking both to review the decision to prosecute and orders permanently staying the proceedings on the ground that they were an alleged abuse of process. Although that application was dismissed, an appeal from that decision caused further delay. The committal proceedings have now been set down to commence in November 1988. Even without further applications, the use by the defendants of the AD(JR) Act will have delayed the committal proceedings for nearly a year. This particular matter also serves as a good example of the tactical use to which the AD(JR) Act can be put in cases involving co-defendants. One defendant filed his formal AD(JR) Act application on the evening prior to the hearing of the other co-defendant's AD(JR) Act application (both applications were in virtually identical terms).

There are other examples which serve to illustrate the delays and interruptions imposed upon the prosecution process by the AD(JR) Act . In **O'Donovan v. Vereker** (1987) 76 ALR 97 the committal proceedings commenced on 27 August 1985 and on 23 June 1986 the magistrate found, pursuant to section 56(1)(b) of the *Magistrates (Summary Proceedings) Act 1975* (Vic), that there was sufficient evidence to put the defendants on their trial (this is not a decision to commit for trial; that decision comes later). In July 1986 the defendants sought a review of that decision. The

matter was heard in November 1986 and judgment setting aside the magistrate's decision was handed down on 1 April 1987. The informant appealed, and on 15 October 1987 the Full Court of the Federal Court allowed the appeal in part - in effect reinstating the Magistrate's decision as to the sufficiency of evidence, but directing that he continue the committal hearing and decide whether or not to commit in accordance with the law. The defendants sought leave to appeal to the High Court, but this leave was refused on 18 March 1988. The committal proceedings were finalised on 1 August 1988 when committal orders were obtained. As can be seen, completion of the committal proceedings was delayed for nearly 2 years by the AD(JR) Act application which was unsuccessful to the extent that the Federal Court was not prepared to interfere with the magistrate's decision as to sufficiency of evidence.

In another case, which has still to go to trial, an application under the AD(JR) Act seeking to review a magistrate's decision was filed in the Federal Court some 18 months after the decision to find a prima facie case, and some 8 months after the decision to commit for trial. Although both decisions were delivered in writing by the decision-maker, and the defendants were both represented at the committal proceedings, the Federal Court was still prepared to entertain a Notice of Motion seeking an extension of time for the filing of the application, and ruled that it would be unable to consider the Notice of Motion without having the merits of the substantive application before it. Slattery J. of the Supreme Court of NSW, the Court before which the matter is due to be heard if the AD(JR) Act application is unsuccessful, has advised that he is reluctant to set the matter down for trial while there are proceedings on foot in the Federal Court, and consequently the matter could not be set down for trial in 1988. The earliest a trial could now be heard is 1989 - and this in the context of committal proceedings which commenced in June 1986!

Almost all applications by defendants under the AD(JR) Act to review decisions in the prosecution process are dismissed. However, this is small comfort as the application, or sometimes applications, will already have consumed both time and resources. This has an important practical impact, particularly in major fraud cases. Such matters are notoriously difficult to investigate and prosecute successfully. An AD(JR) Act application in practical terms takes its toll on those running the prosecution case and may cause that case to be weakened simply by the delay to which the application will inevitably give rise.

This Office has consistently taken the view that, whatever was intended to be the original scope of the AD(JR) Act, it could not have been intended that State magistrates hearing committals concerning Commonwealth offenders were to be considered as Commonwealth administrators, nor

that the Act should provide a means of reviewing committal decisions as a matter of course (see the NSW Law Reform Commission Discussion Paper entitled *Procedure from Charge to Trial : Specific Problems and Proposals,* February 1987, at paragraph 7.45). Yet the AD(JR) Act has gone well beyond review of decisions of magistrates in committal proceedings and is increasingly used to challenge early decisions in the prosecution process. The criminal justice system already has built in checks, balances and safeguards within each State court hierarchy which not only operate adequately, but also in the best interests of justice. There is absolutely no need, in respect of Commonwealth offences, for the imposition of an additional review mechanism for decisions in the prosecution process over and above the existing review mechanisms inherent in the existing criminal justice hierarchy. This point has been acknowledged in the Federal Court (see for example, per Fox J in **Newby v. Moodie** (1988) 78 ALR 603).

Experience to date has shown that the AD(JR) Act has provided very little, if any, assistance to the prosecution process and has generally delayed and frustrated it; in short, the AD(JR) Act could be said to have led to injustice rather than justice in the prosecution process. In addition, the situation has now arisen where that process in respect of Commonwealth offenders is different from that applying to State offenders, even though the same State court system is used to deal with both Commonwealth and State offences. There can be no valid reason why Commonwealth offenders should be treated any differently from their State counterparts. As the NSW Law Reform Commission commented in the paragraph cited above:

> 'This Commission is not charged with the task of examining Commonwealth laws but we should note that, in our view, it is unsatisfactory that different remedies for the review of committal proceedings conducted by Magistrates in NSW should be available depending on whether the prosecution has been launched by the State or the Commonwealth'.

This Office accordingly reiterates the recommendations in the 1984-85 Annual Report that Schedule 1 of the AD(JR) Act should be amended to remove decisions relating to the administration of criminal justice from the purview of the AD(JR) Act. As noted in that Annual Report and the 1985-86 Annual Report, the Administrative Review Council had recommended the removal of decisions made in the course of committal proceedings from the ambit of the Act. It is now even more pressing that the recommendation be accepted and acted upon. For the sake of completeness, the further amendments to section 9(2)(b) of the AD(JR)

Act and to section 39B of the *Judiciary Act 1903* referred to in the 1985-86 Annual Report would also need to be included.

Since writing the above the Administrative Review Council has issued a discussion paper in which it has repeated its earlier recommendation that decisions in committal proceedings not be reviewable under the AD(JR) Act.

COMMITTAL PROCEEDINGS IN NEW SOUTH WALES

The issue of the future of committal proceedings has been the subject of some comment in recent times. On 25 September 1987 at the 24th Australian Legal Convention Wilson J of the High Court commented that -

> 'A number of jurisdictions have followed English precedent in placing responsibility for prosecutions in the hands of Directors of Public Prosecutions, being independent, highly qualified professionals having a status equivalent to a judge ....This development should render the committal proceedings unnecessary and pave the way for its abolition. This has recently been recommended by the Law Reform Commission in NSW'.

The recommendation referred to was one of the tentative proposals of the NSW Law Reform Commission in its 1987 discussion paper entitled *Procedure from Charge to Trial: Specific Problems and Proposals*. In its discussion paper the Commission considered a number of options - improved committal proceedings, waiver by the accused of committal proceedings and abolition of committal proceedings. Although the Commission's preferred approach was to abolish committal proceedings, that was part of a package of proposals designed to establish an alternative procedure to committal proceedings in their present form. Although committal proceedings would be abolished, as the decision to prosecute should of itself be sufficient to bring a prosecution before the courts, that decision would be made according to set criteria. Further, an accused person would have the right to challenge a decision to prosecute in the higher courts. It was also proposed that the prosecuting authority be required to disclose its case and all relevant material to the defence before trial by immediately filing in the court a copy of the statements of all persons who may be able to give relevant testimony together with, amongst other things, copies of relevant documentary evidence and information indicating what is intended to be called in the prosecution case.

The Commission's proposals were considered by the Sydney Office of the DPP in June 1987 in the context of a submission to the Commission on its proposals. The Sydney Office was largely supportive of the concept

behind the Commission's tentative proposals which, when read together, offered a reasonably well balanced alternative to the present form of committal proceedings.

While the Commission has not yet submitted its final report to the NSW Government, in 1987 an amendment was made to that part of the *Justices Act 1982* (NSW) relating to the procedure in committal proceedings which has caused some concern to this Office. A new section 48AA(1) provides that evidence for the prosecution in committal proceedings must now be given by means of written statements. This amendment appears to have picked up only the Commission's proposal that the prosecution disclose its case and all relevant material prior to the trial without taking into account the context in which that particular proposal was made. The DPP is concerned that the practical effect of the amendment may be to unnecessarily disadvantage the prosecution. The DPP's concern centres on the fact that there can be situations where the prosecution case at committal is dependant upon the evidence of a witness who has refused to make a statement although the person would be prepared, or could be forced, to give oral testimony. Although the 1987 amendments did provide that evidence may be given in committal proceedings otherwise than by means of a statement if the magistrate is satisfied that the requirement for a written statement could not be reasonably complied with, it is unclear whether that discretion extends to the situation where a witness has refused to make or sign a statement, rather than simply being unable to sign a statement through, for example, illness or absence.

The DPP's concerns have been raised with the NSW Attorney-General, and the DPP is hopeful that what it regards as the appropriate position will be put beyond doubt by further amendments to the legislation later this year.

RECRUITMENT AND RETENTION OF LEGAL STAFF: THE SYDNEY EXPERIENCE

Previous Annual Reports have referred to the difficulties that the DPP has encountered in recruiting and retaining suitable legal staff. Not so long ago the salary rates for public service lawyers compared favourably with those available in the private profession, at least at the junior levels. This is no longer the case, and indeed the reversal has been quite dramatic in recent years. While the following is primarily concerned with the problems experienced by Sydney DPP, and the steps it has taken in an endeavour to overcome them, it should be pointed out that in many places public service salary rates are less than those on offer in private practice, and significantly so in the case of the large commercial law firms.

In the past year Sydney DPP, along with other regional offices has made a concerted effort in the area of recruitment in an endeavour to attract the best legal staff possible. It has concentrated on attractive advertising in newspapers and journals, rapid processing of applications to minimize the risk of applicants being offered positions elsewhere, and the involvement of senior staff in all stages of the selection process. It remains the case that lawyers are attracted to the DPP. The work of the Office is regarded as 'prestige work', the Office has a high profile and the working conditions are good. However, those factors of themselves may not be sufficient to attract the sort of person we wish to employ. The large Sydney firms are now offering $35 000 plus to the best graduates. With a starting salary of approximately $25 500 for a legal officer who is admitted to practice, clearly we cannot compete in terms of salary.

In an endeavour to add to the range of applicants at the legal officer level DPP Sydney proposes to participate in the existing graduate selection programs in addition to its usual recruitment for vacant positions. Under those programs students are offered positions on or about the completion of their final year at university which they then take up after completion of the 6 months course at the College of Law.

DPP Sydney has been less successful in recruiting staff at the senior legal officer/principal legal officer level where the salary rates are $37 941-$41 169 and $45 583-$48 559 respectively. Top quality lawyers in the large Sydney firms are likely to be earning $60 000-$100 000 after 3 to 4 years. Many who acknowledge the better quality of work at the DPP nevertheless consider that they cannot afford to take the substantial drop in salary which is usually involved. There are, of course, some who are prepared to do so.Often they are persons who are prepared to take a temporary dip in remuneration while gaining experience with the DPP which will stand them in good stead in other areas, particularly the Bar. In this regard, even the most junior capable barristers appear to have incomes which are substantially higher than DPP salaries, even allowing for the high overheads involved.

Within the DPP a good legal officer can expect to receive a salary at the senior legal officer rate within approximately 2 years, and at the principal legal officer rate within 3 to 5 years. While this is more rapid than in other government organizations, and considerably more rapid than in past years, it is in large part a reflection of the difficulties in retaining staff, particularly at the principal legal officer level, because of the greater financial rewards available in the private profession. At the middle and senior levels the DPP must also compete with other law enforcement agencies.

There is no ready solution to the problem of legal staff recruitment and retention under present public service terms and conditions, particularly fixed salary levels.

It is, however, pleasing to note that there is much greater movement between DPP offices. For example, of the 19 legal staff who left DPP Sydney during 1987-88, 6 were promoted or transferred to other DPP regional offices. Other DPP staff were transferred between Perth, Brisbane, Melbourne, Canberra and Head Offices.

Finally, it should be noted that the above problems are not limited to legal staff. There are also significant difficulties in recruitment of other staff, particularly in the keyboard, ADP and office manager positions.

9. LAW REFORM

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 the application of existing laws, as well as to provide informed assessments in the light of operation experience in relation to proposals for criminal law reform. This chapter outlines some of the areas in which the DPP has been active in 1987-88.

The DPP was consulted during the development phase of a number of items of Commonwealth legislation. Apart from the *War Crimes Amendment Bill 1987* (dealt with elsewhere in this Report) this was principally with respect to the *Crimes Legislation Amendment Act 1987* in so far as that legislation amended the *Christmas Island Act 1958*, the *Proceeds of Crime Act 1987* and the *Crimes Act 1914*. The amendments to the first mentioned Act are dealt with elsewhere in this Report. The following is concerned with the amendments to the *Crimes Act 1914*.

The significant changes effected by the amendments to that Act were to resolve the problem of 'hybrid offences' under Commonwealth law identified in **R v Waddington** (1979) 26 ALR 503, and to provide new 'step-down' provisions for the summary disposition of indictable offences. As to the first mentioned, while sections 42 and 43 of the *Acts Interpretation Act 1901* separated Commonwealth offences into those that were indictable and those that were summary, this was subject to a contrary intention. Certain Acts did manifest such a contrary intention, particularly sections 12 and 12A of the Crimes Act which divided offences under that Act into those that were declared to be indictable and 'other' offences. Although the Crimes Act provided for offences in the latter category to be dealt with either summarily or on indictment, in **Waddington** it was held that they were not 'indictable offences' within the meaning of a particular State law as applied by section 68 of the *Judiciary Act 1903*. This created uncertainty in determining whether State procedural laws relating to State indictable offences were applicable to such 'hybrid' offences under Commonwealth laws. The problem has been resolved by the addition of sections 4G and 4H in the Crimes Act which effectively make all offences under Commonwealth legislation either indictable or summary.

The second significant amendment to the *Crimes Act 1914* has been sought by the DPP for some time (see page 38 of the 1984-85 Annual Report and page 15 of the 1986-87 Annual Report). The new section 4J will enable all indictable offences punishable by not more than 10 years

The Discussion Paper identified a number of common law offences that could conceivably have some application for Commonwealth purposes, for example, breach of statutory command. The view of this Office is that to the extent any common law offences may have some application for Commonwealth purposes they should be abolished with those worthy of retention being reconstituted in a statutory form as part of the consolidation of Commonwealth criminal law. The main justification for the abolition of common law offences for Commonwealth purposes is the need for certainty as to what constitutes a criminal offence. The ordinary citizen should be able to ascertain what conduct is criminal by reference to statute and subordinate legislation, not by what might sometimes be an esoteric pursuit of case law over the past 400 years. There would appear in fact to be very few common law offences in areas not at present covered by statutory offences that are worthy of retention in the future Act.

Arrest and Related Matters - Discussion Paper No. 3 dealt principally with the circumstances in which the police (and private citizens) should be able to lawfully arrest a suspect without warrant, and whether police officers should be empowered to detain an arrested person for investigation.

The DPP considers that the basic justification for an arrest without warrant by a police officer should be the existence of an objectively reasonable suspicion, which is in fact held by the police officer, that a person has committed an offence. Further, in the case of offences punishable by less than 7 years imprisonment, it should also be required that the arrest of the suspected offender is necessary to ensure his or her appearance before a court, to prevent a continuation or repetition of the offence, to prevent the concealment, loss or destruction of evidence of or relating to the offence, to preserve the security or welfare of any person, or to preserve any property from damage. However, the latter requirements should not apply in the case of those offences punishable by 7 years imprisonment or more. In respect of such offences the seriousness of the offence itself, as indicated by the maximum penalty provided, provides the justification for arrest. Further, if the police are to be authorised to carry out investigations involving an arrested person then it is illogical that the opportunity to do so should be dependent, not on the seriousness of the offence in question or the need to carry out such investigations, but rather on the incidental but fortuitous circumstance that in the particular case an arrest was necessary, for example, to prevent concealment of evidence or to ensure the offender's appearance at court.

The power of a citizen to arrest without warrant should be restricted to situations where the offence is being committed or has just been

committed. However, it is pointless for the power to make a citizen's arrest to be subject to the restriction that proceedings by way of summons would not be effective or, as is the case under section 352 (1) (b) of the *Crimes Act 1900 (N.S.W.) in its application to the A.C.T.*, that the offence is of a certain seriousness. It is most unlikely that the private citizen will be aware of any restrictions on his or her power to make an arrest, and all that such restrictions achieve is to leave the citizen open to an action for false imprisonment should it eventuate that they are not complied with, notwithstanding that he or she has acted in good faith.

The common law rule that an arrested person must be brought before a Justice as soon as reasonably practicable 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 or otherwise investigate an arrested person. There is a compelling case for the common law rule to be abandoned for Commonwealth purposes, to be replaced with a statutory framework within which the police may lawfully question an arrested person. The period of detention should be for a 'reasonable time' as recommended by a Victorian Committee headed by Mr John Coldrey QC in a report *Custody and Investigation* (April 1986) Only this would provide the necessary measure of flexibility to the investigation of persons in custody, particularly in relation to suspected drug offences.

However, merely to authorise police detention of arrested persons for investigation 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 which contains safeguards to protect the interests of the arrested person. Examples of such safeguards would be the right to have a friend or relative notified of the arrest, and the right to contact and to be advised privately by a solicitor. The main safeguard should be the tape recording of records of interview held by police officers at police stations. The tape recording of records of interview would provide a means that has hitherto been lacking to monitor what actually occurs during the interview, and would reduce considerably the scope and potential for disputes over confessions and admissions at any subsequent trial. As well, the use of tape recorders would provide a protection for the police against allegations that a confession has been fabricated. Evidence of a non-recorded confession or admission made by a suspect when interviewed by a police officer at a police station should be inadmissible unless it was not reasonably practicable in the circumstances for that confession or admission to have been tape recorded.

The future legislation should also deal with what investigative measures the police can undertake involving an arrested person apart from questioning (for example, search of the arrested person and his or her clothing, medical examinations, the obtaining of forensic evidence such as fingerprints, identification parades and the taking of photographs).

The High Court's decision in **R v Williams** (1986) 66 ALR 385 has prompted a number of State governments to also consider enacting legislation regulating criminal investigations, and there is now the prospect of significant differences between State and Commonwealth legislation on such matters as the period that the police may lawfully detain an arrested person for investigation, and the admissibility of evidence obtained while investigating an arrested person. In most cases such differences will be of no moment as most alleged breaches of Commonwealth law are investigated by Commonwealth law enforcement agencies. Further, if State police investigate an alleged Commonwealth offence then it would be appropriate that they comply with the applicable Commonwealth laws. However, it occasionally happens that, although State police conduct an investigation with a State offence in mind, a Commonwealth charge is ultimately laid, or a Commonwealth charge substituted for the State charge initially laid. If the admissibility of evidence on a Commonwealth charge is to be determined solely by reference to Commonwealth law, then there is the very real prospect that evidence, which may be crucial, will nevertheless be inadmissible *per se* or excluded at the subsequent trial for the only reason that it was obtained in good faith by State police in compliance with rules that are, however, inconsistent with those prescribed by the Commonwealth Parliament for the investigation of Commonwealth offences. It would therefore seem appropriate for any future Commonwealth legislation regulating criminal investigations to make allowances for such cases where, although a Commonwealth charge is ultimately proceeded with, the investigation was conducted by State police with a view to determining whether the suspect had committed some State offence.

Search Warrants - Discussion Paper No. 4 related to search warrants, which if obtained in aid of an investigation into an offence against Commonwealth law, are generally issued under section 10 of the *Crimes Act 1914*. The provisions of that section are now quite outmoded and, indeed, substantially revised search warrant provisions have recently been included in more specialist legislation such as the *Proceeds of Crime Act 1987*.

While present statutory provisions in revenue statutes authorising entry onto premises without warrant should be retained, outside the revenue area entry onto premises without the consent of the occupier should only

be authorised by warrant (including warrants authorised by telephone) except in emergency situations. Further, the authority to issue a search warrant should be limited to stipendiary magistrates and justices of the peace who are officers of a court. To exclude local justices of the peace from the authority to issue a search warrant would not present any problems for the police if provision is made for telephone applications.

Future legislation should take account of the special difficulties that can be encountered by the fraud investigator. The investigator is unlikely to know at a relatively early stage of a fraud investigation precisely what evidence is likely to be located on the subject premises.

The future legislation should contain a provision on the lines of section 36 (9) of the *Proceeds of Crime Act 1987* authorising the seizure of articles other than those specified in the warrant which are connected with either the offence under investigation or some other offence, including a State offence.

That legislation should also authorise the obtaining of a search warrant where it is suspected that the thing the subject of the proposed search will be located on the premises at some time in the future. Such a provision would ensure that telephone applications and warrantless searches in emergency situations are only resorted to in cases of real urgency.

There is a clear need for provision to be made authorising the issue of search warrants in respect of particular persons. It would be illogical to confine the use of a search warrant to a search of places or objects such as vehicles in circumstances where it is suspected that the thing connected with an offence will be secreted on a person. Further, a warrant to search premises should also authorise the search of any person found on the premises if the police officer reasonably suspects that that person has located on his or her person a thing specified in the warrant. This should extend to persons about to enter or who have recently left the subject premises.

The requirement in section 10 of the *Crimes Act 1914* that there should be a reasonable *suspicion* (as opposed to a *belief*) that articles are in the premises etc., should be retained. At the time of applying for a warrant a police officer will not ordinarily have entered the premises and may well have no more than a suspicion as to what is in it.

The future legislation should also authorise a search without warrant in emergency situations where it is not practicable to obtain a warrant either in the normal way or upon telephone application. Although mindful of the civil liberty implications involved in giving such a power to the police, on

balance it is considered that such a power in respect of both premises and persons can be justified provided it is subject to safeguards such as those contained in section 38 of the *Proceeds of Crime Act 1987*. Bearing in mind the exceptional nature of such a power, and the strict conditions that must be complied with before such a search would be lawful, it is considered that any inculpatory evidence obtained in breach of requirements such as are contained in section 38 would run a grave risk of exclusion at any subsequent trial.

At present a police officer may not seize a thing for the purpose of ascertaining at a later time whether or not it comes within the terms of the warrant. This poses considerable difficulties for the police if it is either not practicable or even impossible for articles such as undeveloped film to be processed and then examined during the currency of the search. The future legislation should permit the police to take such articles away for examination elsewhere. It is also imperative that the search warrant provisions in the new legislation are capable of applying to the many and various ways that information and documents can now be stored. Not to do so is 'to discriminate in favour of the technologically sophisticated criminal' (Canadian Law Reform Commission Report No. 24 *Search and Seizure*, at page 16).

The last Annual Report outlined at page 15 the guidelines that had been agreed to between the Australian Federal Police and the Law Council of Australia in October 1986 for the resolution of claims of legal professional privilege made during the execution of a search warrant on a lawyer's premises. The guidelines certainly resolved a number of the problems resulting from the extension of the privilege to search warrants, both from the perspective of the police as well as of the person claiming the privilege. In so far as the police are concerned, one of the advantages is that the guidelines require the claimant to institute proceedings asserting the privilege within a few days of the execution of the search warrant. However, once those proceedings have been instituted there are the inevitable delays in going through the pleading and interlocutory stages, getting the matter set down for hearing, and appeals from an adverse decision at first instance. Although the police may ultimately be successful in resisting the claim of privilege, in the meantime the investigation may have been wholly or partially stalled for a protracted period. Delay is very much a weapon and tactic that favours the suspect. This Office therefore considers that some method must be found to circumvent that tactic without at the same time compromising legitimate claims. One possibility that should be pursued is enacting a 'fast track' procedure for the resolution of such claims.

Offences Against Government Involving Property and Money - While there is a clear need to modernise Commonwealth property offences, the subject of Discussion Paper No. 5, an initial question is whether ideally that should take the form of a complete codification dealing with all types of conduct to the detriment of Commonwealth property interests, or whether the existing demarcation in this area between what is a Commonwealth or a State offence should be retained. At present certain property offences such as burglary and the various aggravated forms of stealing are not offences under Commonwealth law. Should such conduct be committed in circumstances adversely affecting some Commonwealth property interest it is punishable under the applicable State or Territory law. Such offences involving Commonwealth property are committed with far less frequency, and the Office has agreed with the tentative view of the Review Committee that the balance of convenience appears to lie with continuing to rely on State law.

The offence of 'stealing' under section 71 of the *Crimes Act 1914*, relying as it does on the common law offence of larceny, is quite outmoded and it and related offences clearly should be replaced with provisions modelled on the Theft Act 1968 (UK) and its Australian equivalents.

On the assumption that the offence of 'stealing' under section 71 will be replaced by a 'Theft Act' offence of 'theft', the Review Committee has raised for consideration to what extent that offence should overlap with the other basic 'Theft Act' offence of 'obtaining property by deception', for the latter offence under all 'Theft Act' models in both Australia and England replaced not only the statutory offence of false pretences but also the common law offence of larceny by a trick. The UK Criminal Law Revision Committee considered that there would only be a partial overlap between the 2 offences it proposed, in that only if the defendant received possession or control of the property by a deception, but not ownership, would there be an 'appropriation' for the purposes of the offence of theft such that either that offence or one of obtaining property by deception could be charged. However, the English Court of Appeal's decision in **R v Lawrence** [1970] 3 All ER 933 went much further, considering that in effect there was virtually a complete overlap between the 2 offences. To a similar effect was the decision in **Heddick v Dike** [1981] 3 A Crim R 139 concerning the equivalent Victorian provisions. However, the complete overlap approach has been the subject of academic criticism, and in fact later decisions in both England and Victoria, although not directly in point, are impliedly inconsistent with it.

The solution that was adopted in the A.C.T.. with its 'Theft Act' legislation was to expressly include in the definition of 'theft' the obtaining of property by a deception. An alternative solution has been

proposed by Professor Glanville Williams. He would limit an 'appropriation' for the purposes of the offence of 'theft' to a taking without the consent of the owner. The 2 offences of 'theft' and 'obtaining property by deception' would then become mutually exclusive.

The solution adopted in the A.C.T. is a pragmatic but nevertheless artificial one if the 2 offences are to be regarded as conceptually different, while the alternative advanced by Professor Williams also has the advantage that it puts the defendant on notice from the outset that it is alleged he obtained the property by a deception, and not by a theft 'simpliciter'. However, this Office has indicated to the Review Committee that for our part we would have no real difficulty if the complete merger approach was also adopted in the future consolidation of Commonwealth criminal law. Although it has not yet been tested in the A.C.T. courts, we can see no reason why it should not work.

The Review Committee has also raised for consideration whether the offence of imposition under section 29B of the *Crimes Act 1914* should be reproduced in the future Act, either in its existing or a modified form. In the context of existing Commonwealth property offences the offence of imposition has a number of advantages and it has been frequently resorted to by Commonwealth prosecutors in the past where money or other benefit has been obtained from the Commonwealth by means of an untrue representation. Not only is the prosecution not required to establish an intent to defraud, but the offence applies to the obtaining of things that are not property, such as the obtaining of employment or promotion as a Commonwealth officer by means of an untrue representation as to one's professional qualifications. However, the offence is not without its deficiencies. Apart from the uncertainty as to what in fact is meant by 'to impose on' the Commonwealth, it is unclear why the section fixes liability at the point in time when the Commonwealth is imposed on but before anything has actually flowed to the defendant as a result of the untrue representation. However, if 'Theft Act' offences of obtaining property, a benefit or advantage by deception were to be included in the future Act, along with a comprehensive set of summary offences of general application dealing with the making of false or misleading statements with a view to obtaining money or other benefit, it is difficult to see what useful purpose would be served by retaining the present imposition offence.

Most fraud on the Commonwealth is committed in the context of the administration of some scheme involving money going from the Commonwealth to individuals or bodies in the form of, for example, social security benefits, medicare payments, export development grants or home savings grants. Notwithstanding that often there is an available

charge or charges under the Crimes Act to deal with the fraud, the practice has been widespread for many years for the legislation administering such schemes to have their own special offences dealing with the obtaining of money or other benefit, by means of false or misleading statements. At pages 104-106 of last year's Annual Report this Office referred to the problems that can arise when such 'false statement' offences really do no more than duplicate the general provisions of the Crimes Act. Further, it is difficult to see any consistency in the characteristics of the offences created. Some are indictable, while others are punishable only on summary conviction. Some require proof of *mens rea* while others are strict liability offences. Finally, there are often quite disparate penalties provided. Compare, for example, the penalty for a breach of section 128B of the *Health Insurance Act 1973* which is 5 times that provided for a breach of section 174 of the *Social Security Act 1947*, notwithstanding that *mens rea* is an element of both offences, and both offences relate to schemes which depend to a significant extent for their efficiency on the honesty of claimants.

The matter has been taken up with the Review Committee which has indicated that it is 'disposed to think that a satisfactory set of comprehensive provisions can be drafted for inclusion in the future consolidating law, and the use of such provisions to the exclusion of the present provisions of special Acts would have quite significant advantages' (para 4.61 of the Discussion Paper).

Most fraud on the Commonwealth is not the result of a single transaction, but rather has the common characteristic of relatively small amounts of money being unlawfully obtained at regular intervals over an extended period resulting in moderate to very large amounts in total. This can present considerable practical difficulties in placing the full criminality of the defendant before the court in a defended trial on indictment. Although the available charges may run into the hundreds (and this is not uncommon in cases of medifraud or welfare fraud) as there must be some upper limit to the number of counts that can be put to a jury in fairness to the accused it is often necessary to proceed on representative charges only. Upon conviction the court imposes a sentence which reflects only the amounts involved in the charges before the court, and not the total amount defrauded.

If more than 2 defendants are involved in a fraudulent enterprise it will often be possible to reduce the available substantive offences to a single count of conspiracy to defraud. However, if only one person has been involved there is the question whether such repetitive conduct can be 'rolled up' into a single count of 'fraud' under section 29D of the *Crimes Act 1914*. Although there is considerable Canadian authority upon which

one can rely to support such a practice, there is the question whether it would conflict with Australian duplicity rules. However, the Review Committee has tentatively agreed with a suggestion made by this Office that the matter could be put beyond doubt in the future Act by providing that a series of acts of a similar nature extending over a period which have a common purpose and represent a continuing criminal scheme can be the subject of a single charge under the equivalent of section 29D.

Attempts - The DPP considers that there should be a 'codification' of the offence of attempt (dealt with in Discussion Paper No. 7) rather than continuing to rely on the common law based offence. The main impetus to codify the offence arises from the House of Lord's decision in **Haughton v Smith** [1975] AC 495 dealing with the vexed problem of impossible attempts. Notwithstanding the decision of the Victorian Court of Criminal Appeal in **Britten v Alpogut** (1987) 23 A Crim R 254 the fact remains that **Haughton v Smith** is a considered decision of the House of Lords which has been followed in 2 Australian jurisdictions. It is considered that the heresy of the 'impossibility doctrine' can only be finally buried by legislation. It would seem more sensible to do that in the context of statutory provisions setting out the elements of the offence of attempt, rather than attempting to graft the abrogation of the doctrine onto what in this area is the rather fluid base of the common law.

However, other advantages would flow from codifying the law of attempt. The common law has failed to come up with an all embracing definition of the *actus reus* of the offence. While accepting that the nature and scope of the offence is such that it may be incapable of precise definition, codification would at the least ensure that liability is determined against the one standard.

The DPP considers that the *actus reus* of any statutory offence of attempt should be drafted on the lines of the definition contained in the Criminal Attempts Act 1981 (UK), although the DPP has a preference for the UK Law Commission's version, viz. an attempt is an act 'which goes so far towards the commission of [an] offence as to be more than merely preparatory'. The words underlined reinforce to some extent the fact that 'mere preparation' is not enough, and could be of some assistance to a jury if the issue whether the allegation amounts to an attempt is to be left to it.

While the Review Committee indicated that it saw considerable merit in the reasoning of the UK Law Commission that the mental element for attempt should be expressed in terms of an intention to commit an offence, the DPP considers that, in addition, proof of recklessness should suffice for the *mens rea* of attempt if it will suffice for the completed offence. However, the common law position, that a charge of an attempt to commit

an offence of negligence or strict liability requires proof of *mens rea*, should be preserved in the future Act.

The DPP considers that whether an act amounted to an attempt should be a question of law under the future Act, and accordingly for the judge to determine. There is a very real prospect of perverse or inconsistent verdicts if the question is left to the jury to determine, particularly if the statutory definition of attempt merely states that it is something that goes beyond mere preparation.

The DPP agrees with the tentative view of the Review Committee that the future Act should not provide for a defence of withdrawal on a charge of attempt. Apart from the fact that such a defence would appear to be a contradiction in terms, there are sound policy reasons for retaining the common law position. Evidence of withdrawal may, of course, be relevant to the issue whether the accused had the requisite *mens rea*, but apart from that it is submitted that the only relevance of voluntary withdrawal once the offence of attempt has been committed is in mitigation of penalty.

Although the Review Committee has tentatively indicated that the impossibility doctrine should be abrogated by statute, it has raised for consideration whether an exception should be made by way of a statutory defence where, although the defendant was mistaken as to some fact from which it flowed as a legal consequence that he could not commit the substantive offence in contemplation, he was not influenced in forming his intention to engage in the conduct in question by his mistaken belief as to that fact. However, while accepting that the total abrogation of the impossibility doctrine could conceivably lead to harsh results in some rare cases should the persons involved be prosecuted, the DPP considers that it is not practical for the defendant's motive to form a basis for determining criminal liability in this area. A statutory defence on the lines indicated by the Review Committee is really the notion of 'objective innocence' upon which the House of Lords foundered in **Anderton v Ryan** [1985] AC 560. However, 'objective innocence' cannot provide the basis for constructing some formula for exempting the 'hard cases', for there can be no consensus as to who in truth is objectively innocent and who is not. The DPP believes that the only practical solution is to excise the impossibility doctrine from the criminal law completely, and for the 'hard cases' to be filtered out in the exercise of prosecutorial discretion.

Conspiracy - The DPP is firmly of the view that as a matter of policy conspiracy - dealt with in Discussion Paper No. 9 - should be confined to an agreement to commit what is a substantive offence under Commonwealth law. It is impossible to justify retention of an offence in a

form which imposes criminal liability for acts done in concert with others when those same acts would not be criminal if done by a person alone. Further, the extension of the offence of conspiracy at common law (and under section 86 of the *Crimes Act 1914*) to the non-criminal has been accompanied by uncertainty as to exactly what are the limits of the offence. Such uncertainty should not be tolerated in the criminal law. Accordingly, the DPP considers that paragraphs 86 (1) (b) - (d) should not be reproduced in the future Act.

The Review Committee invited submissions on whether the future Act, in fixing penalties for conspiracy, should adhere to the present approach of sections 86 and 86A of the *Crimes Act 1914*. At present the penalty for conspiracy to commit an offence is 3 years imprisonment, except where the conspiracy is to commit a substantive offence which is punishable by a greater penalty in which case the conspiracy offence is punishable as if the substantive offence had been committed. Thus, a conspiracy to commit, for example, a summary offence punishable by imprisonment for 1 year is itself punishable by imprisonment for 3 years! In addition, for reasons which are not entirely clear the separate offence of conspiracy to defraud under section 86A of the Crimes Act is punishable by 20 years imprisonment and/or $200 000 although the penalty for the substantive offence of fraud under section 29D of the Crimes Act is only half that.

Although the Review Committee indicated that it was inclined to the view that conspiracy should be regarded as so inherently culpable that one could justify the imposition of a greater penalty for the conspiracy than that available for the substantive offence, the preferred position of the DPP is that the penalty for conspiracy in *all* cases should be that applicable to the substantive offence. Even if it is accepted that those who agree to commit an offence and then proceed to do so are more culpable than the single offender, that is a factor which can be accommodated within the penalty range available for the substantive offence. If the DPP view on this question is accepted then it will be necessary to consider what should be the appropriate penalty for the equivalent of section 29D in the future Act.

The DPP has agreed with the tentative view of the Review Committee that the offence of 'fraud' in section 29D should be reproduced in the future Act in its present form, ie., that it should continue as a common law based offence. Although the offence is rather wide and indefinite in scope, it (and conspiracy to commit that offence) may be the only offence that can be charged in respect of certain kinds of fraudulent conduct, for example, the dishonest acquisition of information from the Commonwealth resulting in economic harm to the Commonwealth. To retain the offence ensures that the Commonwealth has at its disposal an offence which is

sufficiently flexible to enable the more ingenious instances of fraud on the Commonwealth to be penalised. In addition, there are also the more practical advantages of the fraud and conspiracy to defraud charge. A fraud may be perpetrated in circumstances where there are practical difficulties in the way of identifying with sufficient provision a deception such as to establish a charge of obtaining by deception or its equivalent. Deceit, however, is not an essential element of fraud. Alternatively, it may be possible for a complex fact situation to be reduced to a single count of conspiracy to defraud rather than charging a multiplicity of specific offences, particularly if in the latter case it would become necessary to proceed on a representative sample only.

The DPP has agreed for the reasons advanced by the Review Committee that the common law rule, that there can be no conspiracy to which the only parties are spouses, should be abolished in the future Act. The DPP has also agreed with the Review Committee that there should be no change in the common law rule with regard to a purported conspiracy with a mentally disordered person.

The DPP has submitted to the Review Committee that it would seem appropriate for the future Act to address the liability of parties to an agreement where one party is immune from criminal liability in respect of the substantive offence in contemplation. If the only other party to the agreement is a child under the age of criminal responsibility then of course the child cannot be liable for conspiracy as it is deemed unable to form the necessary intent for conspiracy. It is the view of the DPP that neither should the non-exempt party in such a case be liable for conspiracy, for there will not have been a true agreement between them. This is the position under section 2(2)(b) of the Criminal Law Act 1977 (UK) and it is the view of this Office that it should be reflected in the future Act.

Further, there are offences where, although the participation of at least 2 persons is required before an offence is committed, only the participation of one of those persons attracts a criminal sanction. An example is the offence under section 70 (1) of the *Crimes Act 1914* which penalises the *provider* of confidential information but not the *recipient* of that information, even though the latter may have willingly received it with full knowledge of the unlawfulness of the former's conduct. There is some authority that the person who is exempt from liability in respect of such a substantive offence may still be liable for conspiring to commit that offence (**Whitechurch** (1890) 24 QBD 420). However, if the legislature has seen fit not to make the willing participation in the offence of another an offence itself then it seems unconscionable that such an exempt person can still be penalised via the back door of conspiracy. As to the liability of

the non-exempt party in such a case, there will have been an agreement to do an act which, if committed, will constitute the commission of an offence by the non-exempt party. However, the DPP has indicated to the Review Committee that it has no real difficulty with the approach recommended by the UK Law Commission (Report no. 76 at paragraph 1.57) that the non-exempt party should not be liable for conspiracy in such a case. While a somewhat pragmatic approach to the policy issues involved, as the Law Commission observed (at paragraph 1.57) 'we do not think that, in practice, it will in any way hinder the enforcement of the law. The situations described are in the highest degree unlikely to become known until a substantive offence has in fact been committed'.

The DPP has submitted to the Review Committee that it sees no need to make any special provision for the case where the only other 'party' to a purported conspiracy is in fact a police agent. In the nature of things the police agent will have been incited to commit an offence either as a principal or as an accessory. In this regard, the Review Committee in Discussion Paper No. 10 has indicated that in broad principle there seems no reason why a charge of inciting another to be an accessory should not be available in the future Act.

The Review Committee raised for consideration whether it should continue to be an offence in the future Act to conspire to commit what is a summary offence. The DPP is strongly of the view that such should remain an offence under Commonwealth law. In this regard, although the conspirators go on to commit the summary offence contemplated, there may be quite proper reasons for charging a conspiracy (as where the agreement was to commit a large number of summary offences). Further, bearing in mind that a policy justification for the offence of conspiracy is to enable the police to intervene at an early stage without waiting for the offence in contemplation to be either committed or at least attempted, to preclude a prosecution for conspiracy to commit a summary offence would hinder law enforcement. The DPP also sees no need for a requirement that either the Attorney-General or the Director of Public Prosecutions must first consent to a prosecution for a conspiracy to commit a summary offence. The Director has sufficient powers to bring to an end a prosecution for such a conspiracy if its continuation would not be justified in the public interest, or to substitute a charge of a substantive summary offence or offences if that would be the appropriate course.

The DPP has agreed for the reasons advanced by the Review Committee that the future Act should not provide that a charge of conspiracy cannot be laid where the substantive offence in contemplation has been committed.

Secondary Offences and Offences by Corporations - Discussion Paper No. 10 deals first with offences by corporations. The main issue identified by the Review Committee in this area is whether the principles of corporate liability should be left to the common law or should be 'codified'. It can be cogently argued that the common law principles of corporate criminal liability (vicarious liability and primary liability) were fully established by at least 1944, and that the cases since then have essentially involved a refining of those principles. This Office is therefore of the view that 'codification' of the criminal liability of corporations would not have the effect of impeding the development of the law in this area, but rather would be restating well established principles. Further, legislation would have the advantage of clarifying some uncertain or contentious subsidiary points. Finally, if the future Act is to codify the general principles of criminal liability (an issue at present under consideration by the Review Committee) it would seem appropriate to include provisions on corporate criminal liability.

The DPP therefore inclines to the view that the time is ripe for legislation providing for the principles of corporate criminal liability, and that this area should no longer be determined solely by the common law. The question remains what form should this legislation take - that proposed in clauses 34 and 35 of the UK Law Commission's draft code (Law Com. No. 143) or more general provisions on the lines of sections 84 and 85 of the *Trade Practices Act 1974*?

The DPP agrees with the Review Committee for the reasons noted by the Committee that it would be inappropriate to enact provisions similar to those in the Trade Practices Act in legislation intended to be of general application to Commonwealth offences. Those provisions, particularly section 85, have the effect of removing vicarious liability as a basis for corporate criminal liability in the trade practices area. This may well have been the intention of Parliament, but such a restrictive approach would not seem to be appropriate for general application to Commonwealth offences. Any provisions of general application should reflect the well established twin bases of corporate criminal liability - vicarious and primary.

It seems to this Office that the approach adopted in the UK draft code not only encapsulates the existing common law rules of corporate criminal liability, but addresses most, if not all, of the subsidiary problem areas that have arisen in the application of the common law principles. If legislation were enacted on the lines of the UK draft code, case law will of course be relevant, but simply to the extent of illustrating, expounding and elucidating the application of the provisions to various fact situations.

Mention was made in last year's Annual Report of the review that had been conducted by this Office which identified a number of procedural impediments in the various Australian jurisdictions associated with the trial of a corporation. This Office drew the matter to the attention of the Review Committee in October 1987 and the issues involved were canvassed in this Discussion Paper. The Review Committee shares the DPP view that early action is necessary, and the only issue is the most appropriate method.

It seems that the Review Committee's preferred option is for the Commonwealth and the States to enact uniform legislation dealing with the procedure relating to the prosecution of corporations. This Office can readily understand why the Review Committee prefers this option rather than enacting Commonwealth legislation. Section 68 of the *Judiciary Act 1903* is central to the administration and enforcement of Commonwealth criminal law. It fulfils an important role in ensuring that Commonwealth criminal law is administered in each State upon the same footing as State law, thus avoiding the establishment of independent systems of justice. It must be conceded that Commonwealth legislation dealing with procedural aspects in the trial of corporations would be a major departure from the rationale behind section 68, and indeed that uniform legislation in this area would be the ideal. However, the DPP doubts whether, realistically speaking, uniform legislation is presently feasible. Further, 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*. Accordingly, this Office is inclined to the view that the Commonwealth would be justified in taking the unusual step of legislating to remove the procedural impediments in the trial of a corporation for a Commonwealth offence.

As to complicity, the common law principles of secondary participation have by and large served the Commonwealth reasonably well. It is perhaps for that reason that the Review Committee indicated its tentative view that it was not appropriate to have a complete codification in this area in the future Act. However, since the issue of this Discussion Paper the Review Committee has indicated that it proposes to examine whether there should be a codification of the general principles of criminal liability. If there is to be such a codification then it would be curious if, while such matters as the fault requirement, incapacity and defences are codified, parties to offences would still be largely regulated by the common law, the more so if, as appears likely from Discussion Paper No. 7, at least the inchoate offence of attempt is to be codified.

Although any codification in this area in the main would involve a restatement of the common law, codification would present the

opportunity to dispense with the traditional but archaic formulation of an accomplice as one who 'aids and abets' or 'counsels or procures' the commission of an offence. Notwithstanding the views expressed in **Attorney-General's Reference (No. 1 of 1975)** [1975] QB 673 it would seem that the better view is that those words are in fact technical terms used to distinguish the secondary participant who was present at the commission of the offence from the one who was absent. If as a matter of policy presence at the commission of an offence should be regarded as irrelevant, except as evidence of complicity, then it would seem appropriate to abandon those traditional formulations with their technical connotations in favour of words which, furthermore, would more accurately describe the concept of secondary participation in crime. The DPP considers that the verbs 'procures, assists or encourages' proposed in the UK Law Commission's draft code are appropriate replacements.

The DPP has raised the question with the Review Committee whether there is a need to retain in the future Act the words 'or by any act or omission is directly or indirectly knowingly concerned in, or party to' a Commonwealth offence in the equivalent of section 5 of the *Crimes Act 1914*. While they enable the Commonwealth prosecutor at present to neatly sidestep the distinction that is embedded, if only in theory, in the traditional formulation between the accomplice who is present at the commission of the offence and the one who is not, it is doubtful whether they extend the ambit of complicity beyond its common law limits. If the common law distinction is to be abandoned for all purposes in a more contemporary formulation of accessorial liability such as 'procures, assists or encourages', it must be doubted whether there is any need to retain those words.

As to the fault element for complicity, the UK draft code would impose criminal liability where a person is reckless as to the essential matters which constitute the offence. While this does not represent the present law in Australia (and indeed it must be doubted whether it represents the law in England,) the DPP sees merit in the Law Commission's proposal.

Codification would also present the opportunity to clarify the uncertainty that exists on a number of subsidiary points in this area, for example, whether an undercover agent is excused from criminal liability as an accessory where, although he has acted with the motive of frustrating the principal's offence, in so doing he has committed the *actus reus* of the offence with the *mens rea* required.

Discussion Paper No. 10 also dealt with accessories after the fact. While the Review Committee has expressed the tentative view that section 6 of the *Crimes Act 1914* remains basically acceptable subject to providing for

a sliding scale of penalties, the DPP considers that more fundamental changes in this area are necessary.

It would appear that a charge under section 6 may be laid in respect of assistance rendered to a person convicted of an offence against Commonwealth law to break out of prison. If so, there is an unnecessary duplication with the other offences of escape in the *Crimes Act 1914*, particularly in the light of the recent amendments to the Crimes Act in this area, which should not be preserved in the future Act.

The Office has agreed with the Review Committee that the equivalent of section 6 in the future Act should continue to extend to assistance in the disposal of the proceeds of the offence.

Although there would appear to be no reported case on section 6, extrapolating from the authorities on the common law position it would seem that to establish a charge under that section it must be proved that the person charged as an accessory after the fact acted with the purpose of assisting the principal offender. This Office considers that there is no justification for such a narrow approach to be taken of this part of the mental element of the offence. Liability as an accessory after the fact should reflect the harm or potential harm of the defendant's actions - not his motives.

The other mental element in the offence under section 6 is that the defendant must know that the principal offender is guilty of an offence against Commonwealth law. This is too restrictive for it excludes from liability all but those who are certain that an offence has been committed or, at most, are wilfully blind as to the matter.

Section 6 is also too restrictive in that it would seem necessary that the defendant must know the precise offence the principal offender has committed. Thus a person would not be guilty as an accessory after the fact if he assisted someone to escape prosecution whom he believed was guilty of murder when in fact the principal offender had committed some lesser offence such as aggravated assault. On policy grounds there would seem to be no justification for continuing what appears to be the present position in the future Act.

Finally, as to incitement the offence under section 7A of the *Crimes Act 1914* has a somewhat wider scope than that at common law, although the limits of the former are rather uncertain. The thrust of the DPP's submissions to the Review Committee in this area were that the equivalent offence in the future Act should merely restate the limits of the common law offence. The justification for the offence of incitement is that it is a

preventative measure. It permits the criminal law to intervene at a relatively early stage by deterring persons from acting in a manner that encourages others to commit offences, irrespective of whether or not the latter are disposed to actually commit those offences, as well as to discourage those to whom the incitement has actually been communicated from proceeding to commit the crime they have been encouraged to commit. However, the extensions of the offence of incitement under section 7A beyond its common law limits are open to the objections that, not only are they vague and ambiguous, but more importantly they would seem to impose criminal liability at too early a stage for what is an offence of general application.

The penalty for the offence of incitement under section 7A is ridiculously low, and the DPP agrees with the Review Committee that the penalty should be that provided for the relevant substantive offence.

Some Common Issues - There was a number of common issues raised in Discussion Papers Nos. 7, 9 and 10 which are appropriately dealt with together.

While the so called 'impossibility defence' has been discussed above in relation to the offence of attempt, the common law principles relating to impossibility which were laid down in **Haughton v Smith** [1975] AC 476 apply equally to the other inchoate offences of conspiracy (**DPP v Nock** [1978] AC 979) and incitement (**R v Fitzmaurice** [1983] QB 1083). Clearly impossibility should be ruled out as a defence in relation to all the inchoate offences.

Secondly, the 3 inchoate offences of attempt, incitement and conspiracy constitute a distinct offence from the substantive offence. Accordingly, they are not subject to any procedural requirements applicable to the substantive offence such as the need for consent to a prosecution or time limits on the institution of a prosecution unless express provision is made in the relevant legislation. Clearly this anomaly should be corrected in the future Act.

Finally, considerable uncertainty exists as to the relationship of the inchoate offences with complicity. While it is clear, for example, that offences of aiding and abetting an incitement, or aiding and abetting an attempt, are known to the common law, it is unclear whether it is an offence at common law to incite a person to aid and abet the commission of an offence by another, to conspire to aid and abet, or to aid and abet a conspiracy. There is also the question whether there can be a double inchoate offence in any combination. While the offence of attempted incitement is known to the law, is it open, for example, to charge an

attempt to conspire? While these uncertainties were addressed in the UK draft code, it is the view of this Office that its proposals were too restrictive in a number of respects. The drafters of that code considered that, while it should be made clear that it is an offence to aid and abet a conspiracy (we agree), it should not be an offence to conspire to aid and abet or to incite an act of complicity. This Office has agreed with the tentative views to the contrary of the Review Committee.

Computer Crime - An initial question raised by the Review Committee in Discussion Paper No. 12 was whether it is feasible, necessary or desirable for the Commonwealth to legislate to control computer related crime where the activity in question involves private computer systems.

This Office has agreed with the Review Committee's tentative conclusion that Commonwealth legislation regulating or prohibiting activities involving private computers is not warranted. The legislative competence of the Parliament is quite limited in this area. Activities such as hacking into a private computer via Telecom lines could be prohibited pursuant to the power in paragraph 51 (v) of the Constitution and it is arguable that computer frauds perpetrated on commercial or financial institutions otherwise than through telecommunications facilities would fall within another head of legislative power, such as the trade and commerce power in paragraph 51(i). However, in the absence of a general power to legislate with respect to computers or like systems any regulation by the Commonwealth affecting private computers would be piecemeal, operating only in so far as the subject matter is within, or incidental to, some legislative head. Further, changed factual circumstances and technological advances altering the nature of computer related activities may place those activities beyond the reach of any existing Commonwealth legislative power.

As a matter of policy it would seem undesirable to enact Commonwealth legislation which, by reason of the marginal connection with a legislative head of power, may have a limited and somewhat random application to private computers. The jurisdictional dilemma raised by interstate computer activity would not of itself seem to be justification for Commonwealth legislative intervention in this area. Nor is the jurisdictional problem only capable of resolution by Commonwealth legislation. Section 80A of the *Crimes Act 1958* (Vic) contains a formula whereby jurisdiction may be asserted in respect of interstate offences provided there is a real and substantial link between the relevant conduct and Victoria. While it is recognised that a cross-border computer transaction may constitute an offence under the law of different States, the rule against double jeopardy would preclude prosecution in more than one jurisdiction.

As to 'computer abuse' involving Commonwealth computers, while there would appear to be a need for legislative reform in this area, an entire statutory scheme to deal with 'computer abuse' would seem to be an over-reaction. Generally speaking, computers and related electronic devices are not themselves a source of new offences; rather they represent a new means or target for the commission of existing offences. This Office agrees with the Review Committee that the existing provisions of the *Crimes Act 1914* are broadly adequate to deal with frauds effected by means of a Commonwealth computer or frauds on the Commonwealth by means of any computer. In this regard, the decision of the Queensland Court of Criminal Appeal in **R v Baxter** (1987) 27 A Crim R 18 has overcome a potential problem in the application of section 29B of the Crimes Act to computer fraud - that an untrue representation can only be made to a human agent. However, if section 29B is not reproduced in the future Act the present problem with 'Theft Act' obtaining offences (that a machine cannot be deceived) can be overcome by a provision on the lines of section 6 of the *Crimes (Computer) Act 1988* (Vic).

In some instances making the facts of a computer related crime fit an existing offence is a tortuous and artificial process, and some forms of computer abuse simply will not fit into existing statutory provisions. Unauthorised access to a computer is an obvious example. However, there are important policy issues which must be addressed in deciding the form that an offence of unauthorised access should take. Should it be an offence of unauthorised access per se, or should such an offence be qualified by some specific intent, resulting damage or loss or the nature of the information revealed. As to the latter, the DPP can envisage a number of practical problems in prohibiting unauthorised access to a Commonwealth computer by reference to the nature of the information revealed. For one thing it assumes that there is a clear line between information to be protected and other information. Even if that assumption is correct, identifying in statutory form where the line begins and ends may be quite difficult.

Further, the problem of deciding what information warrants protection poses many difficulties. Some information is on its face sensitive or confidential. In other instances information may be sensitive at a particular time or valuable in certain hands so that what would ordinarily be harmless detail is valuable or dangerous depending on who gains unauthorised access and when. Finally, where information is stored in paper form in most instances the only practical means for the outsider to obtain access to that information without the assistance of an insider is to use means authorised by statute or administrative practice (e.g. FOI Act). However where information is stored on computer the technologically

aware outsider can bypass the FOI Act, and the safeguards in that legislation on the release of information.

Other matters: At the request of the Review Committee this Office has provided preliminary submissions on 'offences involving the administration of justice' and 'bribery and corruption'. At the time of writing the Review Committee has yet to issue discussion papers on these 2 areas.

NSW LAW REFORM COMMISSION: *POLICE POWERS OF ARREST AND DETENTION*

In November 1987 the Office provided comments on the discussion paper issued by the New South Wales Law Reform Commission on *Police Powers of Arrest and Detention.* The discussion paper broadly covered the same ground as the 2 discussion papers issued by the Review of Commonwealth Criminal Law on *Arrest and Related Matters* and *Matters Ancillary to Arrest.*

The DPP was in general agreement with the tentative proposals of the Commission. However, in 2 areas the Office disagreed with those proposals. First, while the Commission had tentatively proposed that the police be authorised to detain an arrested person for investigation for such time as is reasonable in all the circumstances, it would place an upper limit on that period, which it considered should be no more than 4 hours from the time of arrest, albeit with provision for extension of that initial period. For the reasons advanced by the Coldrey Committee in its report *Custody and Investigation* this Office advised that it does not favour what was essentially a fixed time limit approach, particularly if the initial period of detention was to be as short as 4 hours. In particular, such a short period of detention would hamper the police in their investigation of more complex matters involving multiple offences and multiple offenders. In this regard, in a sense the Commission's proposals would be even more restrictive than those applying in South Australia, as apparently it was not intended that any allowance be made for necessary delays in investigating the arrested person during the initial period of 4 hours, such as travelling to a police station if arrest took place elsewhere. However, if the Commission was still minded to recommend an upper limit to the initial period of police detention then the DPP considered that it should not be less than 8 hours with allowance being made for necessary delays in carrying out an investigation of an arrested person.

Secondly, the Commission proposed that there be a 'presumption of inadmissibility attaching to any evidence obtained in contravention of procedural rules prescribed for the exercise of powers of arrest and investigation' (pages 133 - 134). It was not entirely clear from the

relatively brief outline of the Commission's proposals in this area as to what extent they would represent a move away in practice from a court's existing discretions to exclude either a voluntary confession if unfairly obtained, or unlawfully or improperly obtained evidence. For example, a confession obtained from a person in custody outside the initial period of 4 hours where no extension had been sought would be obtained during a period of illegal detention. Nevertheless, under the Commission's proposals such evidence might still be admitted if that 'would not be unfair nor contrary to the interests of justice'.

Be that as it may this Office considers that such matters should continue to be regulated by the court's existing exclusionary discretions. In so far as illegally obtained evidence is concerned, it is true that in the past the discretion has often been exercised against exclusion. However, that must be seen in its proper context. Until relatively recently there has been a marked disinclination on the part of governments in both the United Kingdom and Australia to repose express powers in the hands of the police to investigate an arrested person, and at least in Australia the police have been forced to work within the confines of a common law rule that recognises arrest only as a means of bringing a suspect before the courts. Many courts have nevertheless appreciated the public interest in the police being able to investigate offences properly, and the strictures of the common law rule have sometimes been ameliorated, not by a relaxation of the rule as occurred in England, but by exercising the discretion in favour of admitting evidence if obtained during a period of illegal detention although otherwise fairly obtained. Legislation along the lines the Commission proposed in its discussion paper would provide the police with a proper framework within which to investigate an arrested person. There would no longer be a need to rely on a beneficial exercise of the discretion to maintain a de facto balance between the interests of the suspect and those of the public. This Office considers that within such a new framework the courts would be far more disposed to enforce compliance by excluding evidence if obtained, although fairly, in breach of the new procedural rules. In short, this Office considers that what the Commission appeared to regard as the desirable position would in fact be achieved without any change to the court's existing exclusionary discretions.

SENTENCING OF FEDERAL OFFENDERS

In September 1987 the Australian Law Reform Commission issued 2 discussion papers (DP 29 - *Sentencing: Procedure* and DP 31 - *Sentencing: Prisons*) in connection with its sentencing reference, followed in October by a third discussion paper (DP 30 - *Sentencing: Penalties*). Early in 1988 the Commission submitted an interim report (No. 43) dealing only with the conditional release of federal offenders from

prison. This had been requested by the Attorney-General in advance of the final report and attempted to deal with a number of anomalies and deficiencies in existing laws relating to the conditional release of federal offenders on the basis that the present policy framework would be maintained. It is expected that the Commission's final report will be tabled in the Parliament during the Budget session this year. The following is confined to the tentative proposals advanced by the Commission in DP 29 and DP 30 (the DPP did not provide any comments to the Commission on DP 31).

The DPP opposes the main thrust of the Commission's tentative proposals in DP 29 dealing with the sentencing process. At one level it was considered that the Commission had not made out its case for the adoption of a number of its tentative proposals even as an ideal. However, a more fundamental objection was that for the Commonwealth to adopt many of the Commission's tentative proposals would involve a significant departure from the long standing policy enacted in the *Judiciary Act 1903* that the trial of a federal offender in a State court should be conducted generally in accordance with the procedural and evidentiary rules of the jurisdiction in which the trial is conducted.

While reliance by the Commonwealth on the State court systems for the prosecution of most federal offenders has undoubted advantages for the Commonwealth, that also imposes limits on what the Commonwealth can realistically do in making special provision for the trial and sentencing of federal offenders. Irrespective of what merit any of the Commission's tentative proposals might otherwise have were they to operate within a unitary court system, to require a State court when dealing with a federal offender to comply with sentencing rules and procedures that are so dissimilar from those normally applied by that court would, in the opinion of this Office, simply be a recipe for confusion, with mistakes by all concerned inevitable. In short, the remedies the Commission advanced in this discussion paper would, in the view of the DPP, prove to be worse than that which is said to ail the sentencing process at present.

That is not to say that the Commonwealth should be content to always take State law as it finds it. There are anomalies and deficiencies, particularly in the area of conditional release. However, any modifications or exceptions that the Commonwealth makes in the application of State laws to federal offenders must be workable.

The DPP was equally disappointed with the tentative proposals advanced in DP 30 dealing with penalties. It must be doubted whether a system of federally prescribed sentencing options as proposed by the Commission is feasible. Of particular concern was the radical restructuring of penalties

proposed by the Commission. The thrust of the Commission's proposals was that there should be a downward adjustment of existing maximum penalty levels to accord with what the Commission believed were actual penalties imposed. The categories proposed by the Commission do not accord with the Government's current policy. Further, the Commission's proposals do not take account of the fact that the maximum penalty for an offence is fixed by reference to a 'worst case' although many breaches will be at the lower end of the culpability range.

Finally, the DPP finds extraordinary that in the issued discussion papers and the interim report the vexed problem of the federal/State offender was largely ignored.

ALRC GENERAL INSOLVENCY INQUIRY

During the year the DPP made a submission prepared by DPP Brisbane to the Australian Law Reform Commission commenting on the issues raised in the discussion paper issued by the Commission in connection with its general insolvency inquiry.

While this Office was in general agreement with the proposals put forward in the discussion paper and draft legislation, there were some areas where it was considered that the proposals needed strengthening.

The proposal for the voluntary administration of insolvent companies following a declaration of financial difficulty which would automatically result in a 28 day stay on actions or proceedings against the company or its property, while in general a very worthwhile proposal, would be open to abuse by related companies or preferred creditors who could use the moratorium to distance assets of the company from the administrator. It was considered that the administrator should be empowered to seek injunctions against related companies or preferred creditors to maintain the status quo until the administrator had had an opportunity to make proper investigations. The injunction should be available even though the administrator had not completed all necessary investigations and therefore would not otherwise be able to commence proceedings.

In relation to bankruptcy proceedings, the Commission's proposals would abolish the concept of an act of bankruptcy and premise the proceedings on evidence that the debtor is unable to pay his or her debts, evidence of which would be limited to proof of:

(a) failure to comply with statutory demands;

(b) departure from or remaining out of Australia by a debtor with an intention of defeating, delaying, or obstructing a creditor of that debtor; and

(c) unsatisfied execution against the property of the debtor.

The Commission proposed that the existing criteria of territorial connection should be retained, but should be related to the time at which the debt or debts was or were incurred, and to introduce a further criterion, namely the presence of property in the jurisdiction at the time the application for a bankruptcy order is filed. However, this latter requirement would enable insolvent persons to avoid bankruptcy by removing assets from the jurisdiction before the application could be filed and should be abandoned.

In relation to partnerships the Commission considered that it would be undesirable for insolvency law to intrude into the basic principles of partnership law and allow a trustee in bankruptcy the right to wind up a partnership. However, a trustee may encounter great difficulty in selling a partnership interest where the other partners do not consent to the sale and will not buy the interest themselves. Often they continue to employ the bankrupt, the firm has the same appearance to clients that it always had, and when the bankrupt is discharged the interest as a partner can be resumed and no one is any the wiser. This scenario is more likely to occur if the Commission's proposal to reduce the term of the bankruptcy to one or 2 years is implemented. Accordingly it is very important that a trustee have a right to wind up a partnership if within a specified period of time the share or interest of the bankrupt is either not sold or the other partners are not prepared to buy out that share.

It is felt that the proposed legislation does not adequately tackle the problems caused by discretionary trusts. It is becoming common for financial 'high flyers' to ensure that no or very few assets are held in their own name. Often, however, they are shareholders and/or directors of a trustee company which make distributions through a family trust to children or other beneficiaries who then lend the money back to the trust so that it continues to be under the control of the shareholder/director but in the event of bankruptcy is not available for disbursement to creditors. Discretionary trusts with company trustees are the most common means used to defeat creditors, and their use for this purpose is increasing. This is an area where legislation is needed to allow the corporate veil to be lifted and for benefits available to bankrupts through this means to be recovered for the benefit of creditors.

One of the greatest problems encountered with many bankrupts is that they continue to have available to them after bankruptcy significant financial resources (whether in the form of property or income) which allow them to maintain a high standard of living, but which cannot be made available for the benefit of creditors because the resources are outside the legal control of the bankrupt. The Commission proposes that in this situation the court might order the bankrupt to contribute a capital sum for the benefit of creditors. However it is very difficult to see how such an order could be enforced, when to all intents and purposes the bankrupt has no capital out of which the sum could be paid. It may be that existing general law principles enable the separate entity of a company to be disregarded and transactions involving the use of a trust to be regarded as a sham. The decision of the Full Federal Court in **Sharrment Pty Ltd and others v Official Trustee in Bankruptcy** (unreported, 3 June 1988) clearly indicates the need for legislative reform in this area.

CASH TRANSACTION REPORTS ACT 1988

On 13 May 1987 the *Cash Transaction Reports Bill 1987* was introduced into the Parliament as part of a package of legislation designed to attack organised crime. The Bill had not been passed when Parliament was dissolved for the July 1987 election. The Bill was reintroduced in November 1987 and was referred to the Senate Standing Committee on Legal and Constitutional Affairs to consider and report upon certain matters, including the effectiveness of the proposals in the Bill to meet the objective of countering the underground cash economy, tax evasion and money laundering.

At the invitation of the Senate Committee the DPP provided a written submission in February 1988, and on 25 February 1988 officers of the DPP attended before the Senate Committee to answer questions concerning that written submission. The Bill has since been enacted, although at the time of writing only one offence creating provision and the provisions permitting the Cash Transaction Reports Agency to be established have been proclaimed to come into operation. It is understood that the provisions of the Act requiring the reporting of cash transactions will not come into force until the Agency has been established and there has been consultation with cash dealers.

In its submissions to the Senate Committee the DPP supported the proposed legislation. While the novelty of the legislation in the Australian context made it difficult to assess in detail how effective it would be, the DPP considered that it was likely to be a useful investigative and prosecution tool, particularly in the areas of tax evasion, drug trafficking and money laundering. The ability to trace the flow of funds both inside and outside Australia is an important weapon in not only the detection and

prosecution of crime but also in depriving criminals of the proceeds of their illegal activities.

The DPP indicated to the Senate Committee that it regarded the proposed Cash Transaction Reports Agency as the key to the effectiveness of the legislation. If financial information on suspected criminal activities is consolidated rapidly and made readily available to law enforcement bodies it would be of significant use in investigation and court proceedings. On the other hand, if the information is not collated and easily accessible in a convenient form the danger is that the Agency would become merely a storage vault.

Under the legislation the DPP is not within the definition of a 'law enforcement agency' for the purpose of having direct access to CTR information. Although that information may be communicated to the DPP where that is for the purposes of or in connection with legal proceedings or proposed or possible legal proceedings, the DPP apprehends some difficulties as a result of being denied direct access in being able to provide timely legal advice to investigators during the investigation stage.

10. ADMINISTRATION

FINANCIAL MANAGEMENT

There have been many major changes introduced during the last 18 months in the areas of budgeting, estimating, purchasing, accounts payment, travel, office services and the provision of financial information. Some of these have meant the devolution of functions to relevant areas within the Office. These changes have increased efficiency. They have also led to the reorganisation of some of the functions to more closely align support staff with the operational area.

Program Budgeting - This form of budgeting was introduced in 1987-88. It was used to identify resource usage across the 3 programs:

- Executive and Support - which covers those areas involved in the exercise of statutory responsibilities, and support areas which cannot be directly costed to specific programs;

- Prosecutions - which covers those areas of the organisation whose work is directly related to the prosecution of offences, including the legal registry and fines and costs activities; and

- Criminal Assets - which covers those areas involved in the co-ordination and undertaking of activities which aim to recover the proceeds of crime.

Much has been said about program objectives and performance indicators. As an organization the DPP is largely dependent on work being referred to it by other agencies. However, we have an overriding responsibility to contribute to the effective administration of justice. Our primary aim is to ensure that the criminal laws of the Commonwealth are properly enforced both to punish malefactors and to deter future criminal activity. Illustrations of our performance are given elsewhere in this report.

As a general observation, program budgeting has given the DPP the means to establish its base costs in each of the programs and to focus on resource usage for the different types of work undertaken. This will form a valuable base for decision-making and providing advice to Government on the relative costs of law enforcement initiatives. The organisation has now matured and can devote more resources to strategic planning. The benefits, in terms of outcome reporting, will become more evident during 1988-89 as the Office becomes increasingly proficient in presenting program information.

Financial Reforms - The Office does not have resources that can be easily diverted to address the volume of policy, procedural and training work that is required to fully implement all Government reforms of the type referred to at the outset. Nevertheless, substantial work on reforms has been undertaken and various projects have been implemented or substantially completed. In addition, care has been taken to ensure that the capacity of legal staff to manage and undertake legal work has not been reduced by imposition upon them of routine administrative tasks.

The reforms are seen to be a major aid to the redesign of positions. They are a significant factor to be considered when implementing the productivity measures associated with the recent second tier agreements, not just for administrative services officers, but also for librarians and lawyers. It is for these reasons that the DPP considers the full benefits of the reforms will not be realised for at least another 12 months.

Although the estimating procedures have been greatly simplified by the Department of Finance, in some ways the full benefits have not been realised because of the introduction of portfolio budgeting. Despite concerted efforts by the individuals concerned there is no doubt that the need to liaise and negotiate with the Department of Finance through a central point in the Attorney-General's Department has created problems and delays due to double and sometimes treble handling of information. Following consultation and negotiations it is hoped that these problems will be overcome in 1988-89.

As the Attorney-General's Department undertakes the final processing of accounts we are unable to say with any certainty what our performance was relative to prompt payment of accounts. Audit inspections have shown compliance with the requirements by the DPP to the extent practicable. The type and level of supplies and services purchased by the DPP do not lend themselves to substantial negotiation of discounts, but the Office will continue to pursue such avenues as are open to it during 1988-89.

The use of credit cards is gaining momentum and it is in this area that we see real savings accruing in terms of timely payments and quicker processing.

Major savings were expected to result from implementing the reforms proposed by the Efficiency Scrutiny Unit in the way travel is arranged, approved, undertaken and paid for. We have adopted, to the extent practicable, all suggestions made by the Unit on ways to effect savings but the full extent of these are yet to be assessed. It has taken 6 months to establish effective working arrangements with the travel agent selected by

the Government and with only minor exceptions the system is working in all States. A significant proportion of the workload in the travel area is arranging travel for witnesses. It is more efficient for our officers to continue to make travel arrangements for witnesses, rather than have them make their own arrangements, therefore our capacity to effect savings and procedural changes is limited.

During 1987-88 the Office undertook a fraud risk analysis and produced a Fraud Control Plan. The prevention and control measures are being implemented.

Budget Management - Actual outlays for the year were $2m less than anticipated. This resulted from revenue raised following the transfer of the fines and costs function to the DPP, and from an underspending of $1.6m in legal expenses. Several factors contributed to this saving, including an increased use of in-house counsel, guilty pleas, some trials which took less time than anticipated, and inevitable court scheduling difficulties. The increasing use of video technology for trials is contributing to the reduction in time taken.

A difficulty arose in the area of salaries. Additional funds were required to cover the lawyers' second tier award late in the financial year. The submission to the Conciliation and Arbitration Commission indicated that the Office would effect savings through management efficiencies rather than staff or salary savings, and that the major saving would come through a reduction in the use of outside counsel.

The DPP does not have the significant Administrative Service Officer structure that is necessary to ensure immediate savings in terms of reduced higher duties allowance and reduced supervisory levels. Until we have fully implemented the Office Structures Review we will not be in a position to fully absorb the savings determined by the Department of Finance. For this reason we have opted to fund 30% of these savings from our administrative expenses funds.

One highlight in 1987-88 was the ability of the Office to partially absorb the efficiency dividend applied to the administrative expenses vote through a detailed review of its ADP assets and maintenance policy. Significant savings were identified in the area of maintenance and during 1988-89 it is hoped that resources can be devoted to a similar project in respect of other assets.

Fines and Costs - As foreshadowed in last year's report, this Office assumed responsibility in those States where we have regional offices for the fines and costs function previously undertaken by the Attorney-

General's Department. The transfer was completed in all regional offices by January 1988. The recovery rate has been improved and many of the processes have been streamlined. The courts in each State have been very co-operative, particularly in Victoria where we now operate under a system of blanket instructions. Action has been taken in respect of 100% of the debtors and the introduction of an ADP based debt recovery system during 1988-89 will further streamline the process and increase our monitoring capability.

Since taking over the function we have disbursed in excess of $1.5m, of which $500 000 has gone to consolidated revenue and nearly $500 000 has gone to the Department of Social Security. The rest has been divided amongst many other government departments and agencies, notably the Australian Taxation Office ($59 000), Telecom ($60 000), Commonwealth Bank ($44 000), Department of Transport and Communications ($55 000) and the Health Insurance Commission ($29 000).

BUDGET OUTCOME BY PROGRAMS

Summary

	Finance		Staffing	
	87-88 Estimate $'000	87-88 Actual $'000	87-88 Estimate (Staff Years)	87-88 Actual
1.1 Prosecutions	15 061	13 182	225	223
1.2 Criminal Assets	2837	2238	60	52
1.3 Executive & Support	5036	5502	111	120
TOTAL	**22 934**	**20 922**	**399**	**395**

1.1 Prosecutions

	1987-88 Appropriation $'000	1987-88 Actual $'000
Appropriation Bill No 1		
Running Costs		
- Salaries(181.1)(P)*	7167	7200
- Administrative expenses(181.1)(P)	2607	2846
Compensation and Legal(181.2)(P)	5425	3565
TOTAL OUTLAYS	**15 199**	**13 611**

* The (P) indicates that only a portion of the Appropriation Item 181.1 has been used in this program.

1.2 Criminal Assets

	1987-88 Appropriation $'000	1987-88 Actual $'000
Appropriation Bill No 1		
Running Costs		
- Salaries(181.1)(P)	2040	1541
- Administrative expenses(181.1)(P)	797	551
Compensation and Legal(181.2)(P)	-	171
TOTAL OUTLAYS	**2837**	**2263**

1.3 Executive and Support

	1987-88 Appropriation $'000	1987-88 Actual $'000
Appropriation Bill No 1		
Running Costs*		
- Salaries(181.1)(P)	3297	3763
- Administrative expenses(181.1)(P)	1603	1603
Compensation and Legal(181.2)(P)	12	12
Appropriation Bill No 2		
Plant & Equipment (818.1.4)(P)	124	124
TOTAL OUTLAYS	**5036**	**5502**

*Running Costs have been amended to reflect the provision for the Director's salaries and allowances which were previously a charge to a Special Appropriation.

Receipts - During the year money totalling $429 000 was received in respect of Fines and Costs and $25 000 was received through the operation of the Proceeds of Crime Act.

In respect of the latter, the total received by the Commonwealth was in the order of $250 000.

PERSONNEL MANAGEMENT

The recruitment and retention of high quality legal staff is a concern in DPP Offices throughout Australia. The marked disparity between public and private sector salary rates is now having an effect on recruitment not only at the senior levels of the legal officer career structure, as was most noticeably the case in recent years, but also at the entry point for newly qualified lawyers. The solution to the problem is not straightforward, given that the DPP is not free to offer salaries outside the prescribed rates, and a number of methods for attracting staff are being explored. In the meantime the commitment of senior staff to the staff selection process continues to be of high priority.

Occupational Health and Safety - A non-smoking policy has been introduced throughout DPP Offices, in line with the general Australian Public Service policy of a smoke free work place.

Industrial Democracy - The National Industrial Democracy Committee last met on 25 November 1987. Regional Industrial Democracy Committees continued to meet on a regular basis, but no matters were referred to the national body.

Under the Industrial Democracy Plan, meetings of the National and Regional Committees were required to be held at least twice yearly. In its review of operating procedures the National Committee noted that while the arrangements for regular meetings were effective and productive in the large offices, there were difficulties in the smaller regional offices and at the national level as the staff associations (with the exception of the Australian Government Lawyers Association) were unable to attend on a regular basis. As a result, the November meeting agreed to revised procedures, requiring a national meeting to be held every 2 years and regional meetings on either a regular or ad hoc basis as decided on a regional basis.

Outside the formal consultative council framework regular staff and lawyers meetings take place to ensure that lines of communication remain open between management and staff on work related issues. In addition, local weekly newsletters, the DPP Staffing Bulletin and the DPP Bulletin keep staff informed of changes occurring in the Australian Public Service and the legal community which affect them.

Summer Clerks - The practice of offering temporary employment as a 'summer clerk' to penultimate and final year law students during the summer university long vacation was continued and extended to all States.

As part of the commitment to, and program for, Equal Employment Opportunity, at least one summer clerkship in each State was reserved for an Aboriginal law student.

Staff Development - Both legal and administrative staff expressed interest in the range of development opportunities offered outside the DPP.

- Ms Bronwyn Scheelbeek, Assistant Director, SES Level 1, with the Brisbane Office was one of 20 female officers accepted for the Public Service Commission's pilot management development program for women in the SES and its feeder groups, the Senior Women in Management Program. Residential coursework and attendance at some of the

mainstream EDS learning modules has been complemented by a work placement with the Queensland State Government Office of Public Service Personnel Management.

• Mr Terry Franklin, Executive Officer, Administrative Service Officer Class 8, with the Administrative Support Branch, Melbourne Office, was selected to participate in the 1988 intake of the Executive Development Scheme. In February Mr Franklin commenced his first work placement under the scheme with the Program Management and Budgeting Branch of the Department of Finance in Canberra.

Training - The DPP does not have resources dedicated to administrative and non-legal training. The relatively small size of the DPP, the low number of administrative staff and their location throughout Australia has meant that there are more cost-effective methods of meeting staff training needs than through the use of in-house facilities. Considerable use is made of courses and seminars offered by other departments and professional bodies in the various States, and staff have participated in a broad variety of training and information activities.

Training of legal professional staff is mainly co-ordinated by Sydney and Melbourne regional offices. Requirements for mandatory continuing legal education (MCLE) for all solicitors in NSW as a condition of retaining a practising certificate can be satisfied through attendance at lectures presented by lawyers from the Sydney Office.

Within the Melbourne Office a firm of consultants was engaged to undertake a training needs analysis for legal staff, and to develop appropriate training activities. A number of the consultants' recommendations have been implemented and the development of suitable training courses is proceeding. It is anticipated that at least some of these courses will be available for all DPP legal staff.

Each of Sydney and Melbourne have allocated legal training responsibilities to a lawyer within the Office. It is envisaged that the experiences gained from these training efforts in Sydney and Melbourne will be used throughout the DPP.

DPP staff were also involved in the presentation of seminars for investigators from Commonwealth Departments, dealing with legal issues in the investigation process and giving evidence in criminal prosecutions. These seminars are consistently well received by the Departments whose officers attend. Such courses will continue, and we look to expand their scope and availability. To this end a video has been produced by the

Sydney Office, demonstrating aspects of conducting interviews during an investigation, giving evidence-in-chief and cross-examination. The video will be used during the seminars and as an adjunct to papers setting out the legal rules relevant to criminal investigation.

Conferences - Regular conferences continue to be an effective forum for Head Office and regional office staff to discuss topics of mutual interest or concern.

Two conferences were held for Deputy Directors, the first in Melbourne in October and the second in Canberra in April. Participants at the October conference included the Directors of Legal Services from Adelaide, Hobart and Darwin.

Two conferences for Administrative/Executive Officers were held, one in Sydney in October and the other in Canberra in March. Discussion related to general administrative matters (both personnel and finance related), co-ordination of working procedures and the status of current and projected activities.

In addition, a number of more specialised conferences were held for both legal and administrative staff.

EQUAL EMPLOYMENT OPPORTUNITY

The DPP's EEO programme was approved by the Public Service Board in July 1987. An evaluation of this Program commenced in May 1988 and it is expected to be finalized by November 1988 with a revised program to be issued in early 1989.

The Program includes positive steps to identify and eliminate discriminatory practices, introduces measures which allow full equality of opportunity and underpins EEO practices already in place in DPP Offices. Practical tasks are identified and assigned to designated staff. The programme's focus is on opportunities for women lawyers, as the DPP is in the unique position of being able to increase the employment of women in an area which is traditionally considered the province of male lawyers and in which women have historically been low in numbers and limited to the lower levels.

EEO Resources - The Director is committed to the operation of equal employment opportunity for all staff and he has given responsibility for the development, implementation and review of EEO practices to the Senior Assistant Director (Senior Executive Officer, Level 2) in the Administrative Support Branch, Head Office, and to the Deputy Directors in each State Office.

The EEO Co-ordinator in Head Office works in conjunction with the Administrative Officers in the States. As these staff are involved in the day to day management and work of the office, EEO principles and objectives are immediately implemented in the workplace. Also, problems can be readily identified and prompt remedial action taken. All staff in the DPP are asked to support the Program but particular responsibilities are given to Supervisors, Recruitment Officers and Sexual Harassment Officers. The DPP will continue to allocate resources as required to ensure a non-discriminatory work environment.

Consultative Mechanisms - Until recently, the most efficient consultative means for the oversighting and control of the EEO program was to have EEO included as a standing item on the agenda of the Industrial Democracy Meetings, both at the National and Regional level. However, with new consultative processes being put into place throughout the DPP it will be necessary to review the EEO reporting process.

EEO Data Base - The system is in an early stage and at present it contains only a simple record system. The system will be developed to provide information and reports covering staffing, training and recruitment.

Statistical Data - Because of its relatively small size, statistical data would not accurately reflect the situation of EEO in the various DPP offices. However there are some recognisable trends.

- Women are progressing through the levels in both the legal and the administrative streams.

- Migrants from non-English speaking backgrounds are employed at all levels.

- No special plans have been made to employ legal staff with disabilities. To employ staff with severe disabilities requires more than the resources available to DPP at this time.

EEO related grievances - There was only one grievance lodged during the year. It was a claim of sexual discrimination which was investigated internally and rejected. The complainant has now taken the matter up with the State Equal Employment Commission.

Constraints on progress and problems/issues facing the Office - The immediate problems facing the Office are recruitment of women to the more senior levels and Aborigines into the legal structure, and the establishment of career paths for the lower classified staff in the administrative structure. With the need to employ a large percentage of

staff in the lower clerical levels the establishment of career paths and job satisfaction are restricted. These lower classified positions are frequently staffed by women and migrants.

Major Achievements in 1987-88 - The highest priority for 1987-88 has been the implementation of the Program to ensure that the objectives set for each target group were being met. In May, staff with designated responsibilities were asked to prepare a report on the status of EEO in preparation for an evaluation of the Program by the EEO Co-ordinator. This year was significant for women lawyers in that the first woman lawyer was promoted into the Senior Executive Service.

Priorities and Special Issues for 1988-89 - The highest priority for 1988-89 is to review and evaluate the present Program and to issue a revised Program which will list new EEO objectives, those which have been met and those which are continuing. Implementation of the new office structures, with its commitment to the training of staff and job redesign, will provide a unique opportunity for maximising the opportunities for the development of staff and job satisfaction.

Particular attention will be paid to the needs of staff in the designated groups when restructuring work areas or particular jobs.

SECOND TIER WAGE AGREEMENTS

For the DPP, Second Tier Wage Agreements cover 3 separate groups of staff. They are Legal Staff, Librarians and Administrative Service Officers. The latter structure integrates the work of clerical assistant, keyboard and clerical administrative structures (this part of the agreement is referred to as the Office Structure Implementation (OSI)). The Second Tier Wage Agreements encourage multi-skilling, flexibility and mobility in the workplace and improved career opportunities for staff.

In April 1988 the DPP allocated resources to co-ordinate the implementation of the Second Tier Agreement for Administrative Service Officers. The project has proceeded along the guidelines published by the Public Service Commission and endorsed by the Joint Council. A National Steering Committee was set up with the following membership:

• ACOA	National representative
• APSA	National representative
• DPP	First Assistant Director, Head Office
	Senior Assistant Director,Head Office

With the agreement of the National Steering Committee, working parties to undertake the implementation have been set up in each DPP Office. To facilitate implementation and assist the working parties each Deputy Director has appointed an office co-ordinator. The next phase is the work review and redesign of jobs. Implementation of this phase is expected to commence in August 1988. All members of the working parties will have received training in Participative Work Design ('PWD') and Facilitation Skills before this work is commenced.

Awareness sessions were conducted in May 1988 on the Second Tier Wage Agreements. Awareness sessions on PWD are programmed to take place for all staff prior to the next stage of the project commencing. An OSI Bulletin is issued to all staff as items of interest or importance come to hand.

A Keyboard Working Group has been set up which will prepare modules to train staff in keyboard skills from basic to advanced levels. It will also prepare a module on the Occupational Health and Safety aspects of using keyboards. The Group will also evaluate other available methods of training for their suitability for use by DPP staff, for example, formal courses and software packages. It is proposed that a position of Keyboard Skills Co-ordinator will be created to implement training of keyboard skills for DPP staff.

To identify the training needs of staff a Skills and Training Needs Survey was prepared and sent to all staff. Analysis of the survey will allow for a program of training to be designed for each office.

The project has engendered a great deal of interest within the DPP as to just how the work of the Office is carried out and how it could be improved. It is hoped that an initial evaluation of the project will be undertaken in March 1989.

ESTABLISHMENTS

For the greater part of the year the work of the establishments area related to the revised office structure agreed to in connection with the Second Tier Wage increase for clerical staff. All duty statements and other organisational records have been brought into line with the new clerical administrative salary structure. Interim adjustments have been made where anomalies have been identified.

Apart from tasks concerning the revised office structure, 2 new and important positions were created:-

(a) Librarian Class 4 - The DPP has 6 regional library offices, each comprising a specialist law collection of extensive scope. Needs were identified for co-ordination and management of the activities of the network of libraries together with the development and management of a specialized information service in both hardcopy and electronic formats.

(b) Press Officer - The functions and activities of the DPP have been the subject of considerable public interest since the Office was first established in 1984. With the addition of functions such as Proceeds of Crime it is important that the community at large be aware of initiatives and developments in the work of the Office. The role of the Press Officer will involve acting as spokesperson for the DPP in dealings with the media as well as preparing written releases, background papers and information papers on the activities of the DPP. The Press Officer will also take a significant part in the production of the Office's publications. These activities should lead to an enhanced understanding of the role and functions of the DPP.

Establishment and Staffing - ASL allocation for 1987-88 by office was as follows:-

Head Office	39.4
Canberra Office	27
Sydney Office	140
Melbourne Office	99
Brisbane Office	38
Perth Office	30
TOTAL	**373.4**

In addition a further 20.1 ASL was approved in October 1987, for the Proceeds of Crime function. This ASL was not allocated on an office by office basis, but was notionally retained as a Head Office pool to cater for the lag in recruitment action to fill the new positions. The ASL allocation for DPP was therefore 394, which included allocation for paid operative staff. Actual staffing usage as at 30 June 1988 for each office was as follows:-

Head Office	41.78
Canberra Office	29.16
Sydney Office	151.28
Melbourne Office	100.24
Brisbane Office	42.78
Perth Office	30.01
TOTAL	**395.25**

The ASL allocation for 1988-89 is 421. The breakup of this between the individual Offices had not been determined at the time of writing.

End of Month Staffing for 30 June 1988 on a National Level

Full Time

	Perm		Temp	
	Male	Female	Male	Female
SES	24	3	-	-
Other	145	188	19	27
Subtotal	169	191	19	27
Total	360		46	

Part Time

	Perm		Temp	
	Male	Female	Male	Female
SES	-	-	-	-
Other	.59	4.64	.32	-
Subtotal	.59	4.64	.32	-
Total	5.23		.32	

Grand Total: 411.55 (unpaid inoperative staff are not included in this total)

Excerpt from End of Month Legal Staffing Figures as at 30 June 1988

	Actual male occupant	Actual female occupant	Not actually filled as at 30 June 1988
SES L6	1	-	-
L4	4	-	-
L3	3	-	-
L2	8	2	1
L1	7	1	1
PLO	37	12	11
SLO	29	22.59	19
LO	21	22	27
Total	110	59.59	59

ACCOMMODATION

Except for the Melbourne Office, all existing branch offices are now satisfactorily housed. However, it is expected that the difficulties still with us in Melbourne will be resolved during 1988-89 and that will complete the chain of high standard offices. Much of the progress in achieving our goals to provide our professional and support staff with accommodation to an acceptable standard would not have been possible without the support provided by the Department of Administrative Services and in particular its Construction Group.

New document storage facilities were completed during 1987-88 at both Sydney and Perth and are now fully operational.

A refurbishment of the Head Office premises has almost finished and it is expected to be completed during early 1988-89 bringing a most disruptive exercise to its conclusion.

LIBRARY SERVICES

The past year has been one of consolidation and innovation for the DPP libraries. A new position of Library Services Manager, based in Head Office with overall responsibility for the administration of the DPP Library network, was created. The position has been advertised but remains unfilled at the time of writing this report.

The accommodation changes effected in Head Office resulted in the Head Office library collection finally achieving suitable space, shelving and furniture. The Melbourne collection now remains the only DPP library still awaiting suitable accommodation.

Last year's Annual Report outlined the User Needs Analysis that was commenced in 1987-1988. That analysis - re-named the Information Needs Analysis - has been completed. Several of the findings of the Analysis have been adopted and have had a significant impact on DPP libraries and the services they provide. In this regard, the Analysis identified a need within the DPP to control published information of relevance to the work of the Office. Such information was generated both internally and externally, was usually in hard copy format and was typically opinions, judgments, journals, monograph and parliamentary material. This material is now analyzed, abstracted and published in a fortnightly information service provided to every member of the DPP's legal staff. DPP libraries play a pivotal role in the distribution and delivery of documents and information identified in the service.

Of particular importance to the work of the Office are opinions. Various attempts have been made in past years to identify, control and disseminate such material. During the year a database of opinions was established with the librarians acting as collection points and, with their computer searching abilities, providing a retrieval service for DPP legal staff.

The use of computer databases is an everyday part of DPP library work. Several legal databases (particularly SCALE and Clirs) are frequently used and during the year arrangements were made for access to LEXIS, the largest English language law database in the world. The use made of ABN (the Australian Bibliographic Network) described in last year's Report, has expanded considerably. Microfiche catalogues have been produced showing DPP library holdings and the system has been used to obtain hard copy output such as book labels and catalogue cards.

During 1988-1989 the DPP libraries will investigate the feasibility of an automated library management package to provide control over budgeting, expenditure, circulation and information retrieval. In addition, it is proposed to strengthen the concept of the network by electronically linking some of the libraries as a pilot project. Eventually, it is hoped to link them all.

AUTOMATIC DATA PROCESSING

To perform its functions, the DPP collects, analyses and generates a vast amount of diverse information. The volume and complexity of this information means that without computer support some of the DPP's work would not be done at all. Computers are used in litigation support, case matter management, word processing and for legal information reference.

The last year has seen significant achievements in the information systems area in terms of responding to the day to day operational needs of the Office, breaking new ground, and planning for future development.

Information Technology Planning - As part of its ADP strategic planning the DPP undertook an information needs analysis exercise. The exercise was carried out by a team consisting of the DPP Information Systems Manager, 2 specialist consultants and a senior lawyer. The final report has been submitted to the ADP Planning Committee.

The analysis was designed to provide the organisation with a basis from which to plan its Information Technology strategy for the foreseeable future. The exercise stated DPP objectives, functions and information, and from this base potential applications of technology were identified. Existing computer systems were then assessed and recommendations made about future directions. The report also documented the manner in which matters were dealt with. This was especially important in relation to 'bottom-of-the harbour' cases where a good deal of experience was gained through painful trial and error exercises. It is important that this experience not be lost. The analysis also suggested basic performance monitors which are required for the introduction of Program Budgeting in the 1987-88 financial year as well as commenting on the ADP work already being undertaken by the Office, and ways in which existing systems can be improved.

The exercise has fitted in well with the Department of Finance's new guidelines for Information Technology Planning, although there are a number of issues that, in accordance with the guidelines, will need further consideration. The concept proposed by the Department of Finance - that of integrating Corporate and Information Technology planning - is still relatively new in the public service. The information needs analysis has been a step forward in this planning process. Furthermore, some of the insight gained as well as recommendations made during the exercise have already affected most of the year's activities.

Litigation Support - 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 systems were used mainly in major fraud committal hearings and trials but have been extended recently to a wider range of cases, notably in the criminal assets area. In addition, the capabilities of the systems are becoming increasingly sophisticated, particularly in the area of investigating complex relationships and financial transactions. The DPP has refined these systems and reduced the marginal development cost so that many more

cases can benefit to a larger extent from the use of computer litigation support systems.

The DPP is starting to provide computer support for lawyers in court. In Melbourne court rooms at Marland House and Queens Road can now access the litigation support systems in the Melbourne Office. In NSW a stand-alone system is being developed for a committal to be conducted in Murwillumbah.

Case Matter Management - Late last year the new Case Matter Management system was implemented in all branches. The system is very important to the efficient functioning of the Office as 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 measurements of activities and results.

A post-implementation review was planned but had to be delayed due to constant staff turnover. However feedback during the first year of operation indicates strongly that the system meets the objectives stated above. Perhaps even more importantly the system helps the organisation to adapt to changes: the relatively smooth transfer of the Fines and Costs function from the Attorney-General's Department to the DPP, and the timeliness and accuracy of the operational statistics, were in part facilitated by the system.

The Information Needs Analysis reviewed the system in the context of the DPP's total operation, and articulated the concept that the system be a basis for the development of other facilities required to assist the functions of the Office. Some of these requirements have been mentioned above; others such as the need to monitor substantial prosecutions and sentencing patterns are planned to be incorporated in the future.

Fines and Costs - The transfer of the fines and costs function to the DPP necessitated the development of a computer system to help ensure that offenders pay their fines and costs as determined by the courts, and that the monies received are disbursed to referring departments. The system went into operation at the end of the reporting year.

Equipment, Software and Communications - The DPP has continued to build on its ADP equipment and systems developed in previous years. To meet growing user demands for computer support, processing capacity was significantly enhanced in all branches. We have also upgraded most of our terminals to more ergonomic models, and use only laser printers for any new requirements.

To allow faster development of systems to meet these growing demands, the Office uses Speed II, an application development tool which operates on the Wang VS computers. This product has helped achieve some remarkable successes, allowing the Office to develop new systems with greater capability at lower cost than previously available. The Information Needs Analysis identified areas where the capabilities of Speed II are being pushed to the limit and where the more advanced relational technology may be more effective. The Office has started looking at this technology and will further evaluate alternative solutions.

As planned, the DPP implemented a pilot network during 1987-88 linking our VS installations in Head Office and the Sydney branch. All the technical problems have now been overcome and experience so far indicates that the network will provide cost-effective support for the operations of the DPP. The Office expects to now proceed to network all the VS machines and link them into the Attorney-General's Department's mainframe computer. This will provide improved overall control and access to important data holdings between regional offices, as well as facilitating system development support from Head Office to regional offices. The network can also help improve general communications between regional offices.

Previously personal computers in the DPP were primarily used for word processing and spreadsheet applications. However, 1987-88 saw a growing interest in the applications of personal computers within the Office. This was due to both users' initiatives and the Information Needs Analysis exercise. The DPP has embarked on the introduction of new personal computer capabilities in graphics, in-house publishing, and litigation support in the court rooms. Lawyers and financial analysts in Sydney had provided much of the initial drive on the use of this technology, and this enthusiasm is being followed up by a comprehensive development, training and support program by the Information Systems section.

During the year the Attorney-General's Department transferred its computing facilities from the FACOM M200 in the Robert Garran Building to a new Natsemi 9000 in Belconnen. The DPP assisted the Department in this major exercise as requested, and we wish to acknowledge that the transfer was carried out without any disruption to the Office's operations. The DPP has been using the FACOM M200 for several years and will continue to use the Natsemi 9000. All of the DPP's applications on this machine are based on use of the text retrieval system STATUS to search for material such as evidentiary documents, transcripts and statements to assist in the preparation and prosecution of

cases, and to search for legal information collected in-house. Considerable use is made of the SCALE facility supported by the Department, and the 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 Office over the year.

Recruitment - The Office has experienced the common difficulties in retaining suitable professional computing staff and as usual turnover in 1987-88 was significant. Fortunately, the public profile of the organisation, the novel and challenging computer applications, and the wide variety of tasks continue to attract excellent response to staff advertisements at least in Canberra; and we have been able to maintain a suitable level of experienced professional staff. Vacancies in Sydney and Melbourne are much harder to fill. A small increase in the total number of staff is envisaged for 1988-89.

APPENDIX 1: PUBLICATION OF REASONS FOR 'NO BILL' DECISIONS

INTRODUCTION

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

1.2 However, 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 where a magistrate has determined in open court that there is a case fit to go to a jury yet Crown law authorities have decided not to proceed with the trial on indictment. Silence on the part of the prosecution as to the reasons for such a decision may spawn inaccurate speculation or give rise to suspicion that the prosecution was discontinued for improper reasons, particularly where the matter concerned is one that has excited public interest. Further, there may be persons over and above the relevant Government agency who have a clear interest in being informed of the reasons for the decision (for example, the victim of the alleged offence). In any event, public confidence in the administration of the criminal justice system can only be enhanced where those responsible for the making of such decisions are seen to do so in a proper manner.

1.3 Accordingly, these guidelines state when and how a decision to 'no bill', and the reasons for that decision, are to be conveyed to interested persons and the public at large.

PUBLICATION OF REASONS

2.1 The reasons for a 'no bill' decision have always been available to the Australian Federal Police and/or the department or agency concerned with the administration of the relevant legislation. The victim (if any) of the alleged offence (or his or her family), as well as any other person or body who may have a special interest in the particular case will now be informed as a matter of course of the decision to 'no bill'. Subject to the matters referred to in paragraph 3, those persons will also be provided on request with short reasons for the decision.

2.2 Subject to the matters referred to in paragraph 3, short reasons will also be made available on request to the media and concerned members of the public.

2.3 Reasons will not usually be published in the form of a media release. The rationale for the policy of providing reasons is to promote openness and accountability in this important area of the prosecution process, and not to needlessly generate publicity in relation to any decision to discontinue a prosecution. Nevertheless, in some cases it will be appropriate to issue a statement of reasons in the form of a media release. This is likely to be so when the matter is one of considerable public concern and interest.

2.4 In the rare case where it is decided that a media release should be issued, reasons will be provided to those specified in paragraph 2.1 above, and should precede the issue of the press release. Those persons should also be informed that the reasons are to be issued in the form of a media release.

CIRCUMSTANCES FAVOURING NON-DISCLOSURE OF REASONS OR LIMITED DISCLOSURE

3.1 A general policy to make available on request the reasons for 'no bill' decisions must be subject to exceptions where disclosure would be contrary to the public interest or the legitimate interests of individuals. Circumstances which may require that reasons not be provided include:

- where disclosure may prejudice pending or proposed legal proceedings;
- where disclosure would threaten national security;
- where disclosure would jeopardise the life, health or personal safety of any person;
- where disclosure would result in an unjustified invasion of the privacy of any person.

3.2 However, it does not necessarily follow that the existence of any of the above would in all cases preclude any reasons being given. Rather it may indicate the need for particular care in the preparation of the statement of reasons so that more general reasons are given than would ordinarily be the case (provided in such a case that the reasons to be given are not so vague as to defeat the purpose of their provision). Again, it may

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sometimes be feasible for full reasons to be given to some or all of those who have a special interest in the particular case, but on a confidential basis.

APPENDIX 2: 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 3 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 in 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 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

(a) Generally

3.1 Subject to the matters dealt with in (b) below, 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. 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.

3.2 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.

3.3 Except in the circumstances outlined in paragraph 3.2, 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.

(b) Taking into account non-disqualifying convictions

3.4 Any previous conviction(s) recorded against a potential juror, although not such as to disqualify that person from participation as a juror, may give rise to a reasonable apprehension that the person might not be an indifferent juror in the trial of a particular case. Subject to paragraph 3.5 and to the requirements of the jury legislation in operation in each jurisdiction, it is not inconsistent with the ideals of a representative jury that is randomly selected for the prosecution to have regard to information provided to it concerning any non-disqualifying conviction(s) recorded against a potential juror in assessing the suitability of that person to try a particular case.

3.5 A proper exercise of the discretion to challenge, or stand aside, a potential juror on account of information disclosing non-disqualifying conviction(s) recorded against that person requires that the suitability of that person as a juror be assessed having regard to the information provided in the light of the facts of the matter about to be tried. Accordingly, a prosecutor would not be

justified in exercising his or her rights where the information provided is merely to the effect that the potential juror has been previously convicted of some offence, but no details are provided setting out the nature of that conviction.

3.6 Any information made available to the prosecutor concerning non-disqualifying conviction(s) recorded against a potential juror should be made available to the defence, unless to do so would be contrary to the conditions under which that information was provided to the prosecution.

3.7 It should be noted that in some places the prosecution is not provided with a copy of the jury list until the first day of the trial. Accordingly, in those places it is not practicable for any inquiries to be made of the police on behalf of the prosecution to ascertain whether any non-disqualifying conviction(s) are recorded against a potential juror.

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 Subject to paragraph 3.6, 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.

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APPENDIX 3 : APPOINTMENTS, AUTHORISATIONS OR DELEGATIONS MADE BY THE DIRECTOR UNDER VARIOUS ACTS

Audit Act 1901: appointment of various officers for the purposes of sub-section 70AC(7) of the Audit Act in relation to determining the liability of an officer being investigated in relation to losses of, and damages to, public property.

Crimes Act 1914, section 21AA : authorisation 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).

Crimes Act 1900 (NSW) 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 authorised various officers to sign the document referred to in section 448 of the Act (taking outstanding charges into account).

Criminal Procedure Code of the Colony of Singapore in its application to the Territory of Christmas Island : pursuant to section 391B of that Code the Director has authorised various persons to act for the Director in the conduct of prosecutions before the Supreme Court, District Court and the Magistrate's Court of the Territory of Christmas Island; and has authorised Ronald John Davies QC to act for the Director in the conduct of any case or prosecution in the Supreme Court of Western Australia.

Director of Public Prosecutions Act 1983 : the Director has made the following delegations or authorisations to various persons and officers:

- delegation of power to review bail decisions pursuant to section 48(1) of the *Bail Act 1978* (NSW) - see section 9(7) of the DPP Act

- delegation, subject to specific conditions, of the power under sub-section 9(4) of the DPP Act

- authority to sign indictments for and on behalf of the Director for offences against the laws of the Commonwealth

- authority to Donald Rae Wright to represent the Director in summary and committal proceedings for offences against laws of the Commonwealth alleged to have been committed within the Territory of Norfolk Island.

The Director has also, pursuant to section 31 of the DPP Act, delegated to the First Deputy Director all his powers under the DPP Act other than powers under section 9(2) and the power of delegation.

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

Public Order (Protection of Persons and Property) Act 1971, section 23(3) : delegations of power to various officers to consent to prosecutions under that Act.

Public Service Act 1922, section 26 : the Director has delegated to the First Deputy Director various powers exerciseable by the Director under the Public Service Act.

Telecommunications (Interception) Act 1979 : delegations to various officers of the power to consent to summary prosecutions under that Act.

APPENDIX 4: COMMONWEALTH ACTS AND A.C.T. ORDINANCES WHERE THE DIRECTOR HAS POWER TO CONSENT TO A PROSECUTION

- *Air Navigation Act 1920*, sections 22(5) and (6)
- Air Navigation Regulations, regulations 317(1) and (2)
- *Airports (Surface Traffic Act) 1960*, section 16(1)
- *Australian Bicentennial Authority Act 1980*, section 22(7)
- *Banking Act 1959*, section 70(1) (offences under the Banking (Foreign Exchange) Regulations)
- *Broadcasting Act 1942*, section 92R(4) and section 118
- *Children's Services Ordinance 1986*, section 170(3)
- *Classification of Publications Ordinance 1983*, section 57
- *Crimes (Aircraft) Act 1963*, section 21(1)
- *Crimes (Hijacking of Aircraft) Act 1972*, section 20(1)
- *Crimes (Protection of Aircraft) Act 1973*, section 17(1)
- *Crimes (Taxation Offences) Act 1980*, section 9(4)
- *Defence (Transitional Provisions) Act 1946*, section 15
- *Domestic Violence Ordinance 1986*, section 30(3)
- *Family Law Act 1975*, section 121
- *Home Savings Grant Act 1964*, sections 12(2), 12(3), 13, 24, 26, 26A and 29
- *Home Savings Grant Act 1976*, sections 41, 42, 43(2), 43(3), 48 and 50
- *Insurance Act 1973*, section 129
- *Navigation Act 1912*, section 208(3)

- *Police Offences Ordinance 1930*, section 19B
- *Public Accounts Committee Act 1951*, section 21(4)
- *Public Order (Protection of Persons and Property) Act 1971* section 23(2)
- *Public Works Committee Act 1969*, section 34
- *Telecommunications (Interception) Act 1979*, section 7(7)
- *Veterans Entitlement Act 1986*, section 20

APPENDIX 5: STATEMENT UNDER S.8, *FREEDOM OF INFORMATION ACT 1982*

Under paragraph 8(1)(b) of the *Freedom of Information Act 1982* the DPP is required to publish up to date information on the following matters:

> (i) *Particulars of the organization and functions of the agency, indicating, as far as practicable, the decision-making powers and other powers affecting members of the public that are involved in those functions.*

Information on this is contained throughout the Annual Report, but particularly in Chapter 1: Office of the Director of Public Prosecutions and Chapter 2 : Exercise of Statutory Functions and Powers.

> *(ii) Particulars of any arrangements that exist for bodies or persons outside the Commonwealth administration to participate, either through consultative procedures, the making of representations or otherwise, in the formulation of policy by the agency, or in the administration by the agency of any enactment or scheme.*

Persons charged with Commonwealth offences may make representations to the Director concerning those charges either directly or through their legal representatives. The matters raised are taken into account when a decision is made whether to continue the prosecution.

> *(iii) Categories of documents that are maintained in the possession of the agency, being a statement that sets out, as separate categories of documents, categories of such documents, if any, as are referred to in paragraph 12(1)(b) or (c) and categories of documents, if any, not being documents so referred to, as are customarily made available to the public, otherwise than under this Act, free of charge upon request.*

The Office maintains the following documents:

- documents relating to legal advice including correspondence from Commonwealth departments and agencies and copies or notes of advice given;
- documents referring to criminal matters and prosecutions before courts and pre-court action including counsel's briefs, court documents, documents and witnesses' statements from referring departments or agencies;

- general correspondence including intra-office, ministerial and interdepartmental correspondence;
- internal working papers, submissions, reference, issues and policy papers;
- internal administration papers and records;
- investigative material, a considerable amount of which is held on a data base and in the form of tape recordings;
- documents held pursuant to warrants;
- accounting and budgetary records including estimates;
- prosecution manuals.

The following categories of documents are made available (otherwise than under the *Freedom of Information Act 1982*) free of charge upon request:

- Annual Reports and other reports required by legislation eg. Civil Remedies Report;
- relevant press releases;
- copies of the texts of various public addresses or speeches made by the Director;
- DPP Bulletin.

(iv) Particulars of the facilities, if any, provided by the agency for enabling members of the public to obtain physical access to the documents of the agency.

Facilities for the inspection of documents, and preparation of copies if required, are provided at each DPP office. Copies of all documents are not held in each Office and therefore some documents could not be inspected immediately upon request in certain Offices. Requests may be sent or delivered to the 'FOI Co-ordinating Officer' at the addresses set out at the beginning of this Report. Business hours are generally 8.30 a.m. to 5.00 p.m.

Requests for access in States and Territories where no Division of the Office of the Director of Public Prosecutions has been established should be forwarded to the FOI Co-ordinating Officer, Attorney-General's Department, in the relevant State or Territory or to the Head Office of the DPP in Canberra.

(v) Information that needs to be available to the public concerning particular procedures of the agency in relation to Part III, and particulars of the officer or officers to whom, and the place or places at which, initial inquiries concerning access to documents may be directed.

There are no particular procedures that should be brought to the attention of the public. Initial inquiries concerning access to documents should be made at any of the addresses referred to.

APPENDIX 6: PUBLICATIONS AND SPEECHES

The following speeches were given by the Director in 1987-88

- 'Extradition : An Australian Viewpoint' : Joint Bar Conference, Dublin, Ireland, July 1987

- 'The Role of the Legal Profession in Meeting Change' : The Australian Crime Prevention Council, International Prisoners Aid Association, the World Society of Victimology; Adelaide, 11 August 1987

- 'Crime Inc' : Australian Society of Accountants, South Australian Division; Adelaide Convention Centre, 9 September 1987

- 'Extradition Reconsidered - A Jurisprudential Introduction to Extradition Law' : Australian Institute of International Affairs, Queensland Branch, 15 September 1987

- 'The Pursuit of Insidious Crime' : 24th Australian Legal Convention, Perth, 1987

- 'Taking Assets off Criminals - Attainder in Australia Today?' : Law Summer School, Perth, 12 February 1988

- 'Impediments to Tackling Fraud': Royal Australian Institute for Public Administration, Canberra, 2 May 1988.

Copies of the above material are available on request from the Director's Secretary on (062) 705-600.

The following papers by the Director were published in Australian legal journals in 1987-88:

- 'Pursuit of Insidious Crime' (1987) 61 *Australian Law Journal* 510

- 'Technocrime - An Australian Overview' (1987) 11 *Criminal Law Journal* 245

APPENDIX 7: FREEDOM OF INFORMATION STATISTICS 1987-88

Requests received	7
Granted in full	3
Granted in part	1
Access refused	1
Withdrawn	1
Outstanding as at 30 June 1988	1
Response time	0 - 30 days
Fees charged	$30