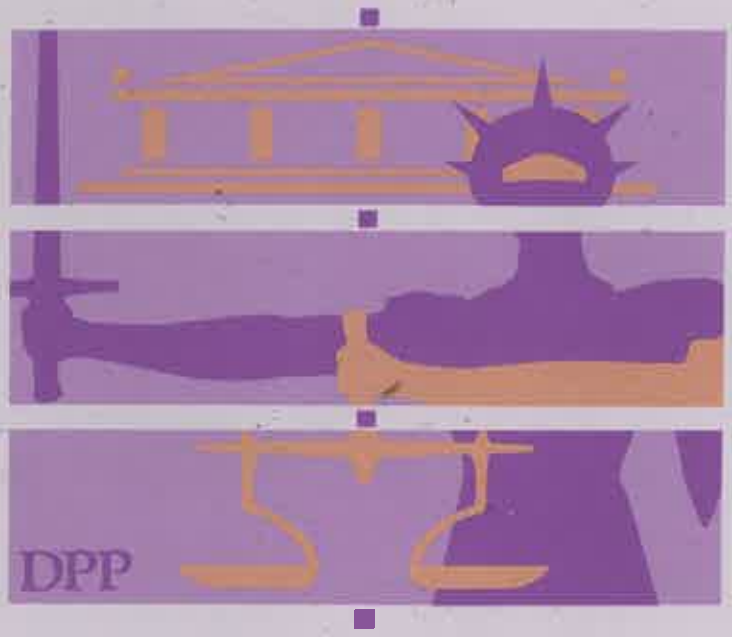
Commonwealth Director of Public Prosecutions



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Commonwealth Director of Public Prosecutions

Annual Report 1988–89

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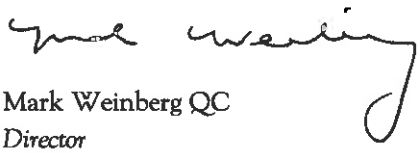
The Hon. Lionel Bowen MP
Deputy Prime Minister and Attorney-General
Parliament House
CANBERRA ACT 2600

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 1989, in accordance with section 33(1) of the *Director of Public Prosecutions Act 1983*.

Yours faithfully,



Mark Weinberg QC
Director

27 November 1989

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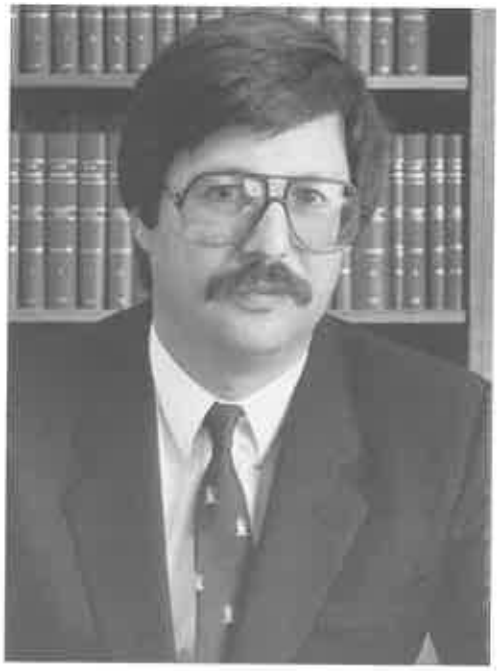
Contents

Director's overview



Mark Weinberg QC,
Commonwealth Director of Public Prosecutions.

This is the sixth annual report of the Office of the Director of Public Prosecutions. It is the first such report under my hand. Having been Director for the best part of a year, I have now had the opportunity of learning at first hand something of how this large and complex organisation functions.

I practised for many years at the defence end of the bar table. It follows that my transition to prosecution work might have been somewhat difficult, and perhaps even daunting. What eased my task considerably was the level of cooperation and assistance afforded to me by DPP staff at all levels, and throughout all offices. It would be natural to expect a newcomer, coming to this position with my background, to have been greeted with some suspicion, if not downright hostility. The reverse has been the case. I should publicly record that fact, and my gratitude and appreciation to all my staff for their loyalty and support.

I should also place on record the cooperation of those within the Attorney-General's Department, and their willingness to develop a close and harmonious working relationship between our two offices. I have nothing but praise for the present Attorney-General who, at all times, has recognised the need for me to be able to operate independently in the exercise of my statutory functions. There has never been any attempt to interfere in any way with that independence.

When I assumed the office of Director, I assured my staff that I would not be making any immediate changes of a radical nature so far as the structure and operations of the office were concerned. I needed time to assess matters generally, and I needed to talk to a number of people as part of my own learning process.

It therefore comes as somewhat of a surprise to me, in looking back over my first year in office, to note the number of significant changes which have in fact occurred during that period. I will return to some of these matters. I should, however, first say something about the functions of the Office. These have continued to expand during the past twelve months, and seem likely to expand still further in the future.

The legislation creating the Australian Securities Commission provides for my office to have a major role to play in the area of companies and securities fraud. This will necessarily entail the acquisition of new skills, and will require additional staff to take on what may prove to be some of the most challenging and demanding prosecution work in this country. Preliminary steps have been set in train to prepare for this new function. Another area of additional responsibility is the prospect of tackling war crimes prosecutions under the War Crimes Amendment Act 1988, legislation which was enacted in December 1988 amid controversy and bitter debate. If prosecutions are brought under this legislation, it will only be after the most careful scrutiny of the evidence supporting any such charges. The enormity of the task confronting any such prosecution half a century after the events in question should not be underrated.

The proceeds of crime initiative (discussed in the last annual report) continues to generate a significant volume of work, and has already led to some recovery of assets. Lawyers working in this field, and in the general area of criminal asset recovery, are rapidly developing highly specialised commercial skills which enable these complex cases to be presented in a thoroughly professional manner. We are proceeding to develop a series of guidelines which will eventually be published so that the community can be made aware of how we go about our work in what is a sensitive and vitally important branch of our operations.

In addition to these rather more specialised functions, the Office continues to prosecute large numbers of drug offences under the provisions of the Customs Act and, where appropriate, State drug laws. Some of the cases prosecuted during the last 12 months have involved vast quantities of narcotic drugs, exceeding anything we have previously seen in this country. Drug law is, of course, highly technical, and requires specialised skills on the part of those who prosecute. Our level of success in this area has been very satisfying.

In the area of major fraud, the last of the 'mega' trials involving so-called bottom of the harbour tax schemes are presently grinding their way through the courts. During the past 12 months, we have also initiated prosecutions in respect of a number of significant sales tax and customs duty frauds. We continue to prosecute social security fraud, Medicare fraud, and sundry other frauds upon the Commonwealth. These general prosecutions, together with an occasional hotly-contested extradition, and the odd foray into the Federal Court in Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) proceedings, continue to keep our prosecution lawyers extremely busy.

My predecessor punctuated his overview with a list of some of the notable successes of the Office during the year of his last annual report. I do not propose to follow his example. It should not be assumed that this means that there were no such successes during my first year in my new position. Rather, it seems to me that a Director's overview should address matters of more general application. I leave for later chapters a discussion of some of the important cases which this office has handled during the last 12 months. I hasten to add that not all of them have been 'notable successes'. A prosecution service which has an exceptionally high conviction rate may not be performing its role properly; it is likely to be avoiding prosecuting those hard cases which ought to be brought to trial.

Among the most important changes to the Office during the past year was the welcome addition of an Adelaide DPP Office. This office, which was formally opened by the Attorney-General on 4 July 1989, provides a belated but much needed addition to the DPP armoury in a State which has seen a considerable expansion in revenue fraud in recent years. With the creation of the new Adelaide Office, the total staff of the DPP comprised some 427, nearly 40 per cent of whom were lawyers.

One significant innovation introduced into the practice of the Office was the appointment in Sydney and Melbourne of in-house counsel. Previously, all indictable matters which went to trial were briefed out to the private bar in those cities. Lawyers within the respective regional offices occupied the role of solicitors. It seemed to me to be highly desirable to retain the services of a limited number of experienced members of the practising bar to act as permanent Commonwealth prosecutors, who would be briefed to appear in the higher courts as barristers prosecuting trials and appeals. The appointment of such permanent prosecutors has the additional advantage of providing an in-house source of legal advice to the younger, and less experienced, lawyers within these offices. Although it is too soon to draw firm conclusions regarding this initiative, the signs are that it will prove to be an outstanding success. It is also likely to be highly cost-effective. The appointment of such in-house counsel required delicate negotiations to be undertaken with the New South Wales Bar Association and the Victorian Bar Council, whose Chairmen proved to be most cooperative. Further, as a result of recent discussions with the New South Wales Bar Association it now appears possible for barristers within the Sydney Office to obtain practising certificates.

Another significant event during my first year in office was the Attorney-General's agreement that the Director of Public Prosecutions Act should be amended to grant the Director the power to bring ex-officio indictments (a power hitherto reserved to the Attorney himself) and to grant transactional immunities to prospective witnesses. Previously, the Director could only grant the more limited 'use' immunity. The decision to confer these powers upon the DPP reflects the trust and confidence reposed in my office by the Attorney.

One of my first tasks was to undertake a review of several of the most important guidelines previously developed by my predecessor. These included the general prosecutions policy of the Commonwealth, and the guidelines governing prosecution submissions during the course of sentencing. Those guidelines are in the process of being reviewed and it is hoped that this review will be concluded early in 1990.

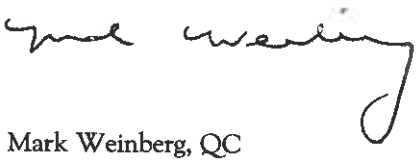
It is obvious from these few opening remarks that the past year has been an eventful one for the Office of the DPP. The appointment of a new Director is only one of a number of important changes to have occurred.

Commonwealth DPP Mark Weinberg QC, with First Deputy Director John Dee (seated).

From a personal point of view, the year has been a highly satisfying one. I have been able to continue to appear on a regular basis in appellate courts, thereby maintaining both my first professional love — advocacy — and perhaps my sanity. I have been invited to address numerous professional bodies and various legal conferences. I have been able to engage in some legal research which will lead to publication in scholarly journals.

The downside has been the enormous amount of travelling required. As the Director of a national organisation with a number of regional offices, it is imperative that I visit each of them from time to time. Commuting interstate on a regular basis, at a time when airline schedules are often disrupted for one reason or another, is scarcely conducive to maintaining low stress levels. It is also highly disruptive to one's own family life. I have no doubt that the position of Director has a rapid 'burn out' factor built into it, and that it may prove to be difficult to persuade anyone to occupy the position for more than a limited number of years.

I should not end this overview without acknowledging one particular source of support which has been an integral part of any success which I may have had in my first year. John Dee, my First Deputy Director, has provided me with his sound counsel and unfailing good humour throughout many bleak times. He, like many of my senior staff, has worked long hours, performing complex tasks for remuneration that can only be described as hopelessly inadequate. If there is a shadow on the horizon threatening the maintenance of high standards in my office, it is the level of remuneration available to attract and retain lawyers of quality. The Government is conscious of the problem, and it is to be hoped that a solution will be found.



Mark Weinberg, QC

1

Office of the Director of Public Prosecutions

Establishment

The Office of the Director of Public Prosecutions (DPP) was established under the DPP Act 1983, primarily to take over the prosecuting function of the then Crown Solicitor's Division of the Attorney-General's Department. The Director also took over most of the functions of the Attorney-General in prosecuting offences against Commonwealth law.

While the DPP is within the Attorney-General's portfolio, for all practical purposes it operates independently of the Attorney-General.

The main function of the DPP is to prosecute offences against Commonwealth law, both summarily and on indictment. It also has important functions in the taking of civil remedies and the recovery of pecuniary penalties as well as under the *Proceeds of Crime Act 1987*.

The DPP does not investigate. Unless a Commonwealth agency has an investigative capacity, an alleged offence must be referred by the agency to the Australian Federal Police (AFP) for investigation before the matter can be dealt with by the DPP.

Objectives

The principal aims of the DPP are to:

- prosecute alleged offences against the criminal law of the Commonwealth, in appropriate matters, in a manner which is fair and just;
- ensure that offenders are deprived of the proceeds and benefits of criminal activity and to ensure the pursuit of civil remedies;
- assist and cooperate with other agencies to ensure that law enforcement activities are effective;
- contribute to the improvement of the Commonwealth criminal law and the criminal justice system generally;
- preserve and enhance public confidence in the prosecution process and criminal justice system; and
- manage resources efficiently and provide an effective service to the Commonwealth.

Statutory functions and powers

Functions

The main functions of the DPP under the DPP Act are to conduct prosecutions for summary and indictable offences against the laws of the Commonwealth, which include the laws of the Australian Capital Territory (ACT) and the external territories except Norfolk Island, and in appropriate cases to recover the proceeds of criminal activity.

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 assist coroners 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.

Criminal assets

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.

Under section 6(1)(fa) of the DPP Act it is a function of the Director to take, or coordinate 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.

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 coordinate 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 that person engaging in a particular prescribed narcotics dealing or in prescribed narcotics dealings during a particular period.

Powers

During the period of this report the powers of the Director, set out in section 9 of the DPP Act and the sections immediately following it, included 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 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, the powers under section 6(2D) and 9(6D) 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 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 Act, senior officers of the Director of Legal Services (DLS) in Hobart, Darwin and, until 4 July 1989, in Adelaide, could 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 1.

The Director has been granted the power to consent to certain prosecutions under the Commonwealth and ACT legislation specified in appendix 4.

Amendments to the DPP Act

The *Crimes Legislation Amendment Act 1989*, which was passed by the Parliament in the 1989 Autumn Session, effected a number of significant amendments to the DPP Act in relation to the filing of an indictment and the grant of indemnities. Pursuant to section 2(3) of that Act the amendments to the DPP Act came into operation on 28 July 1989.

Prior to these amendments an ex-officio indictment could only be filed in the limited situations referred to in sections 6(2A) to (2C) of the DPP Act. In particular, in the absence of the consent of the alleged offender the Director could not file an indictment where there had been no antecedent committal proceedings or the magistrate had declined to commit on any Commonwealth charge. Only the Attorney-General could file an ex-officio indictment in such circumstances (section 71A of the *Judiciary Act 1903*).

In December 1988 the Director recommended to the Attorney-General that the DPP Act be amended to confer on the Director the power to grant an ex-officio indictment in such circumstances. The policy underlying the DPP Act is that the responsibility for the institution and conduct of prosecutions is vested in an independent statutory office holder. It was considered inconsistent with that policy that the Director should not have the power to present an ex-officio indictment in circumstances where that was the appropriate course in the interests of justice. The position at that time was also quite anomalous given that in those States where responsibility for the prosecution process is similarly vested in an independent statutory office holder, the State DPP's are expressly empowered to present an ex-officio indictment.

The Director also recommended that he be expressly authorised to grant a 'transactional' indemnity, i.e. to undertake to a prospective witness that no proceedings would be instituted against that person in respect of a specified offence or offences against Commonwealth law.

Further, section 9(6) of the DPP Act (which empowered the Director to give an undertaking to a prospective witness that the person's evidence would not be used against him or her) was in terms which precluded an undertaking being given either in aid of a prosecution for a State offence or, although the relevant prosecution was for a Commonwealth offence, where the DPP did not have the carriage of that prosecution. The Director recommended that these restrictions on the power under section 9(6), which were unnecessary, be removed.

The Attorney-General accepted these recommendations, although he decided that the powers to file an ex-officio indictment and to grant a transactional indemnity should be exercisable by the Director personally, i.e. they should not be capable of being delegated. Further, the Attorney-General decided, on recommendation from his Department, that the power to grant a use indemnity should be recast as a use/derivative use indemnity provision. Under the latter, not only is the witness' evidence inadmissible against him or her but also any evidence derived directly or indirectly from the witness' testimony. This adopted a recommendation made by the Senate Committee on Legal and Constitutional Affairs in its report on the National Crime Authority Bill.

Other amendments

The DPP Act was also amended by the *Law and Justice Legislation Amendment Act 1988*, which was passed by the Parliament in the 1988 Budget Session. This amendment clarified the right of the Director under section 9(7) of the Act to institute proceedings in the nature of an appeal [for example, a review of a bail decision pursuant to section 48(1) of the *Bail Act 1978* (NSW)].

Finally, pursuant to regulation 4 of the ACT Self-Government (Consequential Provisions) Regulations (Amendment) Statutory Rules 1989 No. 52, the DPP Act was amended to omit ACT laws from the definition of 'law of the Commonwealth' and to equate the ACT with the Northern Territory for the purposes of the DPP Act. Pursuant to regulation 2(2) these amendments to the DPP Act will not come into operation until 1 July 1990. On that date the DPP will cease to have responsibility under the DPP Act for the conduct of prosecutions for offences against ACT laws.

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 1989 the Office comprised six Divisions, being a Head Office (located in Canberra) and regional offices in Sydney, Melbourne, Brisbane, Perth and Canberra. During the financial year Commonwealth prosecutions in South Australia, Tasmania and the Northern Territory were conducted for and on behalf of the DPP by the Directors of Legal Services (DLS), who are officers of the Attorney-General's Department, pursuant to an arrangement under section 32 of the DPP Act.

Set out below is the organisational structure which applied in Head Office and the various regional offices during the financial year. However, it should be noted that in June 1989 it was decided that the organisational structure of the regional offices would be altered during 1989-90 with a view to greater uniformity in both branch titles and functions. Each regional office would have the 'core' branches of Executive and Support, Prosecutions and Criminal Assets. In addition, the organisational structure of a regional office may also include a further 'Fraud' branch to deal with revenue fraud matters.

Head Office

The Head Office is responsible for providing policy and legal advice to the Director in matters warranting consideration at the highest level, controlling and coordinating the activities of the Office throughout Australia, and providing administrative and other assistance to the Director. The Office consists of four 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 ACT other than in respect of the 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 provision and coordination nationally of automatic data processing, library support and administers national budgetary and personnel policy.

Sydney Office

During the financial year the Office comprised five 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 principally handles matters referred to it by the National Crime Authority (NCA) and the Organised Crime Unit of the AFP.

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 responsibility for:

(i) pursuing, and coordinating 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 four branches: Major Fraud, Prosecutions, Criminal Assets and Administrative Support.

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

Brisbane Office

The Office comprises four 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 four 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 five 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 also responsible for the listing and prosecution of all matters heard and determined in the ACT Magistrates Court or the Childrens Court. The Magistrates Court Branch is also responsible for providing assistance in coronial inquests. The Superior Courts Branch is responsible for trials on indictment and sentencing matters in the Supreme Court of the ACT as well as appeals and proceedings in the nature of an appeal to the superior courts. The Criminal Assets Branch has the same functions as its counterparts elsewhere. In

addition, due to the number and complexity of fraud matters being referred to the Canberra Office a unit has been established to deal with fraud matters, both revenue related and general fraud.

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

Establishment of a DPP Office in Adelaide

Last year's annual report noted that the Director had 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 bid was unsuccessful.

Despite budgetary constraints, the Director decided that there were compelling reasons to establish a DPP Office in Adelaide as soon as possible. The workload of DLS Adelaide in respect of 'DPP matters' (both prosecutions and criminal assets) was at least equal to that in some of the DPP regional offices, and further increases in the prosecution workload were anticipated with the opening of an Adelaide Office of the NCA. Further, the staff of the DLS Prosecutions Unit expressed the clear wish to be part of the DPP.

Back Row L to R: Paul Evans, Deputy Director Brisbane Office; Grant Niemann, Deputy Director Adelaide Office; John Pritchard, Deputy Director Canberra Office; Peter Wood, Deputy Director Melbourne Office; Bill Nairn, Deputy Director Perth Office.

Front seated L to R: Peter Walshe, Deputy Director Sydney Office; John Dee, First Deputy Director; Mark Weinberg QC, Commonwealth DPP.

The Attorney-General's Department supported the opening of a DPP Office in Adelaide and, during 1988, DLS Adelaide had established a separately-housed Prosecutions Unit. This greatly facilitated the establishment of DPP Adelaide.

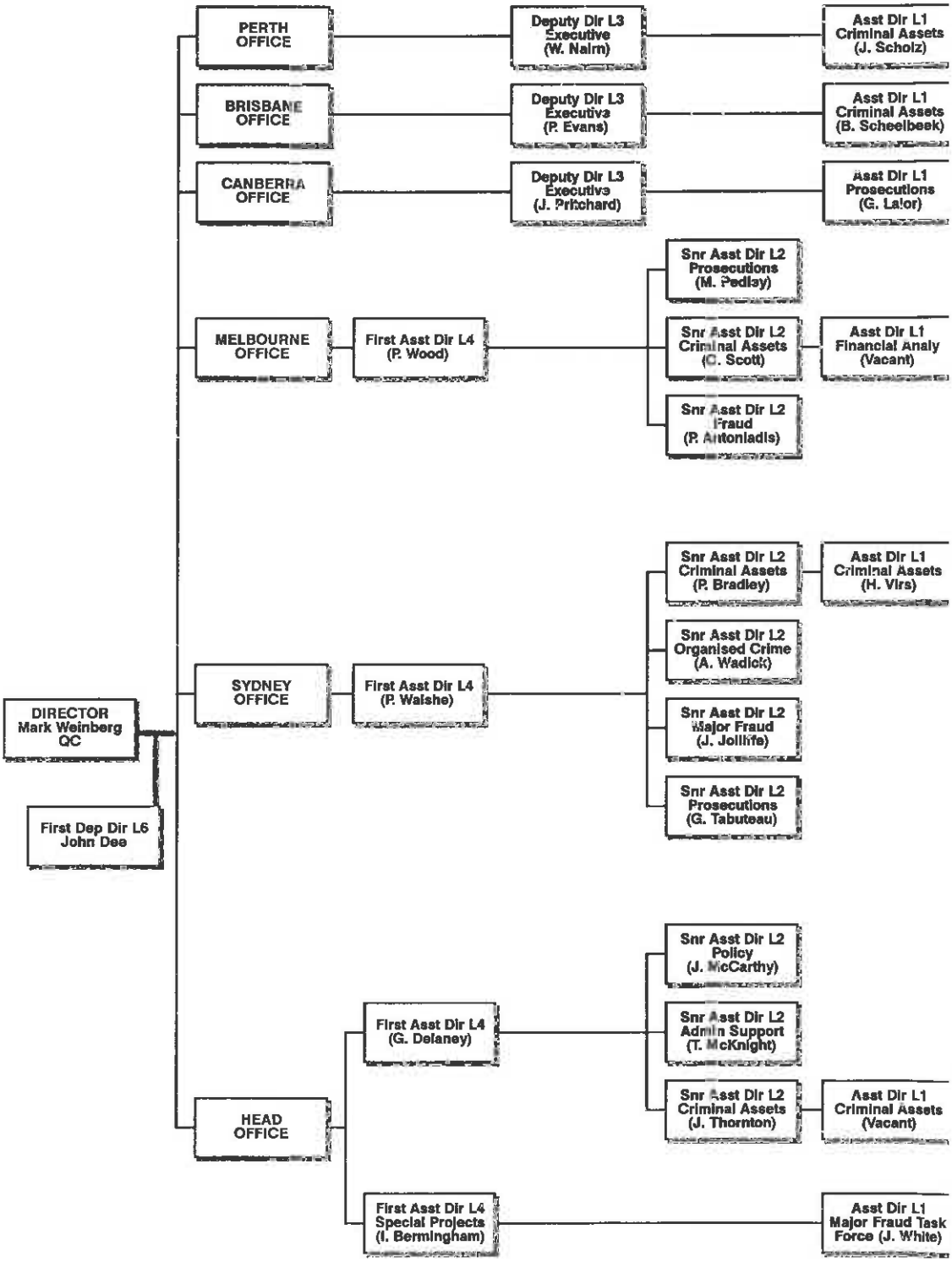
Agreement was reached with the Attorney-General's Department for the transfer of ASL and funds for salaries and administrative overheads, but the DPP had to fund its own administrative, computer and library support together with the additional accommodation for that support. This was achieved by savings in other areas and the postponement of some projects. As a consequence the establishment of an Office in Adelaide has diminished to some extent the capacity of the DPP to meet demands on it, and will continue to do so.

The Attorney-General opened the DPP Adelaide Office on 4 July 1989.

Directors of Legal Services

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

Senior Management Chart



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Exercise of statutory functions and powers

The DPP Act invests the Director with a number of powers associated with the criminal process. As noted elsewhere in this report these powers were significantly extended by amendments contained in the *Crimes Legislation Amendment Act 1989*. The specific statutory powers that are discussed in this chapter are the power to decline to proceed further after a person has been committed for trial [section 9(4)], the power to appeal [section 9(7)], the power to give an undertaking that the evidence a person gives will not be used against him [section 9(6)] and the power to take over and discontinue a prosecution in a court of summary jurisdiction [section 9(5)].

In addition, this chapter contains information about the occasions on which the Attorney-General has signed ex-officio indictments and indemnities.

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 has been committed for trial or been indicted for an offence against Commonwealth law. While the exercise of the power under section 9(4) is often the result of a No Bill application, the power may be exercised even though there has been no application by the accused person.

The power is used infrequently. In virtually all cases there will have been committal proceedings before a magistrate who has decided sufficient evidence is available to warrant the accused standing trial. It is unusual for a matter to be discontinued after an accused person has been committed for trial, although it may be appropriate that this be done in some cases.

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 authorised 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 without merit and it would delay the trial to refer the matter to the Director. They have also been authorised to discontinue a prosecution on a Commonwealth charge if the accused has already been dealt with on a State charge which substantially covers the same factual situation if to proceed with the Commonwealth charge would not be justified having regard to the disposition of the State charge, including any penalty imposed. Pursuant to the arrangement under section 32 of the DPP Act certain senior DLS officers in Hobart and Darwin have also been authorised to determine No Bill applications on the same limited basis. In all other cases the power under section 9(4) can only be exercised by the Director or the First Deputy Director.

In 1988-89 there were 42 matters in which the DPP was formally requested by an accused to discontinue a prosecution following a committal for trial. In 23 cases it was decided that the matter should not proceed to trial. In the remaining 19 cases the No Bill application was unsuccessful.

A further 11 cases did not proceed to trial following committal on the basis of a recommendation from a regional office without a formal application from the accused.

In the 34 cases in which the matter was discontinued:

(a) in five cases there were evidentiary difficulties such as the unavailability of prosecution witnesses or the fact that witnesses had changed their evidence since committal;

(b) in one case the offence was considered to be too trivial to warrant a trial before a jury;

(c) in seven cases the matter was discontinued due to its age or for personal considerations relevant to the accused;

(d) in 11 cases it was considered that there was insufficient evidence to establish a prima facie case;
(e) in three cases it was considered that a conviction was not 'more likely than not'; and
(f) in seven cases it was considered the accused's criminality was already covered by other charges against the accused.

In categorising the reasons for various decisions the predominant reason has been chosen. In many cases there was more than one reason for the decision. Nevertheless, the above gives some insight into the reasons for the exercise of the power under section 9(4).

Of the 19 cases in which a No Bill application was not successful, eight defendants were convicted, two were acquitted and nine matters remain unresolved at the time of writing.

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 under section 9(7) are brought where it is considered that the penalty imposed was manifestly inadequate. Occasionally, however, the right to appeal against a sentence has been employed as a means of correcting a technical error in the sentence. There were three such cases in the year under review.

Where there is no statutory time limit for a Crown appeal, the DPP's policy is to adhere to the time limits applicable to defendants, with the exception of NSW and SA where local practices are taken into account. In four States this requires that an appeal be filed less 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 an appeal to correct a technical error in a sentence, the DPP will only appeal where it is considered that the sentence is outside acceptable limits for a sound exercise of the sentencing discretion.

Statistics on appeals by the prosecution, including appeals against penalty, are contained elsewhere in this report. However, set out below are details of some cases considered during the year which indicate the considerations involved in deciding whether to appeal against sentence.

Delcaro

Delcaro pleaded guilty to a charge of false pretences and to a charge of divulging information to other persons not entitled to receive that information while employed as an officer in the Department of Social Security.

Delcaro was an officer in the Investigation Branch of the Department of Social Security when he met his future wife in 1982. At the time she was receiving unemployment benefits to which she was entitled. Following their marriage, Delcaro convinced his wife that she was still entitled to the benefits which she continued to receive over a five-year period. In all cases Delcaro filled out the necessary forms and had his wife sign them. The forms contained fictitious details concerning his wife's attempts to find employment. When it was necessary for a personal appearance to be made by his wife, Delcaro took leave from his employment with the Department to attend with his wife in order to ensure that she did not say the wrong thing.

The second offence related to Delcaro supplying information from the Department's records to persons outside the Department who used them in connection with credit inquiries.

As a result, over some three years Delcaro received between $26 000 and $30 000. The circumstances of this second offence were discovered when it was noted that Delcaro was spending long hours at work in the Department and accessing an unusually high number of entries on the microfiche system. Delcaro was suspended from work while an investigation was conducted and during that investigation he took steps to cover his illegal activities and to warn those with whom he had been dealing.

There were strong subjective factors in Delcaro's favour. His wife was severely handicapped and Delcaro himself had suffered an emotionally deprived childhood. The sentencing judge deferred passing sentence on each charge conditional upon Delcaro entering into a recognisance to be of good behaviour for a period of two years. In doing so his Honour referred to the fact that in respect of the second offence Delcaro had been prevailed upon by stronger men at a time when he had been vulnerable to pressure. His Honour also referred to Dalcaro's confession and plea of guilty, the very difficult situation of his wife and family, and the fact that he had named the men with whom he had been dealing.

An appeal was instituted on the grounds that the sentence imposed was manifestly inadequate. In agreeing that the sentence was inadequate the NSW Court of Criminal Appeal referred in its judgment to the case of R v. Luu. In that case the Chief Justice had said:

> The Courts of this State have uniformly sought to make plain to persons who abuse the system of social welfare that they must expect to face heavy penalties. The introduction into the administration of that system of overly meticulous preliminary checks before benefits are paid could result in real hardships to persons whose need for benefit is urgent and immediate. Thus it is that such susceptibility is open to abuse, which results in persons who do abuse it receiving salutary penal consequences at the hands of the courts.

In relation to the second charge, involving a breach of trust, the Court noted that the security of information given to the Department of Social Security was an important matter to the community and one upon which many social and other initiatives depend for their successful operation. The breach of trust involved was one which necessarily called for a substantial penalty.

The Court substituted a sentence of imprisonment for three years with a minimum term of 18 months on the first charge and a sentence of 18 months' imprisonment with a minimum term of nine months on the second charge, each to be served concurrently.

Schneider

Schneider pleaded guilty to 49 charges of imposition contrary to section 29B of the *Crimes Act 1914* and five charges of obtaining credit by fraud contrary to section 265 of the *Bankruptcy Act 1966*. Schneider commenced claiming unemployment benefits in November 1983 and continued claiming at various rates until January 1987. At various times during this period he was in full-time employment and not entitled to benefits. He submitted applications for unemployment benefits in which he either failed to declare his income from employment or under declared his earnings. During the period he also received benefits in four other names. The total amount received as a result of the claims was approximately $8000.

The bankruptcy offences related to Schneider's failure to disclose that he was an undischarged bankrupt when he opened bank accounts in false names. As a result of these transactions a building society lost $4886. The sentencing judge imposed two sentences of imprisonment related to each group of offences but ordered that Schneider be immediately released pursuant to section 20(1)(b) of the *Crimes Act 1914*. The immediate release in respect of the imposition offences was on condition that Schneider enter into a bond to be of good behaviour for four years and that within that period he make restitution at $180 per month. In relation to the bankruptcy offences the immediate release was subject to the condition that Schneider perform 240 hours of community service work.

The DPP appealed to the SA Court of Criminal Appeal which quashed the sentence. The Court noted that Schneider was a man aged 41 years with no previous convictions. However, any benefit he may have received for good character ceased in November 1985 when he had begun his course of fraudulent activity. By the time he appeared before the sentencing judge he had long lost the benefit of good character. The Court found that Schneider was involved in the execution of a devious and dishonest plan to defraud the Commonwealth and hence the general body of taxpayers. The Court ordered that he serve a period of two years' imprisonment with a minimum term of 15 months. The Court recognised the general sentencing principles previously laid down in the cases of Vasin and Scherf and indicated that

where offences are committed from greed rather than need a substantial term of imprisonment is called for to serve as a deterrent to both the offender and others.

Cottrell

This defendant pleaded guilty to one count of importing and one of possessing heroin. He had imported 123.4 grams gross, yielding 90.1 grams of pure heroin, through Perth airport from Bangkok. The heroin had been contained in five separate packets, one concealed in his baggage and four concealed internally.

Cottrell sought to discharge the onus that the heroin had not been in his possession for sale or commercial dealing. He claimed that he smoked heroin rather than injecting it, and that he used between five and eight grams per day. However, medical evidence called by Cottrell to confirm his habit tended to contradict his claim. Cottrell also claimed that relatively large sums of cash appearing in his bank account were repayments of unrecorded loans to persons who, however, were not called to give evidence on his behalf. He was sentenced to four years' imprisonment to be served concurrently on each count and he was ruled eligible for release on parole. It was estimated that the street value of the heroin was in excess of $250 000.

The DPP appealed to the Court of Appeal which increased the sentence to seven years and two months' imprisonment on each count to be served concurrently. The order that Cottrell be eligible for release on parole was not disturbed.

The Court noted that this was an offence of a planned and deliberate nature. The method of concealment within the person showed criminality to a high degree and had made detection difficult. The Court also noted that most of the heroin had been intended for commercial use, and that weight must be given to the fact that this was heroin and not a lesser drug.

Logan, Watson and Sunderland

On 6 February 1988 Logan and Sunderland, both United States citizens, arrived at Sydney airport from Los Angeles. Sunderland was searched at the airport and found to be in possession of 406 grams of cocaine. Subsequently Sunderland informed the police that she had been recruited to bring the cocaine into Australia by one Logan. She also informed the police of a previous importation of cocaine that she had undertaken on Logan's behalf. Logan's de facto husband, Watson, had also been involved in arranging the importation of the cocaine.

Sunderland was charged with being in possession of cocaine and importing cocaine. Logan and Watson were each charged with being knowingly concerned in the importation of cocaine into Australia.

Sunderland pleaded guilty and on 11 August 1988 she was sentenced to an effective term of nine and a half years' imprisonment with a minimum term of six years.

On 8 May 1989 Logan and Watson were sentenced as follows:

Watson — 11 years' imprisonment with a minimum term of six and a half years;

Logan — nine years' imprisonment with a minimum term of five years.

Following the sentencing of Logan and Watson, Sunderland instituted an appeal against her sentence in the NSW Court of Criminal Appeal. At the same time consideration was given by the Director to whether the Crown should appeal against the sentences imposed on Logan and Watson on the basis that they were manifestly inadequate. It was decided that although there was a disparity between the effective sentence imposed on Sunderland on the one hand and the sentences imposed on Logan and Watson on the other, an appeal could not be justified. In each case the sentences imposed appeared to be within the acceptable range. As to the question of parity with the sentence imposed on Sunderland, it was considered that while she might feel that she had a legitimate sense of grievance there were certain subjective factors which could justify the higher sentence in her case.

When Sunderland's appeal came on for hearing before the Court of Criminal Appeal it was argued on her behalf that she had been a mere courier in the exercise whereas Watson and Logan had organised the importations, thereby distancing themselves from the drug and the risk of detection. Accordingly, notwithstanding Sunderland had admitted her involvement in relation to the prior importation, it was argued that she should have received a somewhat lesser sentence than those imposed on Logan and Watson. Further, it was submitted on her behalf that she had cooperated with the police whereas Logan and Watson had not.

In response it was argued that the court should not intervene. Nevertheless, the Crown did draw attention to the fact that, contrary to the finding by the sentencing judge, there was evidence that Sunderland had been a casual user of cocaine.

The Court of Criminal Appeal considered that Sunderland could feel justifiably aggrieved by the sentence imposed in her case, and allowed her appeal, reducing her effective sentence to one of seven years' imprisonment with a minimum term of four years.

Indemnities and undertakings not to prosecute

Section 9(6) of the DPP Act (prior to the recent amendments) in effect made provision for the Director to give an undertaking that the evidence of the person in specified Commonwealth proceedings would not be used in evidence against that person. Where the Director gave such an undertaking the person's evidence was not admissible in any civil or criminal proceedings other than proceedings for perjury. The power under section 9(6) has been delegated only to the First Deputy Director.

During the year the Director or First Deputy Director signed 23 undertakings under section 9(6) relating to 16 separate matters. Eight of those matters involved alleged narcotic offences, two of the matters involved allegations of defrauding the

Commonwealth and two concerned alleged breaches of the *Telecommunications (Interception) Act 1979*. The indemnities in the other four matters were given for the purpose of prosecutions involving alleged offences against the Migration Act 1958, an alleged attempt to pervert the course of justice, charges under the *Export Control Act 1982* and a charge of bigamy under the *Marriage Act 1961*.

The First Deputy Director also approved in principle the granting of a further 23 indemnities in relation to the prosecution of a number of persons charged with offences of conspiracy to commit an offence against section 9B(c) of the *Passports Act 1938* and conspiracy to defeat the enforcement of the *Migration Act 1958*. This related to Operation Vision, and is referred to in some detail in the next chapter. In the event, the defendants pleaded guilty and the indemnities were not required.

The giving of an undertaking under the DPP Act involves the balancing of competing interests. On the one hand there is a need for caution in relying on the evidence of indemnified co-offenders. There is always the risk that a co-offender is not telling the truth in order to minimise his or her own involvement in the criminal activity. Further, indemnified co-offenders are at risk of attack as to credit and their credibility can be seriously damaged. On the other hand 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.

Until the recent amendments to the DPP Act outlined in chapter 1 there were a number of situations where the Director could not give an indemnity to a prospective witness. For example, the Director could not give a transactional indemnity, i.e. an undertaking that the witness would not be prosecuted; nor could the Director give a 'use' indemnity in aid of a State prosecution. Prior to the recent amendments it was the practice to seek an indemnity from the Attorney-General in such cases.

During the year the Attorney-General signed 22 indemnities on the recommendation of the DPP. These indemnities related to six separate matters: a coronial inquest, two cases of murder, one case of obtaining money by deception, one case of conspiracy to pervert the course of justice and one case involving the cultivation of Indian hemp.

In relation to the last-mentioned case the Attorney-General granted an indemnity to Giuseppi Verduci to secure his evidence in the prosecution of 11 persons charged with offences against NSW law relating to the cultivation and distribution of Indian hemp in NSW between 1980 and 1984. The prosecution arose from a NCA investigation and was conducted by the NSW Director of Public Prosecutions. The indemnity granted to Verduci was subject to the proviso that he give his evidence truthfully and frankly, without embellishment and withholding nothing of relevance.

Committal proceedings against the 11 accused persons took place in the Local Court at Queanbeyan in early 1989. The court formed the view that Verduci's responses on no less than 51 occasions were either untruthful or inaccurate. It further formed the

view that Verduci had withheld relevant evidence. After seeking the advice of his counterpart in NSW, on 9 June 1989 the Attorney-General took the unprecedented step of withdrawing the indemnity previously given to Verduci.

The Director also has power to give indemnities under section 30(5) of the *National Crime Authority Act 1984*. No indemnities under that section were given during the year.

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 noted in previous annual reports, the power under section 9(5) has only been used rarely. However, during the year the power was exercised to take over a prosecution that had been instituted in NSW. The accused in that case had been charged with 21 offences of using a telecommunications service for the purposes of menacing another person contrary to the by-laws made under the now repealed *Telecommunications Act 1975*. The charges related to a series of telephone calls alleged to have been made by the defendant over a period of approximately 12 months from June 1984 to a variety of people including a retired judge and a magistrate. In September 1985 NSW police laid a number of additional charges against the defendant relating to the same series of telephone calls. Those charges were laid under sections 61 and 248A of the *Crimes Act 1900* (NSW). At a trial conducted by NSW authorities the accused was convicted of 15 of the 22 charges laid under the *Crimes Act 1900* and sentenced to eight years' imprisonment with a non-parole period of five years. However, the defendant successfully appealed to the NSW Court of Criminal Appeal which quashed all convictions on the basis that charges did not lie under State law.

Following that appeal the NSW police decided to proceed with the charges that had been initially laid under the telecommunications by-laws. The defendant complained to the Ombudsman who referred the matter to this Office. The defendant's original complaint was that this Office had failed to appreciate his arguments that the charges under the by-laws were now bad in law. While it was considered that that argument was misconceived, the Director formed the view that it was in the public interest that the matter not proceed. The particular public interest factors relied upon were:

- the time that had elapsed since the commission of the alleged offences;
- the likely penalty in the event of conviction;
- the fact that the defendant had been imprisoned for seven and a half months before his release following his successful appeal; and
- that the State charges laid under the *Crimes Act 1900* (NSW) had been erroneous and misconceived.

The NSW police were reluctant to discontinue the proceedings, and the Director decided that it would be appropriate to take over the prosecution and discontinue it. On 26 June 1989 the NSW police were informed of the Director's view and the matter was discontinued.

Ex-officio indictments

As indicated in chapter 1, as a result of amendments to the DPP Act the Director now has the power to sign an ex-officio indictment in relation to Commonwealth offences. However, during the year, that power rested solely with the Attorney-General. The power was exercised once during the year, in a NSW matter involving the importation of heroin.

In committal proceedings against the accused person the presiding magistrate had held, on 29 July 1988, that no prima-facie case had been made out and had dismissed the charge. After obtaining counsel's advice, a submission was put to the Attorney-General recommending that an ex-officio indictment be filed. In September 1988 the Attorney-General acceded to that recommendation.

On 19 June 1989 the defendant was acquitted after the trial judge directed that the jury return a verdict of not guilty on the basis that the Crown had failed to prove that the defendant had known that heroin was being imported.

While some consideration was given to bringing a 'reference appeal' against the decision of the trial judge, it was felt that such an appeal was unlikely to succeed. Apart from the consideration that the decision to direct a verdict of acquittal had turned on a question of fact, it is questionable whether the Crown in right of the Commonwealth has a right of appeal in circumstances such as this.

3

General 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 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 (ATO) with the agreement of the DPP], State police or private individuals.

Sydney Office

Chidiac and Asfour

In February 1989, following a two week trial, the defendants were convicted of conspiring to import between one and one and a half kilograms of heroin.

The Crown case was based in part on the evidence of Alfred Oti, who at the time of the conspiracy had been a senior Customs officer in the Solomon Islands. Oti testified that he had been involved in four heroin 'runs' into Australia between 1981 and 1985. The heroin, which had been packaged in Penang, had been sent to the Solomon Islands by post, concealed in picture frames. Oti had retrieved the packets and taken them back to his office. After repackaging, the heroin had been brought to Australia. In two cases the heroin had been imported by Oti, and in the other two cases by Oti's brother-in-law, Wilson Kwalau, who also gave evidence for the Crown.

As to Chidiac's involvement, the Crown case was that he had been a party to the ongoing conspiracy only in relation to the third importation. Prior to that importation Chidiac had travelled to the Solomon Islands to discuss the details of the importation with Oti. The Crown case was that Oti and Kwalau had met Chidiac at a hotel in the Solomon Islands and had discussed the venture, with Chidiac agreeing to pay Oti $10 000 for his part in the importation. Chidiac had given Oti his telephone number in Sydney and it was Oti's evidence that he had been in constant telephone contact with Chidiac following this meeting, particularly regarding payment. Oti testified that he had been paid $9000 by Chidiac after the successful completion of the importation.

As to Asfour's involvement, the Crown case was that he had been given the heroin that had been imported on the second and third occasions. Although Asfour had denied all knowledge of Oti, Asfour's telephone book, containing Oti's telephone number in the Solomon Islands, was tendered by the Crown together with Telecom records showing numerous telephone calls from Asfour's premises to Oti's telephone number in the Solomon Islands.

Both Chidiac and Asfour were sentenced to 20 years' imprisonment with a minimum term of 10 years. Oti was already serving a sentence of 20 years' imprisonment after having been apprehended following the fourth importation.

Chidiac and Asfour have appealed to the NSW Court of Criminal Appeal against conviction and sentence.

Harris

Harris, who was a nursing home proprietor, was found guilty in May 1989 in the District Court of 10 offences against section 29B of the Crimes Act 1914 of imposing upon the Department of Community Services and Health. The trial lasted for two weeks.

The Crown case was that between 1981 and 1984 Harris had submitted false documents to the Department of Community Services and Health designed to obtain approval from the Department to increase patient fees in the nursing home.

The majority of the charges related to false claims concerning the employment of two of Harris' daughters at the nursing home. Harris had claimed to the Department that both had acted as 'Deputy Directors of Nursing' at the nursing home for 40 hours per

week. In fact, one daughter had been working at the relevant time at Blacktown Hospital, while the other daughter had been working for much of the relevant time at a country hospital over 600 miles from the nursing home.

It was alleged by the Crown that as a result of these offences Harris had obtained in excess of $70 000 to which she was not entitled. Part of that loss had been borne by the Commonwealth and part by patients who had paid increased fees to the home as a result of the false claims.

Harris had not been sentenced at the time of writing.

Phang

In November 1988 Phang was retried on a charge of possession of heroin. He had previously appealed successfully against conviction to the NSW Court of Criminal Appeal. Initially Phang had also been tried and convicted of an additional offence of being knowingly concerned in the importation of the heroin. However, the Court of Criminal Appeal held that evidence of telephone calls between two co-accused in Australia, who had acted as couriers, and a contact in Hong Kong should not have been admitted. As a result the court held that there was no evidence to establish any knowledge of or concern in the heroin by Phang prior to its importation, and accordingly the charge of being knowingly concerned in importation was not proceeded with at the retrial.

The importation had involved approximately nine kilograms of heroin concealed in Chinese plates which had been specifically manufactured for that purpose. The method of importation was quite sophisticated as the plates had been heat sealed in an attempt to avoid detection by sniffer dogs. Once the heroin had been detected a substitution had been effected, leaving approximately 670 grams of heroin for a controlled delivery sample.

Phang was found guilty of the charge of possession of heroin and was sentenced to 12 years' imprisonment with a minimum term of seven and a half years.

The Crown has since appealed against this sentence in view of the quantity of heroin involved and the sentences imposed in cases involving similar quantities of heroin.

At first instance, Phang's two co-accused had each received a term of imprisonment of 18 years with a minimum term of 12 years. However, they successfully appealed to the Court of Criminal Appeal, which reduced the sentence in each case to 12 years' imprisonment with a minimum term of nine years. The main reason for the reduction was that both had cooperated with law enforcement authorities at great personal risk.

Phang has also appealed against his conviction.

Operation Vision: Pinochet, Visvinandan, Lee and Alarco

These accused were charged with conspiracy to commit an offence against section 9B(c) of the *Passports Act 1938* and conspiracy to defeat the enforcement of the *Migration Act 1958*.

The Crown case was that one or other of the accused had approached prohibited non-citizens from various ethnic backgrounds who were already in Australia and told them that they could obtain permanent residence in return for a fee. The sum had varied between $2500 and $20 000 but generally had been between $12 000 and $18 000. The scheme had involved Alarcon being introduced to the prohibited non-citizens as an employee of the Department of Immigration, Local Government and Ethnic Affairs. Arrangements were made for the prohibited non-citizens to attend the offices of the Department in Chifley Square or some other place for the purpose of 'an interview' with Alarcon, although he would only ever meet with them in public areas of the Department's offices.

The amounts were normally paid by way of three instalments, and at some stage the non-citizens would receive a genuine receipt from the Department for $200 being the application fee for change of status. These receipts had been obtained by one or other of the accused who would attend the offices of the Department and pay the application fee for the change of status. However, the accused never took the further step of lodging the completed forms for application for permanent residence.

The prohibited non-citizen's passport would be given to one of the accused, and Alarcon would then forge a 'permanent residency' stamp in the passport. The non-citizens were led to believe by the accused that the stamps were genuine.

The accused received at least $225 000 during the course of the conspiracy which continued from approximately October 1986 to September 1987.

Alarcon pleaded guilty to the second of the charges and in May 1988 was sentenced to 20 months' imprisonment with a minimum term of 14 months. Pinochet, Visvinandan and Lee pleaded guilty to the same charge on the first day of the committal, and were each sentenced on 4 April 1989 to 18 months' imprisonment with a minimum term of 12 months.

Davies

In September 1988 this accused was convicted after a two week trial in the Supreme Court of being knowingly concerned in the importation of 1.2 tonnes of cannabis into Australia in December 1986.

The Crown case was that the accused, Hanigan and another man had bought and fitted out an old fishing trawler named *Debbie* which they had sailed to Ile Neba, an uninhabited island off the north-west coast of New Caledonia. There, with the aid of hand-drawn maps, they had located a buried stash of cannabis and had transported it back to the port of Ballina. From there it had been taken and hidden on a property outside Byron Bay owned by one Beckner. The AFP had become aware of the activities involving the *Debbie* when investigating another cannabis importation and the accused, Hanigan and Beckner, had been apprehended. However, the fourth man involved had not been apprehended. Hanigan and Beckner each pleaded guilty and were sentenced in September 1987 for their roles in the importation.

At his trial Davies raised the defence of duress, claiming that he had been tricked by Hanigan and the other man into believing that the purpose of the boat trip was to salvage a wreck on Middleton Reef, and that once the true purpose had been made known to him he had had no choice but to cooperate because of fear for his life and threats to his wife and daughter. The jury rejected this defence.

Davies' role in the importation was recognised as having been less than that of his co-accused and he was sentenced to 13 years' imprisonment with a minimum term of seven and a half years. He has since appealed to the Court of Criminal Appeal.

Operation Chair

In December 1987 the ketch *Jalina* sailed from Sydney to Thailand via Cairns. However, the movements of the ketch were being monitored by Customs officers, and in about April 1988 information was received from an unknown source that a large quantity of cannabis was to be imported into Australia by boat. Customs officers then deployed an aircraft in an attempt to spot the vessel. After it had been located it was tracked down the eastern coast by both spotter plane and a Customs vessel. At the same time officers of the AFP were conducting surveillance of persons suspected of being involved with the *Jalina* and recording their telephone conversations.

On 7 June 1988 the *Jalina* commenced a triangular holding pattern approximately four nautical miles off the northern head of Broken Bay. At this stage the *Jalina* was being tracked by radar on the Customs vessel which indicated that other vessels had come into contact with her, one of which was seen to be moving between the *Jalina* and other vessels. The *Jalina* then set course for Noumea and the other vessels headed for Broken Bay.

Shortly thereafter Customs, AFP and NSW Police on board NSW Police boats apprehended the two vessels heading into Broken Bay. One vessel was found to contain 1.16 tonnes of compressed cannabis and the other was found to contain 2.05 tonnes of the same substance. Five people were arrested on board these vessels. Police valued the drug seized at $30 million.

The Customs vessel and a NSW Polair helicopter intercepted the *Jalina* and returned with her to Sydney harbour where four persons were arrested.

On the following day the AFP arrested a US national in Port Douglas, Queensland. It was alleged that this man had been a radio link with the *Jalina* and had relayed information to Sydney concerning its progress down the coast.

At the time of writing seven of those arrested have pleaded guilty to being knowingly concerned in importing a commercial quantity of cannabis. The sentences imposed on the participants have ranged from 16 years' imprisonment with a minimum term of 11 and a half years for the captain of the *Jalina*, to eight years' imprisonment with a minimum term of five years for those who crewed the vessels into Broken Bay.

Wong

This person was retried in the Supreme Court on a charge of conspiring to import a traffickable quantity of heroin. The Crown alleged that the conspiracy charged had been an open-ended agreement in which Wong had agreed to despatch heroin from Hong Kong to another man, Losurdo, in Sydney.

The method of importation had been to secrete quantities of heroin in business envelopes containing legal documents, or in Chinese magazines. These had been posted from Hong Kong and addressed to a fictitious person at various addresses in Sydney. These addresses had generally been blocks of units without specifying a particular unit. The post would leave the items in the foyer of the block for collection, and one of the co-conspirators would then collect the items at the various addresses. The conspiracy had been discovered when some of the envelopes had been returned to the apparent sender, a reputable firm of Hong Kong solicitors, which had alerted the authorities. At about the same time several items had been opened by innocent parties at the various addresses who also had alerted the police.

It was alleged by the Crown that the 'postal' part of the importation had been the preliminary stage, the intention being that the proceeds from the sale of the heroin would be used to fund the importation of larger amounts by courier. Evidence was lead of numerous intercepted telephone conversations between Wong and Losurdo in which a code had been used to discuss the proposed courier importations.

While Wong entered a plea of guilty to the indictment, he stated that he was pleading guilty only in respect of the agreement to import heroin via the post. Following legal argument the trial judge ruled that it was for the court to decide whether the Crown had established beyond reasonable doubt that the agreement to import heroin by courier was part of the same conspiracy as the agreement to import heroin via the post. His Honour held that he could not be so satisfied, and accordingly he would have no regard to the proposed courier importations in passing sentence.

In passing sentence his Honour stated that there were no mitigating factors to be found in the prisoner's favour. In particular, his Honour gave little weight to the plea, which he considered had been brought about only as a result of the strength of the Crown case, and the belief that Wong would otherwise receive a higher sentence. The only benefit accruing from the plea had been some reduction in the expenses flowing from the trial.

His Honour further held that the circumstances of the case were such as to warrant exceeding the sentence imposed at the first trial. His Honour did not attach the same weight as the judge at the first trial to the fact that only a small amount had been imported. It was only the discovery by the conspirators that they were under police surveillance (as a result of the theft of documents from a police vehicle) which had led to the termination of what had been a well planned open-ended conspiracy motivated

by greed. On 1 June 1989 Wong was sentenced to 18 years' imprisonment with a minimum term of 12 years.

Operation Postscript

One of the longest running drug trials in Australia concluded in the Supreme Court, Sydney, on 20 September 1988 with the conviction of Kelleher, Powch and Fan of a conspiracy to import a commercial quantity of heroin.

During the trial, which lasted five and a half months, the Crown alleged that Kelleher, acting in concert with Powch, had recruited couriers to travel from Sydney to Hong Kong to be met by Fan who would supply heroin. By the time of the arrest of the conspirators, 11 kilograms had been imported into Australia. The conspirators used complicated codes in their communications and a business dealing in commodities to disguise the true nature of their criminal activities.

Electronic surveillance from telephone intercepts and listening devices provided important evidence of the conspiracy.

Kelleher was sentenced to life imprisonment, Powch to 26 years' imprisonment with a minimum term of 18 years and Fan to 24 years' imprisonment with a minimum term of 16 years.

Stevenson

This defendant was charged with 41 offences against section 79(1) of the *Trade Practices Act 1974*. The charges related to the defendant's operation of a publishing business, part of which had involved selling advertising space in magazines (some of which, it was alleged, had falsely claimed to be associated with, or have the sponsorship of, particular charities). The principal allegation was that the defendant and his employees had sought advertising for their publications by falsely representing that certain persons in the businesses being approached had previously agreed to insert advertisements. Such conduct is commonly referred to as 'blowing' and has been the subject of many complaints to the Trade Practices Commission. The defendant pleaded guilty to 31 of these charges and the prosecution offered no evidence on the remaining charges.

Stevenson was fined $5000 in respect of two of the charges and $2000 in respect of each of the remaining 29 charges, making a total fine of $68 000. He was also ordered to pay the prosecution's costs.

Melbourne Office

Browne-Kerr

This person was indicted in respect of 57 counts of forgery of social security documents contrary to section 67(b) of the *Crimes Act 1914*. It was alleged that between 1982 and 1984 Browne-Kerr had defrauded the Commonwealth of a large sum of money by falsely claiming unemployment benefits in 18 fictitious names.

The case against the defendant rested on handwriting evidence. Expert evidence was given of a comparison of the handwriting on the various documents which had been lodged with the Department of Social Security claiming unemployment benefits with two other documents (a handwritten statement allegedly made by the defendant to the AFP and an Official Receiver's Office questionnaire allegedly completed by the defendant in his handwriting). It was submitted that this evidence established that the various departmental forms had been completed by the defendant.

At the trial, counsel for the defendant objected to the admissibility of the questionnaire. However the trial judge ruled that it was a question for the determination of the jury whether it was satisfied beyond reasonable doubt that that document was in the defendant's handwriting.

At the conclusion of the Crown case the defendant made an unsworn statement in which he claimed that none of the writing on the questionnaire was his, and indeed that the document had been partially completed by his brother, who had similar handwriting. He also offered an explanation for the other evidence led against him.

The jury returned a verdict of guilty in respect of 26 of the 57 counts on the indictment, and Browne-Kerr was sentenced to two years' imprisonment with a minimum term of 18 months.

Browne-Kerr appealed against his conviction and sentence on the grounds, inter alia, that the trial judge had erred in refusing to hold a voir dire in respect of the admissibility of the questionnaire, and in allowing that document to be tendered.

In allowing the appeal the Full Supreme Court of Victoria held that before the questionnaire could be admitted into evidence, and before the handwriting expert could rely on it for the purpose of comparison, it was for the trial judge to be satisfied on the balance of probabilities that it was in the defendant's handwriting. The Full Court held that the trial judge had not so satisfied himself.

The Full Court further held that the trial judge should have conducted a voir dire before deciding whether he was so satisfied. In refusing the defence application the defendant had been deprived of the opportunity to offer sworn evidence as to the handwriting on the questionnaire to counter the evidence of the Crown's handwriting expert. In ordering a retrial the Full Court stated that it was unnecessary to consider the other grounds of appeal.

Browne-Kerr has since applied to the High Court for special leave to appeal. The application submits that the Full Court was in error in failing to consider all grounds of appeal, and that it erred in holding that a trial judge need only be satisfied on the balance of probabilities on a voir dire.

Maio

Following this defendant's conviction and unsuccessful appeal to the Court of Criminal Appeal (reported in last year's annual report at pages 35-36) an application

was made to the Melbourne Magistrates' Court under the Transfer of Prisoners Act 1983 for Maio's transfer to Western Australia to stand trial on charges relating to the importation of heroin into Perth.

That application was granted, and following an unsuccessful subsequent appeal by Maio to the Supreme Court of Victoria he was transferred to WA.

Jones and Harris

These persons together with a number of other persons were convicted in September 1987 of conspiring to import cannabis resin into Australia.

During the currency of the conspiracy Harris was a Detective Sergeant in the Victoria Police. He had agreed with Jones to arrange the safe clearance of the drugs through Customs by corrupting certain Customs and AFP officers for which he was to receive $25 000.

Harris was sentenced to 14 years' imprisonment with a minimum term of 12 years' and Jones was sentenced to 10 years' imprisonment with a minimum term of eight years.

Both Jones and Harris appealed against their conviction and sentence. It was submitted on their behalf that the trial judge had erred in permitting evidence to be admitted as to the identity of voices on tape recordings of telephone conversations which had been recorded pursuant to a warrant obtained under the *Telecommunications (Interception) Act 1979*. It was urged on the Court of Criminal Appeal that it should state the principles applicable to reception of voice identification evidence. These, it was submitted on the prisoners' behalf, should include procedures analogous to identification parades i.e., a person who is asked to identify a particular voice should be required to identify that voice after hearing a number of tape recordings of various voices. The court stated there was no basis for making any such special rules for the admissibility of evidence of voice identification.

It was also argued on the prisoners' behalf that the trial judge had misdirected the jury as to how it should conclude that a substance was cannabis resin. The *Customs Act 1901* defines cannabis resin to mean 'a substance that consists wholly or substantially of resin (whether crude, purified or in any other form) obtained from a cannabis plant or cannabis plants'.

The Court of Criminal Appeal stated that the word 'substantially' in connection with cannabis resin did not impute a mathematical concept which required that in excess of 50 per cent of the material must be cannabis resin. The court stated that it was the active or dominant ingredient which gave the substance its overall character. In the present case the direction to the jury had permitted it to contemplate crude cannabis resin as consisting of resinous material, of which cannabis itself was the dominant or active ingredient.

Although the Court of Criminal Appeal dismissed the prisoners' appeals against both conviction and sentence, they have since applied to the High Court for special leave to appeal.

Casauria

The defendant was employed in the Melbourne office of the ATO between September 1983 and August 1987. His duties included the tax auditing of individuals and companies.

On 28 August 1987, he was arrested following an investigation by the NCA and charged with theft of ATO files and documents, unlawfully communicating facts concerning an ATO investigation, accepting a secret commission and unlawfully receiving a benefit for himself.

The charges concerned the defendant's activities while he was employed by the ATO and his business association with a person named Joseph Talia. In 1982 the defendant, his brother and Talia were involved in a partnership running a restaurant in Carlton. The business did not prosper and by February 1983 Talia had left the partnership owing the Casauria brothers in excess of $100 000.

In January 1985 the defendant commenced duties in the audit section of the ATO and almost immediately he commenced an investigation into Talia and his business interests. Although the defendant's initial motive was to cause Talia as much harm as possible, he eventually decided to use the vast amount of material that he had accumulated to demonstrate to Talia that he could be of assistance to him by leaking confidential information. In so doing the defendant hoped to secure from Talia, in the form of a secret commission or bribe, the money that Talia owed him and his brother.

Between November 1986 and June 1987 the defendant was in constant communication with Talia and during that time he kept Talia informed of the progress of an official investigation being conducted by other ATO officers. As well as keeping Talia aware of the official investigation, the defendant assisted Talia by suppressing all of the information that he had accumulated as a result of his own investigation into Talia's business affairs. In April 1987 Talia paid the defendant $43 000 for his assistance.

The defendant pleaded guilty to the charges of theft and bribery and on 20 March 1989 he received an effective sentence of two and a half years' imprisonment with a minimum term of 22 months.

An appeal to the Victorian Supreme Court against the sentence was dismissed.

Copperart

In July 1988 Copperart Pty Ltd, Laddeton Nominees Pty Ltd (a subsidiary of Copperart Pty Ltd) and Aart Van Roest, a director of both companies, were charged with a total of 43 offences against the *Trade Practices Act 1974* relating to false or misleading advertising.

The prosecution case was that representations in advertisements claiming reductions in the 'regular' or 'recommended retail' price of goods had been false or misleading as the prices in question had not been the prices which had actually been charged in Copperart stores immediately preceding the representations or in fact at any time in the preceding few years.

In April 1989 pleas of guilty were entered in respect of nine charges and the remaining charges were withdrawn. The three defendants were fined a total of $104 500.

Seelenmeyer

The defendant in this case was the principal in a nursing agency which in 1981 was retained by the Department of Veterans' Affairs to supply trained nurses to veterans requiring nursing treatment in their own homes. The nurses were entitled to a certain rate of remuneration from which the agency took a commission. In addition, the nurses were entitled to claim a travelling allowance for costs incurred in travelling to, from and between patients.

From November 1984 onwards the agency's practice was for nurses to submit claims for travel expenses to the agency rather than to the Department. The defendant agreed to advance the amount of the claims to the nurses and in turn submit the nurses' claims to the Department for reimbursement.

However, the agency did not submit the actual travel allowance claims to the Department. Rather, it prepared separate accounts which included a travel component.

The prosecution case was that there was a discrepancy between the distances shown by the nurses on their claims and those shown on accounts submitted to the Department by the agency. It was alleged that the agency claimed excess travel for the period November 1984 to December 1985 worth over $130 000.

On 4 December 1985 a search warrant was executed on the premises occupied by the agency. It was alleged that during the execution of the warrant the defendant admitted to police that she had instructed the agency's office staff to add an additional mileage to the distance claimed by each nurse for every trip shown on the travel claim sheet. She asserted, however, that this was necessary to cover her administrative costs and provide adequate care to patients.

The defendant pleaded guilty to a charge of defrauding the Commonwealth contrary to section 29D of the *Crimes Act 1914* and on 1 September 1989 she was sentenced to two years' imprisonment with a minimum term of 18 months.

The defendant made full restitution of the overpayment to the Department in September 1988.

Steele

The defendant, who was not a medical practitioner, operated a business known as Medilink which employed doctors to make home visits to patients. The patients were

referred to Medilink by various medical practices at times when the doctors from these practices were not able to attend them. The business operated between January 1984 and January 1985.

It was alleged that the defendant defrauded the Health Insurance Commission of $19 394.50 between March and December 1984. The fraud was perpetrated by the defendant writing fictitious assignment forms in relation to purported treatment of patients and completing false claims for payment for the specified services. The defendant had used the names of patients previously attended by Medilink doctors in the fictitious assignment forms. The fraud involved forging the signatures of the 'patients' and the doctors who were said to have carried out the services.

The defendant was convicted of one charge of imposition contrary to section 29B of the *Crimes Act 1914* and one count of defrauding the Commonwealth contrary to section 29D of that Act and was sentenced to six months' imprisonment on each charge, the sentences being suspended upon his entering into a recognisance in the sum of $5000 to be of good behaviour for a period of three years with the special condition that he continue to receive psychiatric treatment. The amount fraudulently obtained had been repaid prior to the hearing.

Brisbane Office

Operation Tableau

The year saw the successful conclusion of a number of prosecutions arising out of an AFP investigation code-named 'Operation Tableau'. The investigation was one of the largest narcotics inquiries ever undertaken in Australia. It revealed the existence of a large scale international drug smuggling syndicate led by a number of US nationals residing in Australia.

In late January 1987 twelve persons, comprising nine US nationals and three Australians, were presented for committal proceedings in the Brisbane Magistrates Court. Over 160 police and 70 lay witnesses provided evidence used at committal. The evidence established that:

- Leeth, the leader of the syndicate, had been the major operator in planning and effecting an importation of 80 kilograms of cannabis resin into Australia in 1985;
- the syndicate, acting in conjunction with overseas contacts, had financed the purchase of 1.3 tonnes of cannabis resin and arranged for its importation into Australia from the Middle East via Singapore and the Solomon Islands, arriving at Jervis Bay in NSW on 4 March 1986;
- after off-loading, the drugs had been stored at various locations in NSW. Over the ensuing 13 months all but 87 kilograms had been distributed into the community. At a wholesale value of $11.4 million the profits obtained by the syndicate had been enormous;

- between January and May 1987 a major money-laundering exercise had been carried out in Brisbane involving:
  (i) conversion of cash to bank cheques made payable to off-shore companies under the control of syndicate members;
  (ii) conversion of cash to travellers' cheques for remission to Dubai with a view to financing a further drug purchase;
- in April 1987 distribution of the drugs had been halted and what remained had been transferred to the premises of a syndicate member at Gilston in Queensland for storage. It had been located there by AFP and Customs officers in September 1987;
- between July 1986 and May 1987 members of the group based in Australia, acting in conjunction with drug entrepreneurs in Dubai, London, Singapore and the United States, had planned and coordinated a shipment of 16 tonnes of cannabis resin from the same vendor source in the Middle East for shipment and supply to the North American market. Australian based members of the syndicate had had a financial interest in two tonnes of that shipment.

All persons charged were committed for trial. A nolle prosequi was entered in one case, while the remaining eleven pleaded guilty to offences arising out of the investigation.

The principals in the syndicate had been Richard Shierk Leeth, William Bruce Kirk, Dale Kirk and Paul Donovan. In sentencing them to terms of imprisonment ranging from 18 years to 25 years the Court commented that it regarded them as 'major drug operators at an international level' and 'high order criminals'.

The North Queensland Newspaper Company Limited

The defendant, which publishes the Townsville Bulletin, was charged with an offence under the *Family Law Act 1975* of publishing an account of Family Court proceedings that had identified the parties to those proceedings.

The article had been entitled 'The Trauma of Murray and Gail' and had given a detailed description of the breakdown of the parties' marriage and subsequent family court proceedings in New Zealand and Australia. The article had included photographs of the parties. They had been interviewed by a journalist who had told them he was researching divorce.

In March 1989 the company was tried on indictment in the District Court at Townsville. Although both parties had signed a written consent to the publication of the article, the Court held that that did not provide a defence to the charge. The company was convicted of the offence.

Hardie

In June 1986 the Australian Electoral Commission conducted union elections on behalf of the Queensland branch of the Federated Liquor and Allied Industries

Employees Union of Australia. The defendant, who at the time was the Acting Assistant Secretary of the union, had nominated for the position of Assistant Secretary. In accordance with the *Conciliation and Arbitration Act 1904*, the election had been by way of a secret postal ballot.

Many of the members of the union had given their addresses as care of various hotels throughout south-east Queensland, and indeed some 18 000 ballot papers had been forwarded to members, care of hotels. During the course of the ballot the Australian Electoral Commission received a number of complaints that people were collecting unclaimed ballot papers. Inquiries by the Commission also established that the ballot papers of some persons who had not received them had been returned for inclusion in the scrutiny. The matter was subsequently referred to the AFP for investigation.

Following an inquiry into the election by the Federal Court in November 1986 it was declared void due to the irregularities that had occurred and the Court ordered that a fresh election be held.

As a result of the AFP investigation the defendant was charged with five offences of obtaining a ballot paper without lawful authority or excuse. Although he initially pleaded not guilty before the Brisbane Magistrates Court, he changed his plea after three days of evidence.

In sentencing the defendant the magistrate utilised the provisions of section 19B of the *Crimes Act 1914* and discharged him without proceeding to conviction. The formal order was that the defendant be discharged upon his giving security in the sum of $1500 and that he enter into a recognisance to be of good behaviour for three years. The magistrate's use of section 19B was particularly significant so far as the defendant was concerned, since if a conviction had been recorded the defendant would have been automatically disqualified from holding office in a union for a period of five years.

The DPP appealed to the Full Court of the Federal Court against the order made by the magistrate on the basis that it was not an appropriate case to apply section 19B. The appeal was unanimously upheld. The Full Court set aside the magistrate's order, and then convicted the defendant in respect of each offence and imposed fines totalling $1000.

The defendant has since applied to the Federal Court for an order permitting him to continue to hold office in the union despite his convictions.

The Great Barrier Reef Marine Park

There have been a number of prosecutions for breaches of the *Great Barrier Reef Marine Park Act 1975* and regulations in areas north of Rockhampton. Alleged breaches are investigated by officers of the Queensland National Parks and Wildlife Service and the Queensland Boating and Fisheries Patrol, both of which are State agencies.

Of particular importance were a number of prosecutions involving trawling in the cross-shelf transect in the Shellburn Bay Closure. The closure encompasses almost 8000 square kilometres in the Marine Park previously used for commercial fishing and which, since 1986, has been part of the 'B' Zone of the Marine Park. No fishing or collecting of any type is allowed in the area. The area exhibits good examples of all foreshore and off-shore marine life, and contains Raine Island which is an important research location for bird, turtle, and other native wildlife. The area was chosen because of its remoteness and because it provides a valuable benchmark for assessing the impact of human activity on the Great Barrier Reef.

Indonesian fishing vessels

During the year prosecutors attended the Thursday Island Magistrate's Court on four occasions to prosecute the masters of five Indonesian fishing vessels caught catching and processing shark in Australian waters. Thursday Island is a remote location, some 1400 kilometres from Townsville and almost 3000 kilometres from Brisbane.

All five defendants were convicted of offences against the *Fisheries Act 1952* and fined. In all cases the vessel, equipment and product were forfeited. Three defendants were unable to pay their fines and served periods of imprisonment in default.

Enforcement action in these prosecutions is extremely expensive, involving interception by the Navy, escorting the vessel to port, feeding and providing for the master and the crew pending court proceedings, repatriation to Indonesia, and arranging for prosecutors and interpreters for the court proceedings.

Kingly Commodities (Queensland) Pty Ltd and Chin

In this case both the company and Chin were each convicted in the Federal Court of five offences under section 53(c) of the *Trade Practices Act 1974*. Chin was an account executive employed by the company. The charges were based on statements made by Chin when he had obtained money for investment by the company in commodity futures on behalf of customers. The defendant had advised customers that because two opposing futures contracts would be purchased as an investment, the customer would make money whether the market went up or down. This statement was false as were other statements made by Chin. Chin was charged on the basis that he was knowingly concerned in the commission of offences by the company.

Chin and the company were fined a total of $24 000 and $120 000 respectively.

By the time the charges were heard the company had gone into liquidation and the court was concerned as to the effect the imposition of a fine against the company might have on the company's creditors. However, after referring to relevant provisions of the Companies Code and the *Bankruptcy Act 1966*, the court was prepared to impose fines against the company because of the deterrent effect that that would have on potential offenders.

Perth Office

Marinovich, Romeo and Ricciardello

Marinovich was suspected of being involved in trafficking in narcotics and was targeted by a task force comprising officers from the NCA, the AFP and State Police. As a result of material obtained from listening devices installed pursuant to a warrant issued under the Customs Act 1901, the AFP arrested Marinovich, Romeo and Ricciardello in 1987 and charged them with conspiring to possess heroin.

A committal hearing was held in late 1987. In the course of that hearing Marinovich instituted proceedings in the Federal Court challenging certain rulings by the magistrate in relation to privilege claimed for police witnesses in declining to answer questions about police methodology. The Federal Court upheld the police claim of privilege.

After a one week committal hearing the defendants were committed for trial to the Supreme Court, and an indictment was signed by the Deputy Director alleging offences against State law. Subsequently Marinovich and Ricciardello mounted a High Court challenge to the Deputy Director's capacity to sign and present a State indictment. The trial, which was to have commenced in the Supreme Court in July 1988, was adjourned on the application of the defendants pending the hearing of the High Court appeal. That appeal was heard in October 1988 and was dismissed without counsel for the DPP being called on to reply.

The trial of the accused commenced in the Supreme Court on 1 March 1989 and concluded on 14 April 1989 with all defendants being convicted on two counts of conspiring to possess heroin with intent to sell or supply. Romeo and Ricciardello were sentenced to 12 years' imprisonment with eligibility for parole while Marinovich, who at the time of sentence was serving a lengthy term of imprisonment for other narcotics offences, was sentenced to eight years with eligibility for parole. Each of the defendants has lodged an appeal against conviction and sentence. The Crown has appealed against the sentence imposed on Marinovich.

Toh and Chong

At page 86 of last year's annual report mention was made of the conviction of Toh and Chong for the murder of a man on Christmas Island. It was noted that both defendants had lodged appeals against their conviction to the Full Federal Court. Those appeals were upheld on 15 March 1989 and a retrial ordered on the ground that there had been a misdirection by the trial judge as to the law applicable to murder and culpable homicide under the Penal Code of Singapore in its application to Christmas Island.

The retrial commenced in Perth before a local jury on 22 May 1989. On 29 May the jury found both accused guilty of murder and on 21 June 1989 each was sentenced to 15 years' imprisonment. After their initial conviction the defendants had been

sentenced to life imprisonment. However, the penalty for the offence of murder under the Code had since been retrospectively amended from life imprisonment to life imprisonment or such other term as the sentencing court considers appropriate.

In reaching its decision the Full Federal Court commented on the difficulties facing a trial judge who has to explain to a jury the operation of an 'outdated legal regime', namely the Penal Code of Singapore. This is commented upon elsewhere in this report.

Thompson and Bicknell

Thompson was an employee of the Department of Social Security who had agreed with Bicknell to develop and authenticate an unemployment benefit claim in the name of a fictitious person. Payments were subsequently generated which were made by cheque to Bicknell's address in the fictitious name. Subsequently, when benefits could only be paid to the credit of a bank account, the defendants opened a bank account in the fictitious name. When the fraud proved successful, a second fictitious beneficiary was subsequently created. The two offenders shared the proceeds, which amounted to approximately $28 500 over nearly two and a half years. By the time an investigation commenced the claims had ceased and the departmental records were, in the main, missing.

Thompson and Bicknell were both convicted after a trial in the Perth District Court, and each was sentenced to three years' imprisonment with eligibility for parole. Thompson subsequently pleaded guilty in the Perth Court of Petty Sessions to a number of offences under the *Social Security Act 1947* relating to the creation of a third fictitious beneficiary. He was sentenced to an additional nine months' imprisonment.

Millar

This person was convicted following a trial in the Supreme Court on a charge of conspiring to import a commercial quantity of heroin. Millar had approached another man named Warner, who had been a heroin addict and previous offender in respect of heroin, and had pressured him into contacting some Thai nationals Warner had met in prison with a view to them supplying Millar with heroin. Warner eventually agreed to make the necessary introductions. He was to receive a few thousand dollars if the venture was successful.

Millar took approximately $30 000 to Thailand which he used to purchase approximately 2.5 kilograms of heroin of 68 per cent purity. Upon returning to his hotel after purchasing the heroin, Millar had been warned by a hotel employee that his room was under surveillance. Millar had then taken the heroin to a national park where he concealed it, writing out a set of directions for its recovery. Upon returning to Perth without the heroin Millar tried to persuade Warner to find someone to buy the directions to the heroin, but nothing came of this. In the meantime AFP officers had been monitoring Millar's movements and had arranged for Thai authorities to recover the heroin using a copy of the directions.

Although both Warner and Millar were arrested, Warner was subsequently indemnified and gave evidence against Millar which led to his conviction. Millar was sentenced to 12 years imprisonment and was ruled eligible for parole. His subsequent appeal against conviction was dismissed.

DLS Adelaide

Drug Penalties

There has been a disturbing trend in South Australia over the past 12 months for the Supreme Court to give suspended sentences to persons convicted of possessing significant quantities of heroin, even when that possession was for a commercial purpose. It is of concern that these cases may lead to a general reduction in the sentences imposed in respect of serious drug offences. An outline of the three relevant cases follows.

Murn

The defendant pleaded guilty to possessing 20 grams of pure heroin after having been searched at his premises by members of the AFP. The defendant was a heroin addict and there was some doubt as to whether or not he would be able to effectively 'kick the habit'. The Court noted that he was a happily married man of 38 years with two children. He had his own business as a design print maker and was able to produce outstanding character references. Although there was not a great deal of evidence as to his intention with respect to the drug, it was accepted by the court that he would have had to sell at least some of the heroin in order to maintain his habit. The defendant was sentenced to four years' imprisonment with hard labour with a minimum term of three years. However, the sentence was suspended on the condition that the defendant enter into a recognisance in the sum of $1000 to be of good behaviour for three years.

The penalty was considered inadequate having regard to the amount of heroin, which was high for South Australia, and the previous pattern of sentencing. However, this appeared to be an isolated case and an appeal was not brought.

Warner

On 21 January 1988 the AFP executed a search warrant at the defendant's home and located 15 paper envelopes each containing an amount of heroin. The envelopes were in a plastic bag which was wrapped in a brown cloth. Also located during the search was a used hypodermic syringe.

When interviewed the defendant readily admitted to being in possession of heroin. He stated that each paper envelope contained about one gram of the drug and that he had intended to keep one packet for his own use and sell the rest. The defendant also stated that the syringe was his and that he administered heroin either intravenously or by smoking it. Chemical analysis revealed that the powder in the envelopes contained 15.72 grams of impure heroin of 21 per cent purity, or about three grams of pure heroin.

The defendant was a married man of 29 years. He had a successful business in car sales and was able to tender references from his previous employers who had a high regard for him. The court accepted that he had a 12 year history of drug abuse in a variety of drugs. It also appeared that he had been able to conceal his habit from his wife and friends and had maintained the appearance of a successful lifestyle while being addicted to heroin. The serious feature of this case was that there was direct evidence that the defendant had intended to sell heroin. Although the amount involved was relatively small, the combined fact of the admission of trafficking together with the long period of use to which the defendant admitted, made this a serious offence.

The defendant was sentenced to imprisonment with hard labour for four years with a minimum term of two years and six months. However, the Court then directed that he be released upon his own recognisance in the sum of $1000 to be of good behaviour for a period of three years. On this occasion an appeal was lodged in the Full Court of the Supreme Court of SA. While leave to appeal was granted, after considering the matter at some length the Full Court declined to interfere with the sentence on the basis that the suspension of a sentence is a discretionary decision which the Full Court felt compelled to leave undisturbed.

Spano

The defendant was charged with one count of being knowingly concerned in the importation of heroin and one count of possessing a prohibited import. He pleaded guilty to being knowingly concerned in the importation of heroin. No evidence was tendered on the second count.

The amount of heroin involved was 81.34 grams of 77 per cent purity, or about 62 grams of pure heroin. Upon the defendant's return to Australia after some seven years in Thailand, he had arranged for his Thai wife to send heroin to him through the post concealed in an oven mit. The parcel had been intercepted and the AFP had arranged a controlled delivery, substituting most of the heroin with glucodin. The AFP had found the accused at a friend's home shortly after he had flushed the heroin and glucodin into a septic tank from where it was retrieved shortly after.

After pleading guilty the accused sought to establish that the heroin had been for his own use. The sentencing judge rejected the accused's claim and found that the heroin had been imported at least partially for commercial purposes. The sentencing judge found that the defendant had engaged in a carefully planned course of conduct. The Court observed that he had first set up a dummy run by arranging for his wife to address a communication to him under an assumed name. The defendant was sentenced to imprisonment for five and half years with a minimum term of three years but he was released on condition that he enter into a bond in the sum of $1000 to be of good behaviour for three years and pay a pecuniary penalty of $4800.

Having regard to the substantial amount of heroin involved and the DPP's view that there was nothing about the defendant that could justify a suspended sentence, leave was sought to appeal against the sentence. However, the Supreme Court took the view that in its submissions before the sentencing judge the prosecution had not rejected the suggestion by the defendant's counsel that the sentence should be suspended with sufficient vigour for it to now appeal against penalty. Leave to appeal was denied.

Mitson v. The Law Society of South Australia

This case involved allegations against a firm of solicitors in SA. The matter arose out of complaints made to the South Australian Legal Practitioners Complaints Committee, a body separate from but comprising the same members as the Law Society of South Australia. The AFP sought the cooperation of the Complaints Committee and requested the handing over of documents that had been obtained by that body. The Complaints Committee declined to provide the documents on the ground that they were prevented from doing so by the secrecy provision contained in the Legal Practitioners Act (SA).

The AFP then executed a search warrant obtained under section 10 of the *Crimes Act 1914* and seized a number of documents from the Law Society and the Complaints Committee. Those documents were placed in containers which were then sealed and delivered to the Justice of the Peace who had issued the warrant pending resolution of the question whether section 10 of the Crimes Act overrode the secrecy provision of the Legal Practitioners Act.

When the matter came before the Federal Court, the Law Society of South Australia also sought to attack the search warrant on the basis that it was too broad. The Federal Court decided that, although it was not necessary to finally determine the question, section 10 of the Crimes Act clearly overrode the State provision and that the warrant itself was not too broad.

A further question arose whether legal professional privilege could be claimed by the Complaints Committee for the documents. This issue was resolved when the clients of the firm of solicitors waived legal professional privilege in relation to some documents and the police decided not to pursue access to others.

DLS Darwin

Indonesian fishing boats

In November 1988 and March 1989 the Australian Fishing Zone was invaded by a large number of deep water, long-line fishing vessels. These fishermen were entirely separate from a similar type of invasion which occurred in the Trochus beds off the WA Coast.

The November incursions were by boats which came from the Aru Islands of Indonesia and the March incursions by boats from Merarke, a major port in Irian Jaya. In all, 29 vessels were brought to Darwin as a result of the activities of Coast Watch,

the Royal Australian Navy and Fisheries officers. The masters of each of the 29 vessels were prosecuted.

Each master eventually pleaded guilty to charges under the *Fisheries Act 1952* of using a foreign boat for taking fish in the Australian Fishing Zone without a licence or having in his charge a foreign boat equipped with nets for taking fish in the Australian Fishing Zone without a licence. The masters were all convicted and placed on good behaviour bonds. Orders were made that each vessel, its catch and gear be forfeited to the Commonwealth. A number of the vessels were sold, the rest being destroyed by burning.

The prosecutions drew an enormous amount of publicity and a degree of discussion in the community concerning the value of the prosecutions and the true circumstances of the defendants. There is no doubt that each of these masters was a commercial fisherman fishing shark for the fins and tails and selling to a market at a price that was higher than it had been for some years.

Daw and Watts

The defendants stole $50 200 in cash from the safe of the Commonwealth Bank Agency at Port Keats, a remote Aboriginal community in the NT. They gained access by first breaking into the house of the postmaster and stealing the keys to the safe. The money was divided equally between the defendants. Before their apprehension, the defendants had spent about half the money on motor vehicles, gifts, a guitar and a 'good time'. The rest of the money was recovered. It had been Daw's idea to steal the money and he was sentenced to three years' imprisonment with a minimum term of 18 months. Watts, who was regarded as a follower, was sentenced to two years' imprisonment with a minimum term of eight months.

DLS Hobart

Pawsey

The defendant is a medical practitioner who was charged with a number of offences under section 129(1) of the *Health Insurance Act 1973*.

The charges related to the making of statements that were false or misleading in a material particular and which were capable of being used in support of an application for payment of an amount under the Act. It was alleged that Dr Pawsey had claimed assigned Medicare benefits in respect of post mortem examinations performed on former patients. It was alleged that benefits were not payable in respect of those services, that Dr Pawsey was aware of that fact, and that he had deliberately falsified the assignment forms.

On 2 December 1988 the trial judge directed the jury to acquit the accused following his Honour's ruling that the Health Insurance Act and regulations do not require services to be rendered to a live patient in order to attract Medicare benefits.

Tasmania is the only jurisdiction in Australia where the Crown can appeal from an acquittal on indictment. In this case an appeal was lodged on the ground, inter alia, that the trial judge had erred in law in holding that the words 'patient' and 'person' in the Act and regulations could include a corpse. The Court of Criminal Appeal upheld the appeal, ruling that Medicare claims can only be made for attendances upon the living.

At the time of writing it has not been decided whether the defendant will be retried.

Dourdoulakis

The defendant was charged with one count of imposition under section 29B of the *Crimes Act 1914* in relation to a blank Commonwealth bank cheque which had been stolen and passed on to him. The defendant had subsequently been a party to a scheme whereby the figure of $40 000 was typed onto the cheque and the signatures of bank officials were forged to make the cheque appear genuine. The defendant subsequently cashed the cheque and obtained $40 000 from the Wrest Point Casino in Hobart. He used the funds to gamble and to pay his accomplices.

The defendant pleaded guilty and was sentenced to two years' imprisonment.

Mason

The defendant was charged with a total of 16 counts of forging, uttering and making a false entry in a document in breach of his duty as a Commonwealth officer. The facts were that the defendant, who was a loans officer with the Commonwealth Bank, had created fictitious loans accounts for himself and for associates who could not obtain loans in their own right because of their financial position. The defendant used the money he obtained to finance the refurbishment of a sports car. When some of the loans fell due the defendant simply created new loans to finance their repayment.

The defendant pleaded guilty and was sentenced to 15 months' imprisonment.

Table 1(a)
Matters Dealt With Summarily in 1988-89 (i)

State or Territory	Defendants outstanding as at 1.7.88	Matters received during year	Number of defendants dealt with	Outcome of Summary Trials: Pleas of guilty to all charges	Outcome of Summary Trials: Number of defendants convicted (ii)	Outcome of Summary Trials: Number of defendants acquitted on all charges	Outcome of Summary Trials: Other (iii)	Defendants outstanding as at 30.6.89
NSW (iv)	489	1109	1007	782	59	22	144	591
Vic.	403	1752	1477	1179	189	27	82	678
Qld	126	667	662	607	14	7	34	131
WA	143	685	701	667	19	7	8	127
SA	559	1196	1351	1266	70	15	-	404
Tas.	97	241	163	146	15	2	-	175
NT (v)	80	1419	1437	217	27	12	1181	62
Total	1897	7069	6798	4864	393	92	1449	2168

Notes : (i) See tables in chapter 5 for details of matters dealt with summarily in the ACT.

(ii) i.e. where a defendant was convicted on at least one charge, or at least one charge was found proved.

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

(iv) Does not include certain prosecutions conducted in southern NSW by Canberra DPP.

(v) 1265 of the matters received by DLS Darwin during the year were in respect of alleged breaches of the *Commonwealth Electoral Act 1918*. While 134 of those matters were determined the remainder (1130) were discontinued. In the vast majority of cases the reason for discontinuing the prosecution was an inability to effect service of the summons.

Table 1(b)
Legislation : Matters Dealt With Summarily in 1988-89 (i)

Legislation	*NSW*	*Vic.*	*Qld*	*WA*	*SA*	*Tas.*	*NT (ii)*	*Total*	
Crimes Act	252	265	156	140	171	18	33	1035	(15.85%)
Social Security Act	327	582	306	258	336	103	43	1955	(29.94%)
Customs Act	35	42	31	26	45	13	7	199	(3.05%)
Health Insurance Act	7	5	3	1	7	4	–	27	(.41%)
Taxation Legislation	22	27	7	31	20	4	7	118	(1.81%)
Bankruptcy Act	8	17	2	7	6	2	2	44	(.67%)
AFP Act	3	6	1	5	2	1	–	18	(.28%)
Air Navigation Act or Civil Aviation Act	3	9	7	15	5	1	3	43	(.66%)
C'wlth Electoral Act (iii)	16	5	2	5	450	2	1265	1745	(26.72%)
C'wlth Places (Application of Laws) Act (iv)	–	175	2	60	–	2	–	239	(3.66%)
Postal Services Act	13	21	8	10	20	–	–	72	(1.10%)
Telecommunications Act	37	86	17	16	75	2	9	242	(3.71%)
Trade Practices Act	–	–	–	–	1	–	–	1	(.02%)
Other	140	155	86	119	213	11	68	792	(12.13%)
Total	863	1395	628	693	1351	163	1437	6530	(100%)

Notes : (i) See chapter 5 for details of the categories of cases prosecuted summarily in the ACT.

(ii) See note (v) to table 1(a).

(iii) Except in SA and the NT almost all prosecutions for offences under the *Commonwealth Electoral Act 1918* were conducted by the Australian Electoral Commission without reference to the DPP.

(iv) By arrangement with the Office of the Director of Legal Services, Sydney, that office conducts prosecutions under the *Commonwealth Places (Application of Laws) Act 1970* that would otherwise be handled by DPP Sydney.

Table 1(c)

Crimes Act 1914 : Matters Dealt With Summarily in 1988-89 (i) (ii)

Legislation	*NSW*	*Vic.*	*Qld*	*WA*	*SA*	*Tas.*	*NT*	*Total*	
Breach of recog. etc. (ss.20A, 20AC)	4.76	3.77	.64	5.71	-	-	-	3.00	(31)
Damage Prop (s.29)	.79	1.89	.64	-	-	-	6.06	.97	(10)
False Pretences (s.29A)	1.98	3.77	3.85	1.43	1.75	16.67	12.12	3.19	(33)
Imposition (s.29B)	44.84	48.68	73.72	46.43	73.68	11.11	30.30	54.11	(560)
False Statements (s.29C)	-	-	-	.71	.58	-	-	.19	(2)
Fraud (s.29D)	13.49	7.92	.64	5.00	-	-	3.03	6.18	(64)
Offs. relating to Admin. of Justice (ss.32-50)	-	.38	-	-	-	-	-	.10	(1)
Forgery (ss.65-69)	14.29	15.09	9.62	23.57	9.94	33.33	-	14.20	(147)
Stealing or Receiving (s.71)	13.10	12.08	7.69	7.86	13.45	16.67	21.21	11.69	(121)
Falsification of Books (s.72)	.79	.75	.64	-	-	11.11	-	.68	(7)
Bribery (ss.73 & 73A)	.40	-	-	-	.58	-	-	.19	(2)
False Returns (s.74)	-	2.26	-	1.43	-	-	6.06	.97	(10)
Conspiracy (ss.86 & 86A)	.40	.38	.64	2.14	-	5.56	-	.68	(7)
Other	5.16	3.02	1.92	5.71	-	5.56	21.21	3.86	(40)
Total	100% (252)	100% (265)	100% (156)	100% (140)	100% (171)	100% (18)	100% (33)	100%	(1035)

Notes : (i) Actual totals in brackets.

(ii) See table 4 in chapter 5 for details of prosecutions under the *Crimes Act 1914* conducted in the ACT Magistrates Court.

Table 2(a)
Matters Dealt With on Indictment in 1988-89 (i)

State	Defendants outstanding as at 1.7.88	Matters received during year	Number of defendants dealt with	Outcome of Trials: Pleas of guilty to all charges	Outcome of Trials: Number of trials	Outcome of Trials: Number of defendants convicted (ii)	Outcome of Trials: Number of defendants acquitted on all charges	Outcome of Trials: Other (iii)	Defendants outstanding as at 30.6.89
NSW	157	195	206	145	53	43	12	6(iv)	146
Vic.	35	45	32	23	8	6	3	–	48
Qld	24	109	96	75	18	14	5	2	37
WA	12	47	40	26	7	12	2	–	19
SA	49	50	46	30	13	14	1	1	53
ACT	41	129	84	29	45	40	14	1 (v)	86
Tas.	4	5	4	3	1	–	1	–	5
NT	6	6	6	4	2	1	1	–	6
Total	328	586	514	335	147	130	39	10	400

Notes : (i) This table does not include matters where a 'no bill' was entered during the year, and the 'number of defendants outstanding as at 1.7.88' has been adjusted accordingly. See chapter 2 for details of 'no bills' entered during year.

(ii) i.e. where a defendant was convicted on at least one charge.

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

(iv) Includes two 'hung juries', two trials which aborted and one trial where the indictment was quashed.

(v) Accused found unfit to plead.

Table 2(b)
Legislation : Matters Dealt With on Indictment in 1988-89 (i)

Legislation	NSW	Vic.	Qld	WA	SA	Tas.	NT	Total	
Crimes Act	91	17	52	21	29	2	3	216	(50.23%)
Customs Act	87	13	29	13	14	–	2	157	(36.51%)
Health Insurance Act	–	–	–	–	2	1	–	3	(.70%)
Marriage Act	1	–	–	–	–	–	1	2	(.47%)
Bankruptcy Act	–	2	1	–	1	1	–	5	(1.16%)
Non-Commonwealth	12	–	5	3	–	–	–	20	(4.65%)
Other	15	–	9	3	–	–	–	27	(6.28%)
Total	206	32	96	40	46	4	6	430	(100%)

Note : (i) See chapter 5 for the categories of cases dealt with in the Supreme Court of the ACT in 1988-89.

Table 2(c)
Crimes Act 1914 : Matters Dealt With on Indictment in 1988-89 (i)

	NSW	Vic.	Qld	WA	SA	Tas.	NT	Total	
Damage Prop. (s.29)			3.85	19.05				2.79	(6)
False Pretences (s.29A)	12.09		5.77					6.51	(14)
Imposition (s.29B)	49.45	23.53	44.23	38.10	86.10			48.84	(105)
False Statements (s.29C)									
Fraud (s.29D)	17.58	5.88	11.54	4.76	6.90			12.09	(26)
Offs. relating to Admin. of Justice (ss.32-50)	1.10	11.76						1.40	(3)
Forgery (ss.65-69)	6.59	29.41	13.46	4.76		100.00	100.00	11.16	(24)
Stealing or Receiving (s.71)	5.49	11.76	17.31	14.29				8.84	(19)
Falsification of Books (s.72)				9.52				.93	(2)
Bribery (ss.73 & 73A)									
False Returns (s.74)									
Conspiracy (ss.86 & 86A)	6.59	17.65	1.92	9.52	6.90			6.51	(14)
Other	1.10		1.92					.93	(2)
Total	100% (91)	100% (17)	100% (52)	100% (21)	100% (29)	100% (2)	100% (3)	100%	(215)

Note : (i) Actual totals in brackets

Table 2(d)
Duration of Trials on Indictment Completed in 1988-89

State	Number of trials	Total number of defendants dealt with	Number of hearing days: Less than 5	5–10	11–15	16–20	21–25	26–30	More than 30
NSW	53	61	25	11	7	4	2	1	3 (i)
Vic.	8	9	3	2	2				1
Qld	18	21	14	3	1				
WA	7	14	5	1					1
SA	13	16	7	1		1	4		
ACT	45	55	35	10					
Tas.	1	1	1						
NT	2	2	1	1					
Total	147	179	91	29	10	5	6	1	5

Note : (i) These trials were Ward, Knight and Russell (32 hearing days); Kelleher, Powch and Fan (103 hearing days); English (40 hearing days).

Table 3(a)
Prosecution Appeals Against a Sentence Imposed by a Court of Summary Jurisdiction in 1988-89

State	Number of appeals dealt with	Type of matter			Outcome of appeal	
		Drugs	Social Security	Other	Upheld	Dismissed
NSW (i)	–					
Vic.	–					
Qld	–					
WA	3		3		2	1
SA	–					
ACT (i)	–					
Tas.	5		1	4	4	1
NT	1			1	1	
Total	9		4	5	7	2

Note: (i) In the ACT the prosecution does not have a right of appeal against a sentence imposed by the the ACT Magistrates Court, and such a right was only recently conferred in NSW.

Table 3(b)
Prosecution Appeals Against a Sentence Imposed Following a Conviction on Indictment in 1988-89

State	Number of appeals dealt with	Type of matter		Outcome of appeal	
		Drugs	Other	Upheld	Dismissed
NSW	15	9	6	13	2
Vic.	–				
Qld	1		1	1	
WA	1	1		1	
SA	3	2	1	1	2
ACT	3	3			3
Tas.	–				
NT	–				
Total	23	15	8	16	7

Table 3(c)
Other Prosecution Appeals in 1988-89 (i)

State	Number of appeals dealt with	Decision appealed from			Outcome of appeal	
		Failure to convict or commit	Grant of bail	Other	Upheld	Dismissed
NSW	3		3		3	
Vic.	–					
Qld	1			1	1	
WA	–					
SA	1	1				1
ACT	–					
Tas.	1	1 (ii)				
NT	–					
Total	6	2	3	1	4	1

Notes : (i) This table does not include prosecution appeals from adverse decisions on appeal. These are included in table 3(d).
(ii) Decision reserved.

Table 3(d)
Appeals From Decisions on Appeal in 1988-89

State	Number of Appeals Dealt With	Court in which appeal was heard	
		Superior	High Court
NSW	4		4
Vic.	1		1
Qld	1		1
WA	–		
SA	–		
ACT	1		1
Tas.	–		
NT	–		
Total	7		7

Table 4(a)
Appeals by Persons Convicted by a Court of Summary Jurisdiction in 1988-89

State	*Number of appellants dealt with*	*Type of appeal*		
		Appeals against conviction only	*Appeals against sentence only*	*Appeals against conviction and sentence*
NSW	147	38	108	1
Vic.	52	1	45	6
Qld	12	–	10	2
WA	10	1	9	–
SA	13	–	10	3
ACT	16	8	4	4
Tas.	3	–	3	–
NT	4	1	1	2
Total	257	49	190	18

Table 4(b)
Appeals by Persons Convicted on Indictment in 1988-89

State	*Number of appellants dealt with*	*Type of appeal*		
		Appeals against conviction only	*Appeals against sentence only*	*Appeals against conviction and sentence*
NSW	37	7	18	12
Vic.	4	–	3	1
Qld	5	1	3	1
WA	9	3	4	2
SA	–			
ACT	2	1	1	–
Tas.	–			
NT	–			
Total	57	12	29	16

Table 4(c)
Applications by Accused Persons Under the ADJR Act in 1988-89

State	Matters dealt with
NSW	3
Vic.	1
Qld	–
WA	–
SA	
ACT	–
Tas.	–
NT	–
Total	4

Table 5

Social Security Offenders: Amounts Defrauded in Charges Found Proved in 1988-89(i)

State	*Amount defrauded*
NSW	$ 4 622 475
Vic.	4 542 885
Qld	2 662 009
WA	1 776 236
SA	1 963 441
ACT (ii)	690 581
Tas.	488 997
NT	158 322
Total	$ 16 904 946

Notes : (i) Includes amounts defrauded where charges laid under the *Crimes Act 1914*. 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) Includes prosecutions conducted by Canberra DPP in southern NSW.

Table 6(a)

Matters Dealt With in Committal Proceedings in 1988-89 (i)

State	*Number of defendants dealt with*	*Committed for sentence*	*Committed for trial*	*Discharged*
NSW	254	140	114	
Vic.	41	1	36	4
Qld	68	25	43	
WA	43	-	43	
SA	46 (ii)	6	35	
Tas.	5		5	
NT	6		6	
ACT	129	42	87	
Total	592	214	369	4

Notes : (i) Does not include matters where all charges withdrawn prior to commencement of committal hearing.

(ii) Committal proceedings against 5 defendants part heard as at 30.6.89.

Table 6(b)
Duration of Defended Committal Proceedings Completed in 1988-89 (i)

State	Defendants dealt with	Number of hearing days: Up to 1	2	3	4	5–10	11–15	16–20	21–25	26–30	more than 30
NSW (ii)											
Vic. (iii)		19	4			8	1	1			1 (iv)
Qld	43	34	1	4		4					
WA	43	32	4	5		2					
SA (v)	40	30		2	1	6	1				
Tas.	5	4	1								
NT	6	6									
ACT (vi)											

Notes : (i) Except in the case of Victoria the figures represent the number of defendants.
(ii) While complete figures are not available for NSW, one committal hearing conducted by Sydney DPP against Crennan, Dalco, Goldspink and Lupton on charges of conspiracy to defraud occupied a total of 146 hearing days.
(iii) Figures represent the number of committal proceedings.
(iv) This matter (the committal proceedings against Forsyth, Brown, Swansson, Lithgow and Connell) occupied a total of 155 hearing days over a three and a half year period.
(v) Includes part-heard committal proceedings.
(vi) Figures not available.

Table 7 Advice Matters in 1988-89 (i)

State	Advice matters outstanding at 1.7.88	Advice matters received during year	Matters dealt with	Type of advice: General	Insufficient evidence	Prosecution not appropriate	Other (ii)	Matters outstanding at 30.6.89
NSW	578	312	394	128	98	92	76	496
Vic.	339	304	421	49	56	159	157	222
Qld	127	406	316	56	31	73	156	217
WA	60	191	175	95	4	34	42	76
SA (iii)								
ACT (iii)								
NT	26	36	55	17	5	13	20	7
Tas.		46	41	12	20	9	–	5
Total	1130	1295	1402	357	214	380	451	1023

Notes : (i) In the case of NSW, Vic, Qld and WA this table only includes 'advice matters' recorded on the CMM system. A file may not be created where the advice related to a relatively minor matter and was conveyed orally. Other advice matters may be located on 'running files' i.e. the file will relate to more than one matter. Still other advice matters are not recorded on the CMM system for security reasons.
(ii) e.g. where time limit on the institution of a prosecution has expired.
(iii) Figures not available.

Processing time : summary matters

The following graphs record the time taken from the receipt of a summary matter by the DPP to:

(i) the first mention of the matter in court; and

(ii) the final disposition of the matter.

Matters in respect of which all charges against a defendant were withdrawn or no evidence offered by the prosecution in respect of any charge [recorded under 'other' in table 1(a)] have not been taken into account.

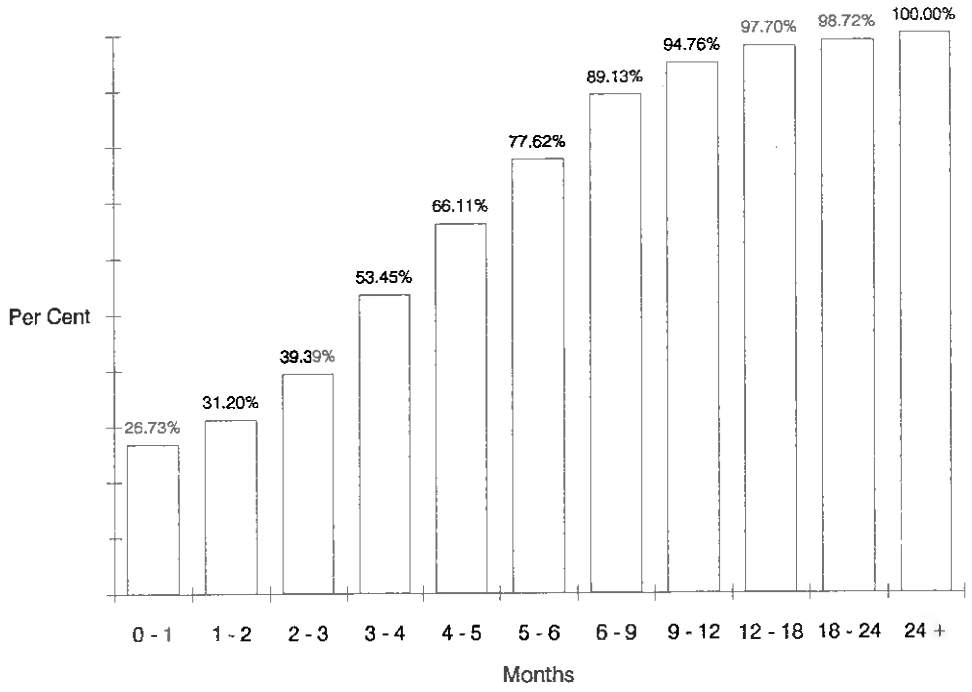
While some summary matters are received by the DPP following arrest and charge, in the vast majority of cases a summary prosecution is instituted following the receipt of a brief of evidence from the relevant investigative body for decision whether a prosecution should be instituted and, if so, on what charge or charges. In some cases a prosecution will not be instituted until further investigations have been undertaken to close gaps in the evidence disclosed by the Office's examination of the brief of evidence.

The following graphs deal only with summary prosecutions conducted by the DPP in NSW, Vic, Qld and WA. Insufficient data is available in the case of summary prosecutions conducted by DPP Canberra, and the details of summary prosecutions conducted by DLS Adelaide, Hobart and Darwin were recorded on a different system.

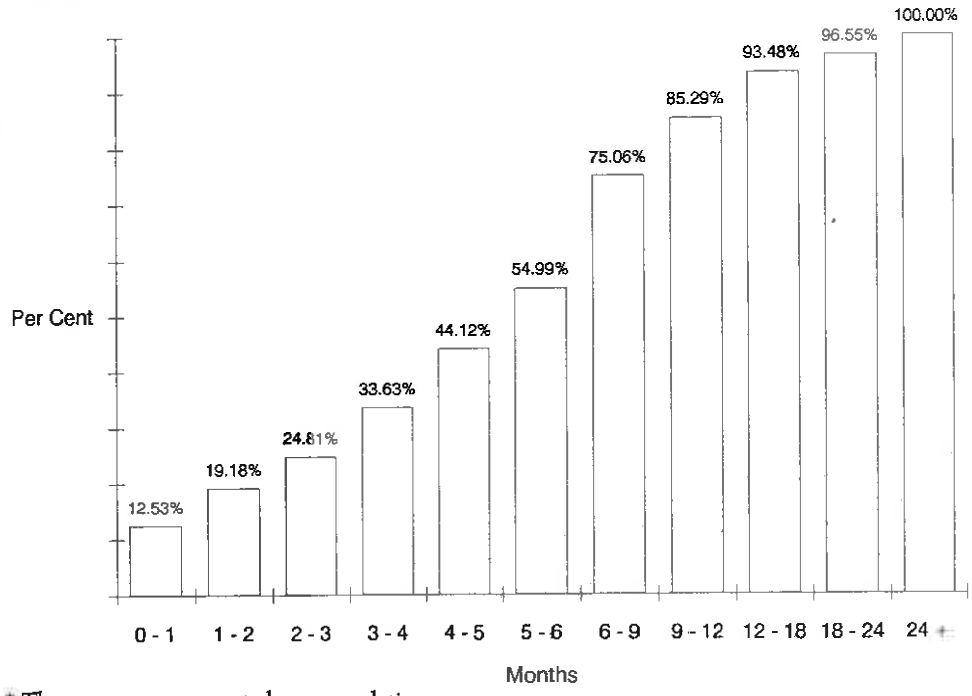
In the case of Victoria the date a summary matter was first mentioned in court was not retained, and accordingly it is not possible to provide details of the time taken from receipt to first mention.

NSW : Summary Matters Determined by a Plea of Guilty

1(a) Time from Receipt to First Mention *



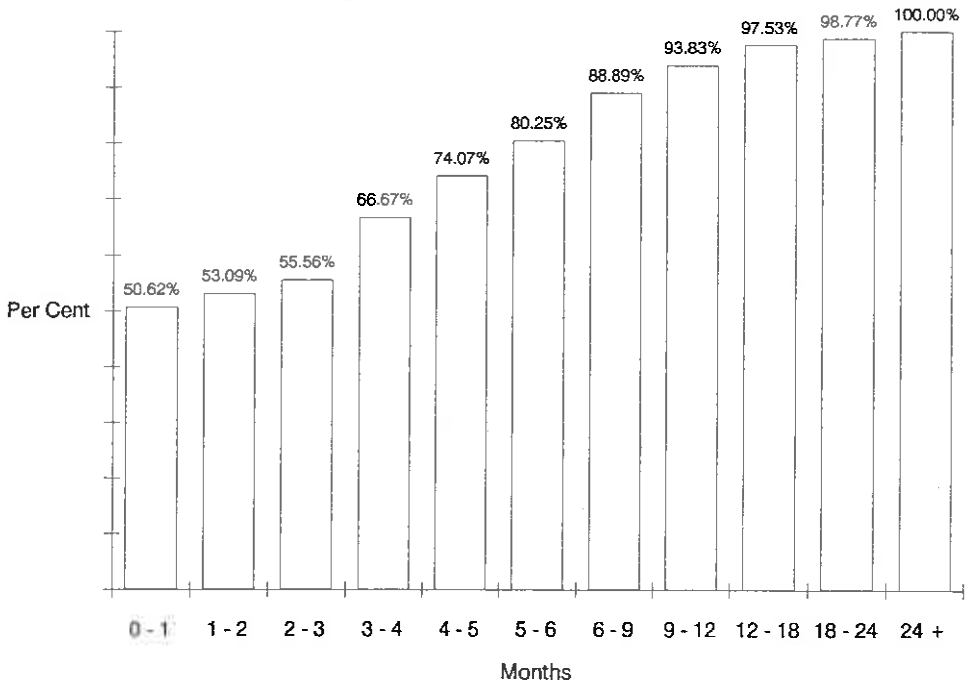
1(b) Time from Receipt to Sentencing *



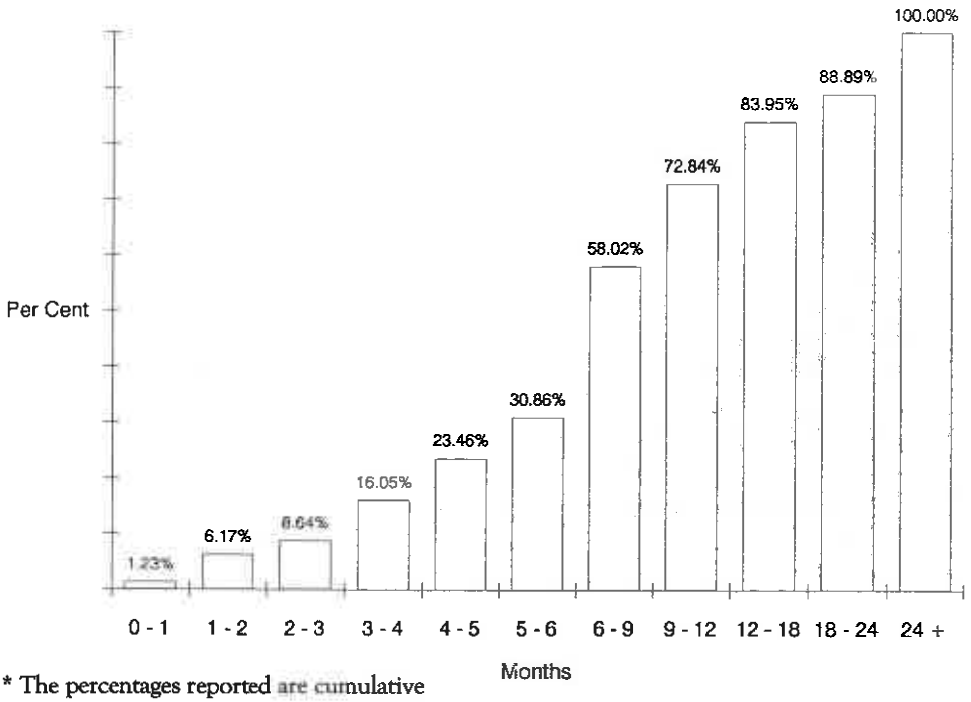
* The percentages reported are cumulative

NSW : Defended Summary Matters

1(c) Time from Receipt to First Mention *

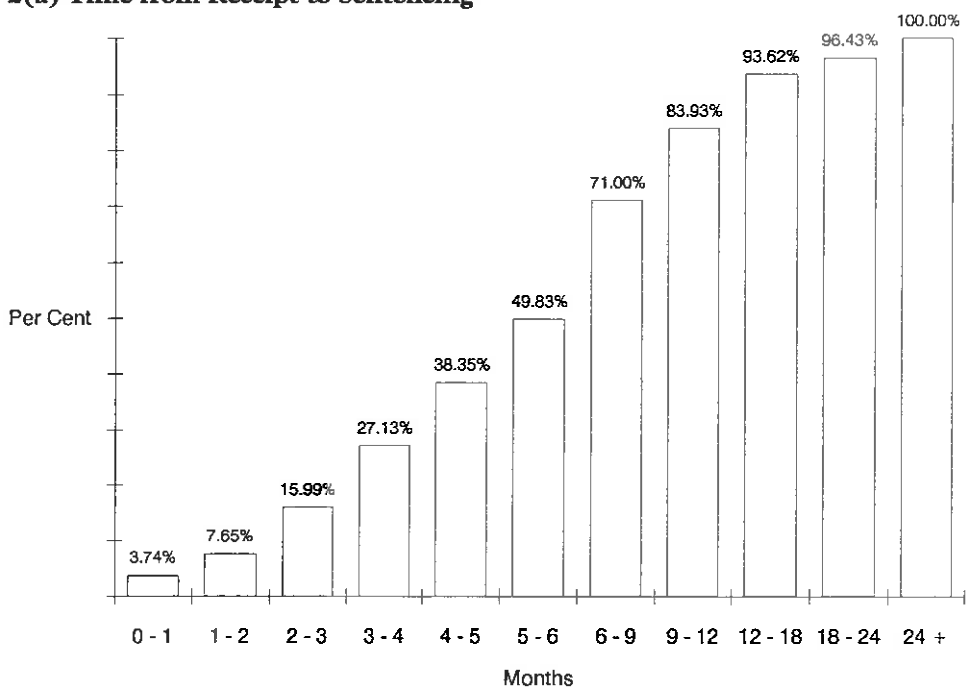


1(d) Time from Receipt to Sentencing/Acquittal*

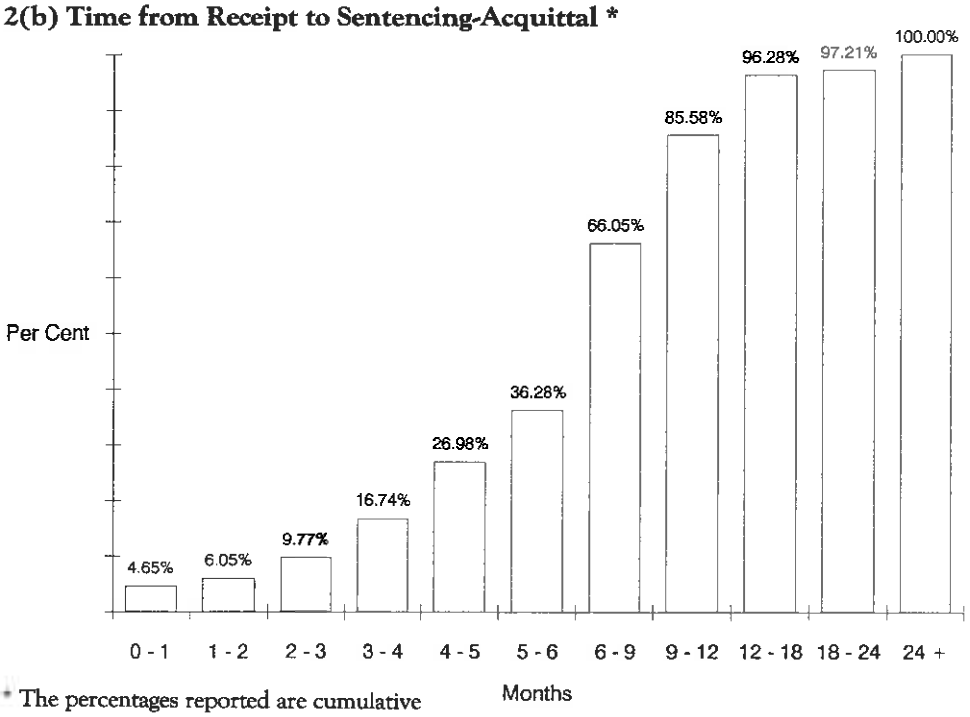


* The percentages reported are cumulative

Vic. : Summary Matters Determined by a Plea of Guilty
2(a) Time from Receipt to Sentencing *



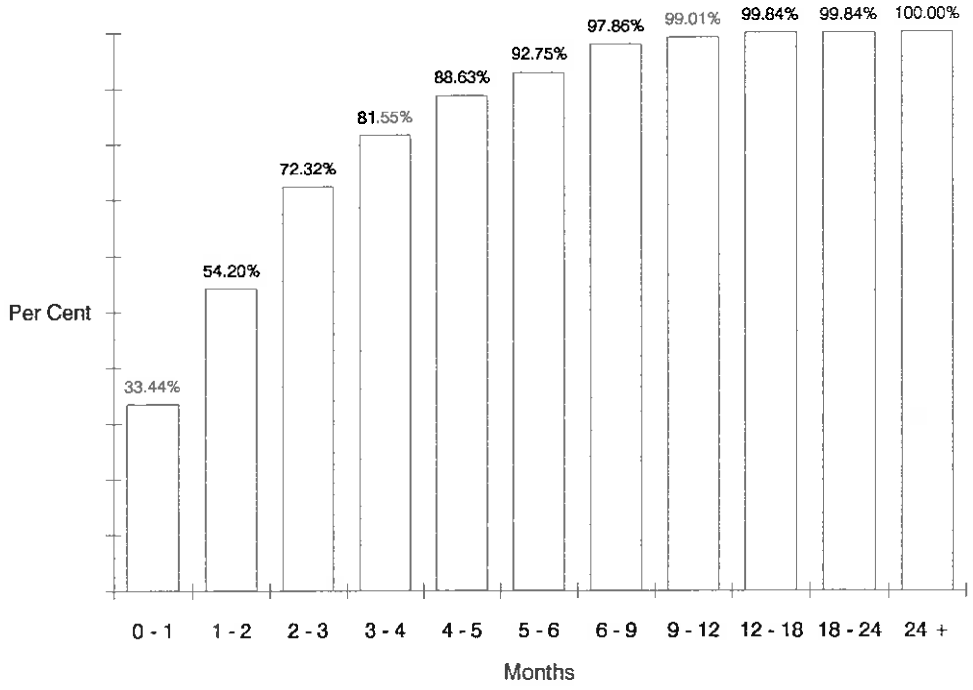
Vic. : Defended Summary Matters
2(b) Time from Receipt to Sentencing-Acquittal *



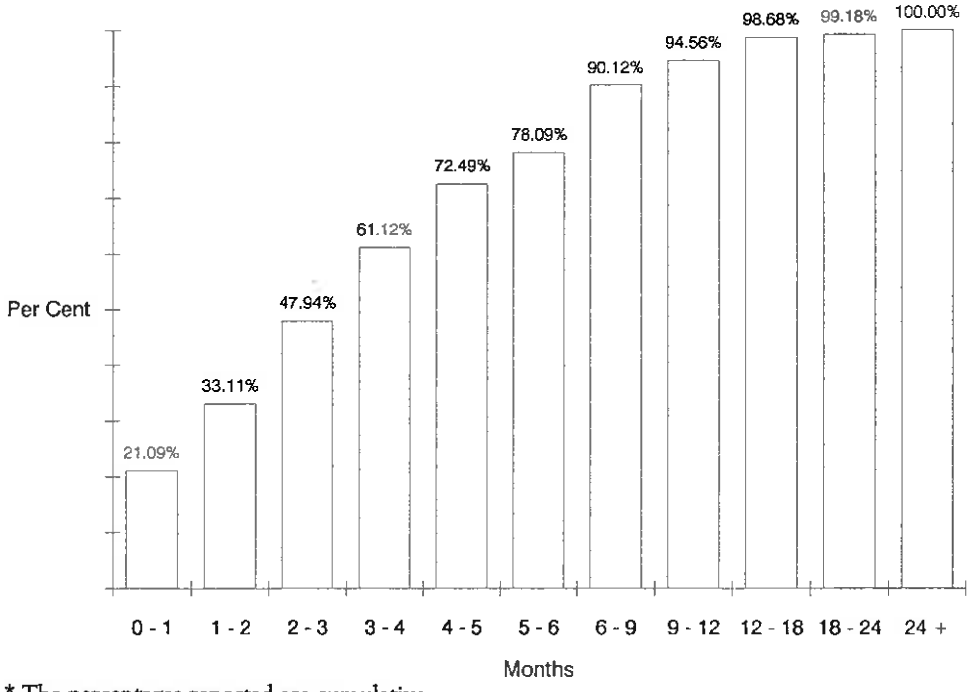
* The percentages reported are cumulative

Qld : Summary Matters Determined by a Plea of Guilty

3(a) Time from Receipt to First Mention *



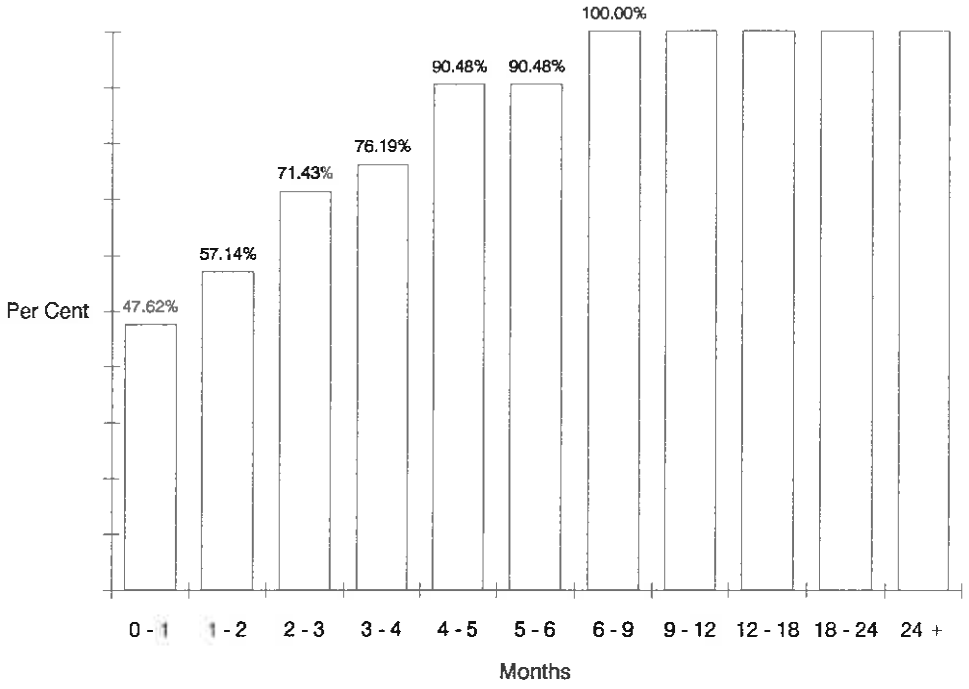
3(b) Time from Receipt to Sentencing *



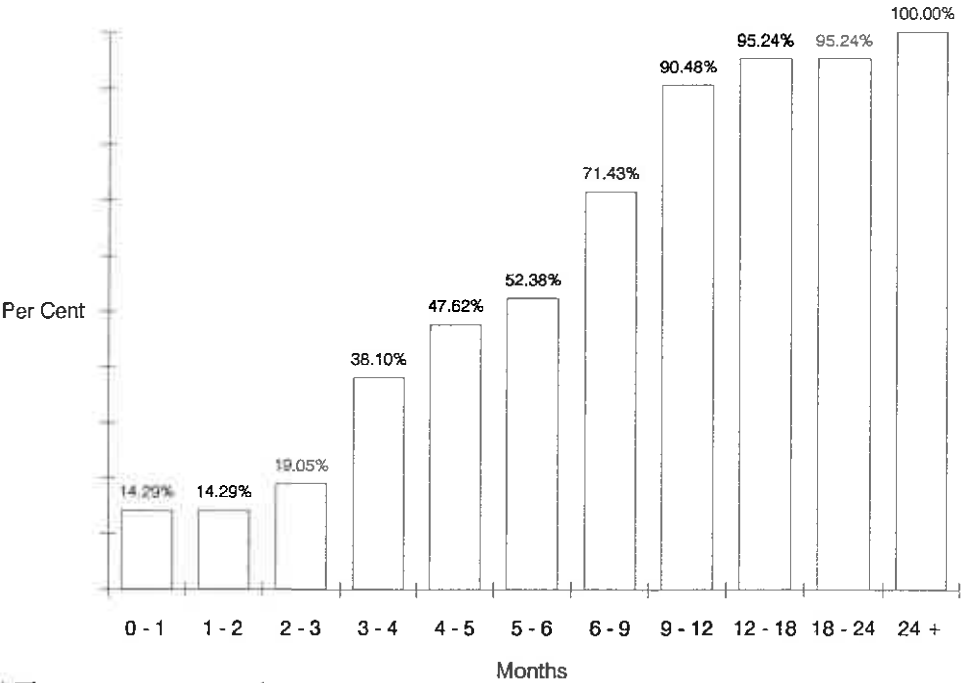
* The percentages reported are cumulative

Qld : Defended Summary Matters

3(c) Time from Receipt to First Mention *



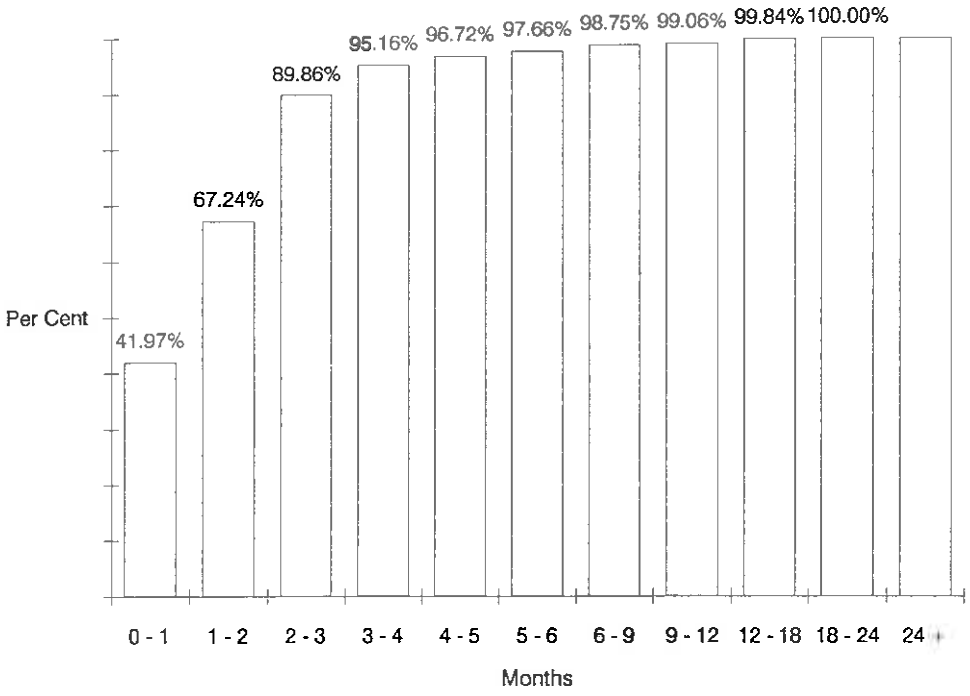
3(d) Time from Receipt to Sentencing-Acquittal *



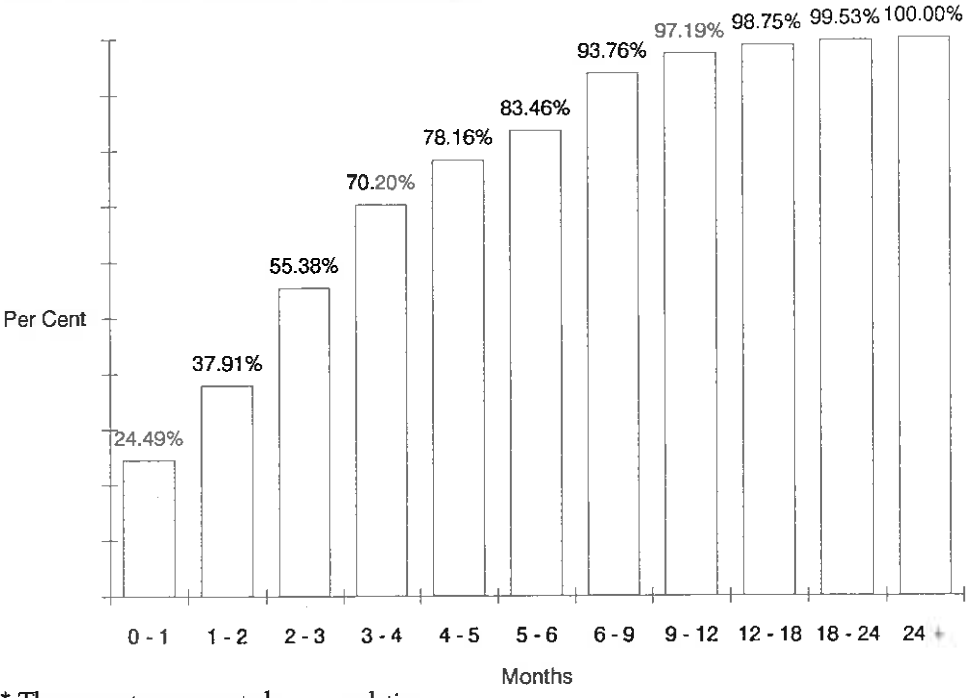
* The percentages reported are cumulative

WA : Summary Matters Determined by a Plea of Guilty

4(a) Time from Receipt to First Mention *



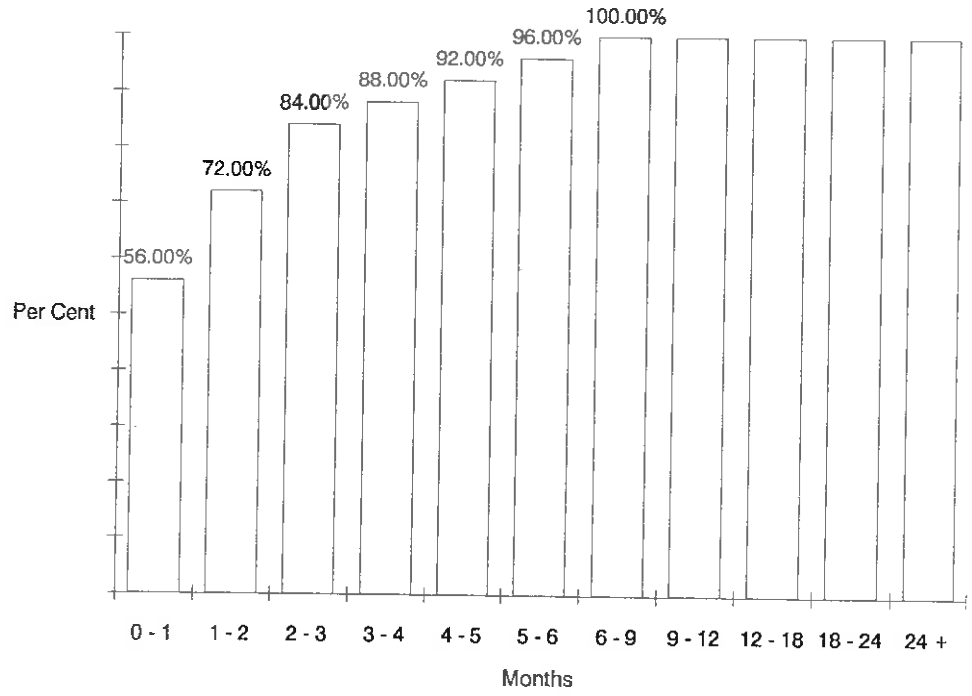
4(b) Time from Receipt to Sentencing *



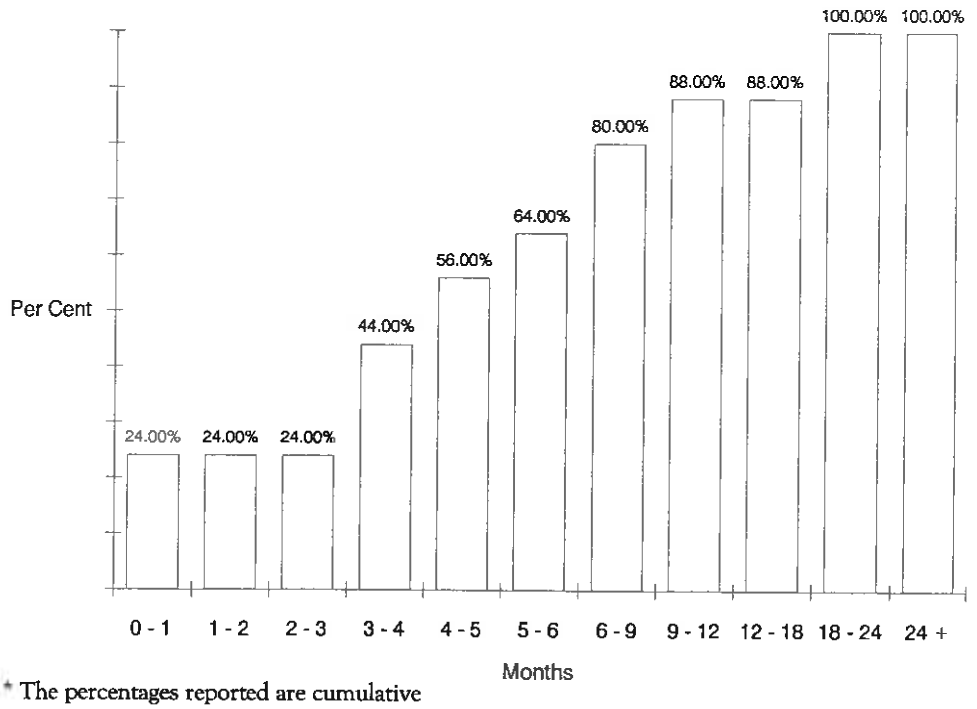
* The percentages reported are cumulative

WA : Defended Summary Matters

4(c) Time from Receipt to First Mention *



4(d) Time from Receipt to Sentencing-Acquittal *



* The percentages reported are cumulative

4

Major Fraud

In September 1984 the DPP assumed responsibility for prosecutions begun by former Special Prosecutor Gyles, QC, arising from bottom-of-the-harbour tax schemes. This has historically formed a large part of the work of the Major Fraud branches, although as that work has wound down, the branches have taken on a range of other revenue-related matters.

Prosecutions in this area have typically involved the unravelling of complex financial transactions and the conduct of long and difficult court proceedings. Extensive use has been made of computerised litigation support systems, and indeed in many instances a prosecution would be virtually impossible without support of that kind. The work in the major fraud area requires a unique combination of painstaking preparation and innovative presentation.

As the majority of the bottom-of-the-harbour prosecutions has now been completed, it is timely to report on the status of those matters. The balance of this chapter contains a brief outline of some of the other revenue-related work of the Office.

Bottom-of-the-harbour prosecutions

Upon completion of his term as Special Prosecutor, Mr Gyles had authorised charges against 54 defendants. At that time, one of those defendants had been dealt with and a

number of warrants had been issued in relation to persons believed to be overseas. An additional 10 defendants were charged after the DPP assumed responsibility for bottom-of-the-harbour prosecutions.

Present Position

Charges against 52 persons have now been finalised. Details are as follows:

	Name and State	*Result*
1.	Harold Abbott WA	Charge not proceeded with.
2.	John Waymouth Ahern Qld	Convicted; 18 months' imprisonment.
3.	John Evan Anderson Vic.	Acquitted.
4.	Joseph Michael Arahill NSW	No Bill granted.
5.	Ian Robert Beames Vic.	Pleaded guilty; two years three months' imprisonment.
6.	Daryl Frederick Bledsoe Qld	No Bill granted.
7.	Peter Briggs WA	Convicted; 18 months' imprisonment (minimum term of eight months).
8.	Paul Raymond Brinklow WA	Charge not proceeded with.
9.	David Martin Bullock NSW	No Bill granted.
10.	David William Cantwell NSW	Convicted; two years' imprisonment (minimum term of 16 months).
11.	Colin Coghill Vic.	Pleaded guilty; two years' imprisonment.
12.	Ian Patrick Cornelius WA	Convicted; 18 months' imprisonment (minimum term of eight months).
13.	Peter Damian Dennis NSW	Pleaded guilty; nine months' imprisonment, to be served by way of periodic detention.
14.	John Anthony Ditfort NSW	Convicted; three years'imprisonment. Reparation order for $273 109.

	Name and State	*Result*
15.	John Patrick Donnelly Qld	Convicted; two years three months' imprisonment on Commonwealth count and two years nine months' imprisonment on State count.
16.	Robert Mervyn English NSW	Acquitted.
17.	Lloyd Errol Faint Qld	Pleaded guilty; two years' imprisonment.
18.	Lionel Myer Freedman Qld	Convicted; 12 months' imprisonment.
19.	Peter William Gallus NSW	No Bill granted.
20.	David John Ginges NSW	Pleaded guilty. Fined $25 000 and released on good behaviour bond.
21.	Ian Maxwell Greenham WA	Charge not proceeded with.
22.	Lee Gabriel Hurley Qld	Pleaded guilty; two years' imprisonment.
23.	Desmond William Knight Qld.	Indemnified as prosecution witness.
24.	Reginald Keith Knight NSW	Two years eight months' imprisonment (minimum term of two years). Reparation order for $3 million.
25.	Gunnar Knudsen Vic.	Acquitted.
26.	Donald Brookes Lockyer Vic.	Pleaded guilty; two years six months' imprisonment.
27.	Phillip Vernon Mackey NSW	Convicted, two years eight months' imprisonment (minimum term of two years).
28.	Brian James Maher Qld	Convicted; two years nine months' imprisonment on Commonwealth count, five years' imprisonment on State count. An appeal against conviction on the State count was subsequently upheld.
29.	Kenneth McTrusty Vic.	Pleaded guilty; six months' imprisonment.

	Name and State	*Result*
30.	Ralph William Merrell NSW	No Bill granted.
31.	Jonathon Gwynne Meyer NSW	No Bill granted.
32.	Damian John Nolan Vic.	Indemnified as prosecution witness.
33.	Alan Roy Palmer Qld	Acquitted.
34.	Brian Ray Vic.	Acquitted.
35.	Barry James Rumpf Vic.	Pleaded guilty; two years three months' imprisonment (minimum term of 18 months)
36.	Paul Richard Russell NSW	Pleaded guilty, released on good behaviour bond. Reparation order for $30 000.
37.	Barry Saunders Vic.	Convicted; 15 months' imprisonment (minimum term of nine months).
38.	Gerard Sheehan Vic.	Convicted; 15 months' imprisonment (minimum term of nine months).
39.	Alexander Silbersher Vic.	Charge not proceeded with.
40.	Peter John Ridsdale Snow WA	Discharged at committal.
41.	Graham David Spence Qld	Convicted; 12 months' imprisonment.
42.	James Turner Stewart Vic.	Charge not proceeded with.
43.	Peter John Titley NSW	Pleaded guilty, released on good behaviour bond. Reparation order for $15 000.
44.	Wilfred Henry Tolhurst WA	Died during committal hearing.
45.	John Michele Vereker Vic	Pleaded guilty; nine months' imprisonment (minimum term of three months).
46.	Francis Dennis Ward NSW	Convicted; two years eight months' imprisonment (two years minimum term). Reparation order for $3 million.

	Name and State	*Result*
47.	Donald Vine Williams NSW	Discharged at committal.
48.	Graeme Ernest Wolf Vic.	No Bill granted.
49.	Ronald Warren Woss WA	Discharged at committal.
50.	John Walker Wynyard NSW	Died during committal hearing.
51.	Alan Joseph Young NSW	Convicted; 18 months' imprisonment (minimum term of eight months).
52.	Eric James Young Qld	Convicted; 15 months' imprisonment.

A further 11 defendants have been committed for trial on one or more charges and are awaiting a hearing date for their trial.

Summary

Convicted	28
Acquitted	5
Committed and awaiting trial	11
Charges not proceeded with	5
No Bill granted	7
Discharged at committal	3
Died during committal	2
Indemnified as prosecution witness	2
Committal pending	1
	64

Outstanding charges

The committal proceedings involving 10 of the defendants still awaiting trial were extremely protracted.

The committal hearing of charges against five of these defendants was conducted in NSW. That committal hearing commenced in September 1985 and was finally concluded on 5 May 1989 with the committal for trial of all defendants. The committal hearing was punctuated by lengthy adjournments due in part to lack of court time.

The committal hearing of charges against the other five defendants was conducted in Victoria. In that matter, which initially involved six defendants, committal proceedings commenced on 22 July 1985 and the prosecution closed its case on 20 March 1986.

The magistrate found that there was sufficient evidence to caution each defendant, which finding was the subject of unsuccessful appeals to the Federal Court and the Full Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*. An application by some of the defendants for special leave to appeal to the High Court was refused.

On 1 August 1988 the Magistrate committed five of the defendants for trial. The remaining defendant, Vereker, had by then pleaded guilty to one count of conspiring to defeat the enforcement of the *Income Tax Assessment Act 1936*. One defendant appealed unsuccessfully to the Federal Court, and subsequently to the Full Federal Court, against the committal order. Indictments charging conspiracy to defraud against the five defendants have been filed in the Victorian Supreme Court.

Matters completed during year

In the period of this report, the following bottom-of-the-harbour matters were finalised.

English

On 13 September 1988 English pleaded not guilty to one charge of conspiring with John Wynyard to defraud the Commonwealth. The matter was heard before Graham DCJ in the District Court of NSW.

The charge arose out of the alleged company stripping activities of the Shareholder Group of companies between October 1979 and June 1982. The Shareholder Group, through its purchasing companies, had bought the shares of approximately 240 companies with current year profits and contingent tax liabilities. The method of acquiring these companies had effectively divested them of any assets with which to meet their tax liabilities. It was alleged that the Commonwealth had been defrauded of $30 647 495 in lost revenue. Wynyard had been the principal controller of the Shareholder organisation and evidence was given that English had served as a director of 337 of the acquired companies.

After a three week trial the jury acquitted English of the charge against him.

Knight, Ward, Russell and Titley

This prosecution was finalised on 12 May 1989. It involved the asset stripping of some 71 companies which resulted in the companies being unable to meet their tax liabilities. The loss to the revenue was approximately $21.5 million. The accused were all indicted on a count of conspiracy to defraud the Commonwealth.

In December 1988 Titley entered a plea of guilty and he was released upon his entering into a recognisance to be of good behaviour for a period of three years and to pay $15 000 in reparation to the Commonwealth. On 16 February 1989 Russell entered a plea of guilty in the Supreme Court of NSW and was sentenced at the conclusion of the trial of Knight and Ward. He was also released upon entering into a

recognisance and he was ordered to pay $30 000 in reparation to the Commonwealth. Both Titley and Russell were seen as lesser players in the conspiracy.

The trial of Knight and Ward commenced on 1 March 1989 and concluded on 1 May 1989 when a reduced jury of 10 returned verdicts of guilty. The defendants were each sentenced on 12 May 1989 to imprisonment for two years and 8 months with a minimum term of two years. Both were ordered to make reparation to the Commonwealth in the sum of $3 million. The trial involved evidence from 45 witnesses and over 2000 documentary exhibits.

Sheehan and Saunders

On 16 December 1988, after an aborted trial and a retrial, Sheehan and Saunders were convicted of conspiring to defraud the Commonwealth. Each defendant was sentenced to imprisonment for 15 months with a minimum term of nine months.

This matter related to the asset stripping of 45 companies with tax liabilities. The total assets involved were approximately $5.5 million. The conspiracy had involved the implementation of highly complex and artificial depreciation and prepaid interest tax treatment schemes. The jury found that, irrespective of the efficacy or otherwise of those schemes, the defendants had dishonestly agreed that the companies would be rendered unable to meet any prospective tax liabilities.

During the course of the two trials the prosecution utilised a computerised list of 46 000 exhibits, computerised text retrieval systems of the trial transcript, computer generated colour film transparencies illustrating the schemes, and the expert evidence of accountants and tax officers to explain the various acts and transactions the subject of the prosecution.

Appeals

During the year John Waymouth Ahern applied to the High Court for special leave to appeal against his conviction for conspiring to defraud the Commonwealth. The High Court granted special leave but dismissed the appeal. In its reasons, the High Court outlined the considerations to be applied by a trial judge in the reception and use of evidence of the acts and declarations of co-conspirators outside the presence of the accused.

Peter Briggs also applied to the High Court for special leave to appeal against his conviction for conspiracy to defraud. The High Court refused special leave.

Sales tax fraud

DPP lawyers were closely involved as advisors during the investigation and brief building phases of the bottom-of-the-harbour prosecutions. That involvement has continued in more recent investigations of other suspected fraud. The DPP will continue to apply the experience and expertise developed in the preparation and prosecution of bottom-of-the-harbour cases to other areas of fraud on the Commonwealth. In particular, DPP officers have been involved with officers of the

AFP and the ATO in sales tax investigation task forces. The investigations have resulted in a number of prosecutions for alleged sales tax fraud. Details of some of those matters are as follows.

Operation Shindig

On 14 April 1989 four persons were committed for trial in the Supreme Court of NSW on charges of conspiring to defraud the Commonwealth. The alleged fraud involved the purported implementation of a scheme to reduce the sales tax on goods such as motor vehicles and boats. The scheme involved participants in Qld, SA and NSW. It is alleged that the scheme operated between 1978 and 1982, and that the loss to the revenue was approximately $25 million.

All the defendants have lodged applications under the *Administrative Decisions (Judicial Review) Act 1977* for review of the Magistrate's decision to commit for trial.

Yates

Yates was committed for trial on 10 December 1987 in respect of 65 charges alleging offences against section 29A(2) of the Crimes Act 1914 of causing a benefit to be given by the Commonwealth by means of a false pretence with intent to defraud. It is alleged that Yates, acting on behalf of one of his companies, had quoted a sales tax number to Customs authorities which had the effect that sales tax was not charged on goods imported by that company. Evidence was given that the company had not been the holder of the sales tax number which had been quoted.

Yates applied under the *Administrative Decisions (Judicial Review) Act 1977* challenging the magistrate's decision to commit on the ground that the charges did not disclose offences against section 29A(2). In particular, it was argued that the non-levying of sales tax cannot constitute the giving of a benefit by the Commonwealth within the meaning of section 29A. This argument failed at first instance and Yates appealed to the Full Federal Court. That appeal also failed (Woodward and Morling JJ, Einfeld J dissenting). An application for special leave to appeal to the High Court was recently refused.

Melbourne cases

Five individuals were charged with sales tax related offences under the *Crimes Act 1914* during the past year. The charges arose out of alleged frauds involving failure to declare sales tax liability and failure to remit sales tax. All five defendants will face committal proceedings in the latter half of 1989. Further charges are expected to be laid in Vic. in the near future relating to alleged sales tax fraud.

Adelaide cases

Charges have been laid against two persons alleging a conspiracy to defraud the Commonwealth of $2.5 million in sales tax. An order has been made for the extradition of one of the defendants from the USA. That order is at present the subject of an appeal in the United States. The committal hearing of the charges against

the other defendant, who is a resident of Vic., has been transferred from Adelaide to Melbourne.

Other matters

South Australia

In October 1987 committal proceedings commenced against four persons for an alleged conspiracy to defraud the Commonwealth arising from a scheme which involved the purported gifting of redeemable preference shares to a charity and the subsequent claiming of tax deductions. It is alleged that the scheme was a sham. The committal proceedings concluded on 18 December 1987 with all four defendants being committed for trial. It has since been decided not to proceed against one defendant.

The trial of the remaining three defendants was due to commence on 5 September 1988. However, in the week prior to the hearing the defendants sought orders permanently staying the proceedings as an abuse of process of the court. The abuse of process hearing took 12 weeks.

On 9 November 1988, while the abuse of process hearing was still under way, two of the defendants pleaded guilty to charges of imposing on the Commonwealth contrary to section 29B of the Crimes Act 1914. Both have agreed to give evidence against the remaining defendant. The stay application of the remaining defendant was refused on 31 January 1989. However, the trial has been adjourned on the basis of a finding by the court that the defendant is at present unfit to give complex evidence. A supression order is in force preventing publication of the names of all four persons.

Stohl Aviation

This matter was investigated by the NCA and is being handled by our Melbourne Office. It is alleged that the three defendants were involved in the importation of an aircraft from Spain in 1981 and the attempted sale of that aircraft in Australia. The aircraft had been manufactured in 1978 and used for demonstration purposes, clocking some 630 hours prior to being imported into Australia. It is alleged that the defendants made misrepresentations to potential buyers of the aircraft to the effect that the aircraft was new and would qualify for an investment allowance under section 82AB of the Income Tax Assessment Act 1936. All three defendants have been committed to stand trial on charges of conspiring to defraud the Commonwealth and conspiring to defraud potential investors.

NCA Brief

In this matter, also being handled by our Melbourne Office, four individuals were charged in February 1989 with conspiring to defraud the Commonwealth. The charges were laid on the basis of preliminary briefs referred to this Office by the NCA and relate to an alleged agreement to evade income tax in the 1982 tax year by the promotion of a scheme involving fishing activities and the purchase and sale of fishing

vessels. A committal hearing commenced in the Melbourne Magistrates Court on 1 August 1989.

Trailer fraud

This matter, again in Vic., involves the activities of a company which was engaged in the manufacture and sale of trailers. The company was registered for sales tax purposes with the ATO as a manufacturer/wholesaler. As such the company was required to submit monthly returns of the number of trailers sold and to remit the appropriate sales tax, at the rate of 20 per cent.

It is alleged that between 1 January 1985 and 31 January 1986 the company manufactured and sold at least 8340 trailers while only declaring the sale of 836 trailers in its sales tax returns. It is alleged that $369 881 in sales tax was evaded. In June 1989 the principal director and his accountant were committed for trial on charges, respectively, of defrauding the Commonwealth and being knowingly concerned in the fraud.

The matter came to light when a business competitor complained to the ATO about the underpricing practices of the company.

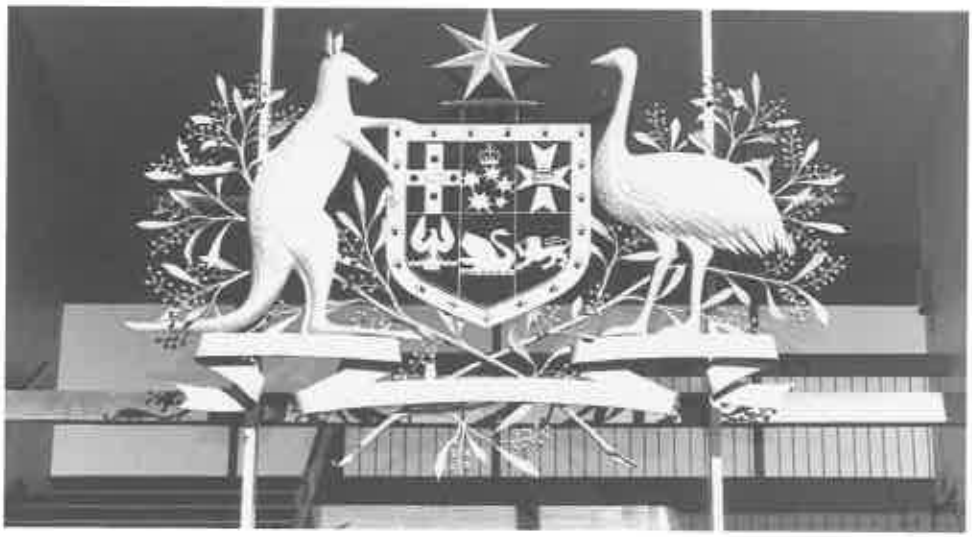
Unsuccessful proceedings

It should not be thought that all major fraud prosecutions brought by the DPP result in conviction. In this area, as in others, a proportion of defendants will ultimately be acquitted or discharged.

The matter of English has already been mentioned. There were also two very substantial prosecutions in the course of the year which did not reach a jury.

The first, arising in Queensland, involved the alleged evasion of a substantial amount of sales tax by a prominent businessman through a scheme which allegedly involved the preparation and presentation of false invoice documents to Customs authorities in respect of imported pleasure boats. The defendant was committed for trial on the charges but, at the trial, the judge directed a verdict of acquittal on the basis that the evidence was not capable of proving beyond reasonable doubt that the defendant had an intention to mislead the taxation authorities, as opposed to misleading the Customs service.

The second matter, in NSW, involved an alleged scheme to evade Customs duty on imported clothing which, it was alleged, cost revenue in excess of $4 million. The prosecution alleged that the defendants conspired to defraud the Commonwealth by means of misrepresentations aimed at securing a grant of quota. Some evidence of the illegal misrepresentations was addressed at the committal hearing. However, the charges were withdrawn when it became evident following the cross-examination of key witnesses that the prosecution could not establish that no quota would have been granted but for the alleged misrepresentations.



5

Prosecutions in the ACT

The Canberra Office is unique within the DPP. Prosecutions for offences against Commonwealth law represent a small part of the work undertaken by the Office and the range of offences which may be dealt with summarily in the ACT is very wide. It extends to offences which are punishable by imprisonment up to 10 years and, in the case of offences relating to money or other property, by imprisonment for up to 14 years. There is no intermediate criminal jurisdiction in the ACT. Consequently a larger proportion of cases is disposed of summarily in the ACT than in the States; indeed, most cases prosecuted by the Canberra Office are heard and determined summarily in the Magistrates Court or the Childrens Court.

Committals

There were a total of 129 committal orders made during the year under review comprising 87 committals for trial and 42 committals for sentence. This compares with figures of 82, 59 and 23 respectively for 1987-88.

Indictable matters

In the Supreme Court 84 persons were indicted (73 in 1987-88), 29 of whom pleaded guilty (28 in 1987-88). There were 45 trials (38 in 1987-88) involving 55 accused

persons (45 in 1987-88). A total of 40 persons were convicted (26 in 1987-88) and 14 were acquitted (the same figure as for 1987-88). The remaining defendant was found unfit to plead. This was a conviction rate of 73 per cent in defended trials, which compares favourably with those State DPP's which have a similar 'indictable' practice to the Canberra Office.

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

Conspiracy to supply drugs	9
Possess drugs for supply	4
Supply drugs	5
Burglary	5
Robbery	11
Theft	6
Handling or receiving stolen property	4
Aiding and abetting burglary	1
Destroying or damaging property	4
Forgery	1
Defrauding the Commonwealth	1
Obtaining export development grants without entitlement	2
Kidnapping	1
Sexual intercourse without consent	8
Sexual intercourse with young person	2
Indecent assault	3
Assault with intent to engage in sexual intercourse	2
Arson	2
Assault occasioning actual bodily harm	4
Malicious injury	1
Assault	1
Assault with intent to murder	2
Shooting with intent to murder	1
Murder	3
Culpable driving	4

Of all these matters only one was briefed to outside counsel — at a cost of $14 790. This matter, involving an ACT Administration concrete repairs fraud, was briefed out at the request of the ACT Administration. All other trials were conducted by DPP lawyers. However, some Federal Court appeals and seven matters in the Magistrates Court were briefed to private counsel either for convenience, for policy reasons or at the request of the referring department. Counsels' fees in the appeal matters were borne by the DPP. The cost in the Magistrates Court matters was borne by referring departments.

Summary matters

A total of 54 386 charges were laid in the Magistrates Court (including the Childrens Court) during the year, compared with 39 623 for the previous year. This increase in the total number of charges laid was the result of a substantial increase in the number of parking prosecutions (27 802 as against 10 260 for last year). Parking prosecutions yielded $1 140 418 in fines and $424 100 in costs (compared with figures of $406 295 and $164 180 respectively for the previous year). The figures include 7253 pleas by post in respect of traffic matters.

Excluding parking prosecutions and pleas by post 8 290 defendants were charged with 10 927 offences (excluding back up or second leg charges). Of these 2720 defendants pleaded not guilty. In 1987-88 the figures were 8822, 10 621 and 2048 respectively. The significant increase over last year in the number of defended matters caused additional work for the Office both in preparation and time in court.

There were 82 inquests during the year in which officers from the Canberra Office assisted, including inquiries into 34 suicides and 36 deaths from motor vehicle collisions.

Drug prosecutions during the year involved the following net weights of pure drugs (last year's figures appear in brackets).

Heroin	85.750 grams	(85.882)
Cocaine	84.528 grams	(9.189)
Amphetamines	56.671 grams	(37.093)
Methylamphetamines	6.366 grams	
Cannabis	90.2 kilograms	(62.66)
Cannabis Resin	58.7 grams	(184.4)

As mentioned in last year's annual report, in April 1988 the Canberra Office assumed responsibility for social security prosecutions in southern NSW. In 1987-88 there were a total of 21 such prosecutions conducted by the Canberra Office in Canberra and southern NSW, involving a total of $310 362 defrauded from the Commonwealth. In the year under review the Canberra Office conducted 112 completed prosecutions, involving a total of $690 581 defrauded from the Commonwealth. At the time of writing a further 76 matters are before the courts awaiting disposition. The largest number of prosecutions emanated from Canberra (44) and Albury (36), figures strikingly close despite the disparate populations of the two cities.

Penalties imposed in social security matters in the area covered by the Canberra Office showed little consistency. In large measure this is due to the fact that as yet there is no arrangement with NSW pursuant to section 3B of the *Crimes Act 1914* which would allow the use of community service orders or other 'half way' sentences when federal offenders are sentenced in that State. Accordingly the NSW courts have been forced

to choose between imposing a fine, unsupervised release or imprisonment, and as a result the disposition of social security prosecutions may appear either inappropriate or, indeed, unduly harsh or lenient. The utility of such 'half way' sentences is shown by the fact that community service orders were imposed in 23 of the 44 social security prosecutions dealt with to finality in the ACT Magistrates Court.

The sentencing pattern in social security prosecutions conducted by the Canberra Office is set out below. Where more than one sentencing option was employed it has been recorded under each of the relevant categories of disposition.

Fine	*Recognisance*	*Community service order*	*Suspended custodial sentence*	*Custodial sentence*
48	51	23	12	14

The case of Maxwell, which was prosecuted in Albury, involved the largest overpayment during this period, and graphically highlights the difficulties facing sentencing courts in this area. Between May 1981 and December 1986 the defendant had been paid unemployment benefits at the married rate. However, he had divorced his wife in 1980, and between March 1982 and January 1984 he had been in full-time employment. As a result of his failure to disclose these circumstances, Maxwell received $41 251.62 in benefits to which he was not entitled. He pleaded guilty and was committed for sentence on five charges of imposition under section 29B of the *Crimes Act 1914*. Before Judge Conomos of the NSW District Court he was released on a bond to be of good behaviour for three years. While conceding that offences of the kind committed by the defendant were prevalent, and that they invited a deterrent sentence, his Honour felt that a non-custodial sentence was warranted in view of the fact that the defendant previously had been of good character, had pleaded guilty, was working and was living in a stable de facto relationship. Most importantly in his Honour's view was the fact that the defendant had undertaken to repay the amount defrauded in full from the proceeds of the sale of his house. However, the recognisance was not conditional upon him making such repayment, and in the period of nearly two years prior to being sentenced the defendant had repaid only $1200.

In the same month the Albury Local Court sentenced two persons, Drysdale and Castles, to gaol terms of four months in respect of social security frauds totalling $4116 and $2462 respectively. In both cases the defendants had previous convictions and in the case of Drysdale the previous convictions were for offences of a similar nature.

As noted in last year's annual report, a fraud unit was established during 1987-88 because of the increased volume and complexity of fraud matters being referred to the Canberra Office. The unit was initially staffed by one lawyer, but this was not enough to cope with the increased volume of matters and during the year another lawyer was attached to the unit. Several fraud matters of some complexity are at present before

the courts or under consideration with a view to prosecution. One of the matters handled by the fraud unit during the year, involving allegations of insider trading, is now the subject of an appeal. Prosecutions continued during the year in respect of Commonwealth employees allegedly involved in defrauding the Commonwealth over minor concrete repair contracts (referred to in last year's annual report). Most were dealt with in the Magistrates Court but one offender, Carruthers, was convicted following a trial in the Supreme Court and sentenced to a term of imprisonment. A number of these prosecutions is still outstanding.

The year under review has seen an increase in the number of municipal prosecutions being referred to the Office, with prosecutions being instituted in areas which until recently had been the subject of no or few prosecutions. The Canberra Office has continued to liaise with the responsible areas of ACT Administration with a view to ensuring the efficient disposition of matters referred.

There has been an increase in the number of prosecutions involving under age drinking despite amendments to the *Liquor Act 1975* making provision for a minor to receive a caution for a first offence. There has also been an increase in the number of licencees prosecuted for selling liquor to minors in the Territory.

Lawyers from the Canberra Office appear on a regular basis on the hearing of appeals to the NSW District Court sitting at Albury and Wagga Wagga. Five appeals were heard in the most recent sittings of the District Court at Albury. Four were severity appeals from the Local Court in prosecutions for contravention of the *Taxation Administration Act 1953*, while the other was an appeal against convictions under the *Trade Marks Act 1955* and the *Copyright Act 1968*. In that particular case the appeal was dismissed although the penalty was reduced.

Court delays continue to beset the administration of justice in the ACT, although efforts currently underway to obtain a fourth Supreme Court judge and extra magistrates, if successful, should go some way towards reducing the delays. The average length of time between committal and trial is now 3.41 months for persons in custody and 9.68 months for persons not in custody. The corresponding figures for last year were 3.38 and 6.28 months respectively. The delay in the Magistrates Court between the time of first appearance and the hearing of a matter is about six months, which represents an improvement over last year's figure of about 10 months.

Non-legal support staff (legal assistants) have greatly assisted in the efficient functioning of the Office. Since early 1988 every effort has been made to ensure that their work does not consist only of repetitive keyboard duties. To that end legal assistants have been trained in the collation and preparation of minor cases, and at least one attends court each day to assist lawyers in the presentation of cases. The Office's legal assistants also perform duties in relation to social security prosecutions which are assigned to para-legal officers in other DPP Offices. Thus the support staff

have learned to understand and appreciate the role of the Office in the criminal process.

There has also been a learning process for lawyers. Several lawyers now have keyboards and terminals in their offices and some have reached a reasonable level of proficiency in keyboard skills — reasonable enough, in any event, to type correspondence and search the database for case details.

During the year several students from the Australian National University Legal Workshop underwent work experience with the Office and the Office also employed summer clerks. Lawyers from the Office also assisted at the Law School and the Legal Workshop in moots and practical exercises.

Set out below are descriptions of some of the important or otherwise interesting cases dealt with by the Canberra Office during the year.

Allen Douglas Thompson

On 8 June 1989 the High Court delivered its judgment on the appeal by Thompson against his 1986 conviction in the ACT Supreme Court of the murder of two sisters, Mirjana and Ljiljana Milosevic, on 30 December 1981.

The facts of this case are fully set out at pages 42-44 of the DPP's 1986-87 annual report but, briefly, the bodies of the two sisters had been found in a burnt-out vehicle which had struck a tree off the Monaro Highway in the ACT, near the border between the Territory and NSW. Thompson had been the driver of the vehicle, and he had claimed that it had struck the tree by accident and had been engulfed in flames before he could rescue the two girls. A subsequent coronial inquiry found that the deaths of the two girls had been accidental.

On 28 March 1984 Thompson murdered four other members of the Milosevic family in Richardson (a Canberra suburb) and, following his conviction for those murders, the investigation into the two earlier deaths was reopened. A post-mortem examination of the exhumed remains revealed that one of the girls had suffered a gun shot wound to the head, and that the other girl had suffered either a gun shot wound or a blow to the head by a blunt instrument. Evidence of the Richardson murders was admitted at the trial as similar fact evidence.

After an unsuccessful appeal to the Full Federal Court against his convictions for murder, Thompson sought special leave to appeal to the High Court on the following grounds:

- that there had been insufficient evidence to enable the jury to satisfy itself beyond reasonable doubt that the deaths of the two girls had occurred in the ACT; and
- that the evidence of the four murders at Richardson should not have been admitted as similar fact evidence.

The ACT Legal Aid Office represented the appellant, with the Director appearing for the respondent.

The High Court granted special leave to appeal but dismissed the appeal. All members of the Court agreed that the similar fact evidence had been properly admitted. On the question of jurisdiction, the leading judgment was jointly delivered by Mason CJ and Dawson J, with Gaudron J in a separate judgment agreeing generally with their conclusions.

The Full Federal Court had rejected a submission made on Thompson's behalf that there was insufficient evidence to enable the jury to satisfy itself beyond reasonable doubt that the deaths had occurred in the ACT. Although the Federal Court had not elaborated beyond saying that 'there was evidence upon which the jury could find as they must have done that the deaths occurred in the ACT and not in NSW', for their part Mason CJ and Dawson J doubted that the evidence did establish this beyond reasonable doubt. However, their Honours saw a distinction between the issue whether an offence is committed within the jurisdiction and the issue of guilt. Proof of jurisdiction, although a prerequisite of guilt, is otherwise 'not an element in proof of the commission of the offence except in those cases in which the offence is so defined that commission of it in a place or locality is made an element of the offence charged.'

Although there was a dearth of authority in England and Australia dealing with the standard of proof to be applied in proving that a criminal offence had been committed within the territorial jurisdiction of a court, their Honours concluded that the standard was the civil one, i.e. proof upon the balance of probabilities. As their Honours observed, to apply the criminal standard 'to the proof of facts establishing the jurisdiction of the trial court would extend the protection of an accused person to the point of entitling him to an acquittal on the ground that the prosecution could not prove beyond reasonable doubt that the offence was committed in one State or Territory rather than the other, even though, if jurisdiction were assumed, the circumstances would be such as to show beyond reasonable doubt that the accused committed the offence charged.'

In holding that the civil standard applied to proof of jurisdiction their Honours rejected the approach that has been applied in a number of jurisdictions in the United States of a rebuttable presumption that a deceased person died within the jurisdiction where the body was discovered. Their Honours considered that there were a number of objections to the recognition of such a presumption, one being that the fact that it had no relevance to any criminal offence other than homicide served to indicate its failure to address the fundamental issue of standard of proof.

In separate judgments Brennan and Deane JJ also concluded that the question of jurisdiction was to be established on the balance of probabilities, but did so for different reasons.

The High Court's decision on the jurisdictional point is to be welcomed. It should substantially reduce the potential for a wrongdoer to escape conviction where jurisdiction cannot be established beyond reasonable doubt. Nevertheless, it would

still appear desirable for such jurisdictional issues to be resolved by uniform legislation.

Nathan Bank and Ernst Franz Allesch

These two persons were each convicted on two charges brought under section 39 of the *Export Market Development Grants Act 1974*. That section creates a number of offences relating to the obtaining of an amount by way of a grant which is not payable or by means of a statement that is known to be false or misleading in a material particular. The two persons, as directors of a company known as Aussie Campa Pty Ltd, were involved in promoting for export a particular kind of tent which doubled as a clothes hoist. The charges covered a number of matters. One, for example, related to a claim for airfares incurred which was in fact false. Either the air travel had not been taken as claimed or the air travel had been undertaken for private purposes. Bank and Allesch were fined a total of $4000 and $1000 respectively and ordered to pay compensation to the Commonwealth.

Desmond Applebee

On 13 May 1988 Applebee was charged before the ACT Magistrates Court with various offences arising from allegations of assaults of a sexual nature on three separate victims on 18 February 1988, 21 February 1988 and 13 March 1988. Bail was refused. On 18 July the defendant escaped from the Belconnen Remand Centre with a number of other persons one of whom, Arthur Nelson, was shot dead by the Victorian police some weeks later. Applebee surrendered to the Australian Federal Police on 12 November 1988. On 13 March 1989 he was committed to the Supreme Court for trial on various charges arising out of the alleged assaults on the women.

The trial commenced on 5 June 1989 with Applebee representing himself, having dismissed his counsel from the Legal Aid Office (ACT) prior to the commencement of the trial. However, he obtained representation by counsel briefed by Aboriginal Legal Aid later in the trial.

Prior to the commencement of the trial, Applebee's then counsel had successfully applied for a number of the counts to be severed from the indictment, and the trial proceeded on one count of sexual intercourse without consent, one count of sexual assault in the third degree and one count of an act of indecency without consent.

Initially Applebee's defence was essentially one of mistaken identity, with Applebee claiming that on the night in question he had not been anywhere near the park in Manuka where the young woman had been sexually assaulted. However, in an unsworn statement from the dock Applebee claimed that, while he had had sexual intercourse with the woman, it had been with her consent. There can be little doubt that the change in the nature of Applebee's defence was brought about by expert evidence which had been admitted as part of the Crown's case establishing that the DNA pattern of a sample of Applebee's blood matched the DNA pattern obtained

from a blood and semen-stained pair of briefs worn by the victim. The chances of such a match are 165 000 000 to 1. 'DNA fingerprinting' is the subject of a separate note later in this chapter. The Applebee trial was the first completed prosecution in Australia where DNA fingerprinting was relied on as evidence of identification.

Applebee was convicted on all counts and sentenced to an effective term of 10 years' imprisonment. However, the sentencing judge declined to set a non-parole period. Applebee has a criminal record which can only be described as atrocious. Born in 1950 he first came before the courts when he was nine years old, and by the time he was 35 he had spent 10 years of his life in goal. Indeed, he had spent most of the last 10 years in prison serving various sentences for rape, assault occasioning actual bodily harm and armed robbery.

In the sentencing proceedings the prosecution took the novel course of tendering statements from medical and psychiatric witnesses showing the effect the offences had had on the victim. Counsel for Applebee objected to the tender unless the victim was prepared to subject herself to examination by a psychiatrist of Applebee's choosing. The statements were not admitted, his Honour indicating that he would not be assisted by such reports in this particular matter.

However, his Honour called upon the legislature to make provision for victim impact statements to be tendered in similar cases.

John Edmund Carruthers

On 12 September 1988 Carruthers was indicted on three counts of accepting a bribe as a Commonwealth officer contrary to section 73 of the *Crimes Act 1914*. After a nine-day trial Carruthers was found guilty and sentenced to 12 months' imprisonment on each count with a non-parole period of six months.

Carruthers had been a works supervisor employed by the Commonwealth to supervise periodic contracts by private contractors performing minor concreting works in the ACT. The allegations against Carruthers were that he had certified exaggerated claims for payment for concrete repairs to enable a contractor to defraud the Commonwealth. A comparison of concrete supplied and the amount paid for revealed a discrepancy in money terms of approximately $500 000 to one contractor over a 12-month period. It was alleged the contractor had made car payments on the defendant's behalf and had bestowed other monetary gifts on him in return for his help. In sentencing Carruthers the trial judge said that he had breached a position of trust and that a gaol term was the only appropriate penalty notwithstanding his prior good reputation.

Pamela Gigliotti

On 22 April 1988 Pamela Gigliotti was convicted in the Albury Local Court on 24 counts of contravening the *Copyright Act 1986* and six counts of contravening the *Trade Marks Act 1955*. She was the proprietor of a video outlet in Albury that had experienced a downturn in trade. Together with her husband she had purchased a

colour photocopier which enabled the pair to make false 'slicks' for copied videos that they had made at their shop. They also had made false trademarks that they had attached to the spines of the video tapes. Gigliotti pleaded not guilty to the charges in the Local Court, but was convicted and fined the sum of $200 on each count.

She appealed to the Albury District Court against both conviction and sentence. Although the appeals against conviction were dismissed, the penalty in each instance was reduced to $100. The Court also ordered that the video tapes be forfeited to the Commonwealth.

Craig Skillin

On 27 April 1989 Craig Skillin was indicted on a charge of murdering Owen Wilbers on 20 October 1988. Originally Skillin and a co-accused, Eric Cadona, had both been charged with the offence. However, Cadona pleaded guilty to manslaughter and this plea was accepted by the Crown. Cadona, whose involvement had been far less than that of Skillin's, was sentenced on 26 April 1989 and was then called by the Crown to give evidence against Skillin.

The case against Skillin was that during the evening of 20 October 1988 he and Cadona had gone to the Carosello discotheque in Phillip, a place they often frequented. Also at the Carosello was Owen Wilbers, a person who was slightly retarded. Wilbers was well known at the discotheque and was generally regarded as friendly and harmless.

Around midnight Skillin assaulted Wilbers in the discotheque and took his car keys from him. He then lured Wilbers out of the discotheque and, together with Cadona, took him to a deserted spot in the Canberra suburb of Lyons. Skillin then took Wilbers behind a bush and struck him heavily several times on the face with a large piece of masonry. The force of the blows was such that all the bones in Wilbers' face were shattered. Skillin then took a keycard from Wilbers and attempted to use it at a bank shortly afterwards.

However he was unsuccessful in obtaining any money as there was only $2.67 in the account. Skillin then returned to the discotheque with Cadona where they continued drinking.

After a four-day trial the jury returned a verdict of guilty against Skillin, and on 5 July 1989 he was sentenced to 20 years' imprisonment with a non-parole period of 12 years.

John Craig Pearson

On 20 October 1988 Pearson was acquitted by a jury on a charge of assault occasioning actual bodily harm. The charges arose out of a game of rugby union played in 1985 between the Royals and Daramalan under-18 (No. 2) sides. It was alleged that the accused, a front row forward in the Royals team, without warning had run up to and 'king hit' the complainant, the captain of the Daramalan team, who had

suffered a blow out fracture to the right orbital floor which caused serious nerve and muscle damage to his right eye.

Michael Edward Rigg

On 14 October 1988 Rigg was convicted by a jury of one count of arson. The charge arose out of an incident at the Rose Cottage Inn in Canberra late on Sunday, 19 July 1987. After having been refused service after the bar had closed, Rigg had made threats to bar staff about 'blowing the place up'. He was subsequently seen at a store room at the rear of the inn where shortly afterwards two separate fires had been found. Fortunately the fires had been extinguished before they could spread to flammable liquids which were in the store room. Miles CJ sentenced Rigg to two years' imprisonment which was suspended upon him entering into a recognisance in the sum of $1000 to be of good behaviour for two years on condition that he accept parole supervision for two years and perform 208 hours community service. He was ordered to pay $500 in compensation to the owners of the Rose Cottage Inn.

Jean Pierre Maupin

Maupin was convicted by a jury of two counts of sexual intercourse with a boy under the age of 16 years. At the time of the offences Maupin, a butcher, had been the boy's employer. The offences had occurred in the butcher shop after closing time after Maupin had stimulated the boy with pornographic magazines. On 4 April 1989 Maupin was sentenced by Miles CJ to three years' imprisonment on the first count, which was suspended upon him entering into a recognisance in the sum of $5000 to be of good behaviour for three years on condition that he accept parole supervision and pay $1000 compensation to the victim. On the second count Maupin was ordered to perform 208 hours community service.

Charles Claudianos

On 22 June 1989 Magistrate Somes found that a prima-facie case had not been established against Claudianos on three charges laid by the Corporate Affairs Commission pursuant to the insider trading provisions of the *Securities Industry Act 1980*. It had been alleged that, as a result of his employment at the John Curtin School of Medical Research at the Australian National University, Claudianos had obtained price-sensitive information in relation to AIDS research which was to be undertaken by the company Rancoo Ltd. It was further alleged that he had communicated this information to his brother and that the brother had arranged for the purchase of shares in the company for both of them. The Magistrate found that there was insufficient evidence to show that Claudianos had communicated the information to his brother. This was the first case of alleged insider trading to be prosecuted in the ACT. The prosecution has appealed against the magistrate's decision.

Neil, Trevor, Darren and Ian Kelly and Susan Evans

The victim in this case had gone to Susan Evans' house after an evening out with Evans and two other girlfriends. Four of Evans' brothers, Neil, Trevor, Darren and Ian

Kelly, were at the house when she arrived. The victim remained at the house for some time waiting to be driven home by one of the girls, and while there was intimidated by the Kellys into playing games designed to get her to remove her clothes. After the second of those games she was forcibly taken by Ian, Trevor and Neil Kelly into the bedroom where Darren Kelly lay asleep. Darren Kelly was told to leave and the victim was thrown onto the bed. Once on the bed Neil, Ian, and Trevor Kelly and Susan Evans tore off her clothes, and Neil, followed by Trevor and then Darren, raped her. Ian Kelly later came into the room and assaulted her with a belt and warned her 'not to dob on his brothers'. Neil Kelly then raped her again. The defendants were sentenced as follows:

Neil Kelly — Five years' imprisonment, with a non-parole period of three years.
Trevor Kelly — Three years' imprisonment, with a non-parole period of 20 months.
Darren Kelly — Two years' imprisonment, with a non-parole period of 12 months.
Ian Kelly — Twelve months' imprisonment, with a non-parole period of nine months.

Because of subjective factors, Evans was released on a bond subject to certain conditions without sentence being passed.

The Director has appealed against the sentences imposed on Neil, Trevor and Ian Kelly.

John Kim Smith and Others

On 29 November 1987 police entered premises in the Canberra suburb of Narrabundah and arrested John Kim Smith and his wife. Six other persons, including a 14-year-old girl, were also arrested either on the premises or elsewhere. All were subsequently charged with conspiracy to supply heroin.

The evidence revealed that during the period 13-29 November 1987, on at least two and perhaps three occasions, up to half an ounce of heroin had been purchased by John Kim Smith for approximately $5000 from contacts in Sydney. This had been returned to the ACT via a 'safe house' in Queanbeyan occupied by two of the defendants. At Queanbeyan the heroin was prepared for sale by cutting and dividing it into foils which were then concealed in bushland near Canberra. Supplies were conveyed to the house by the 14-year-old girl who carried the heroin concealed in her vagina. Two of the accused, who lived a short distance from the Smiths, were involved in a form of 'sub-agency' supplying small amounts to persons referred to them by the Smiths.

After committal proceedings lasting two weeks the adult defendants were committed for trial. Five of the adult defendants pleaded guilty in the ACT Supreme Court to various counts of conspiracy, with the remaining two (the residents of the premises at Queanbeyan) pleading guilty to three counts of being knowingly concerned in the possession of heroin for supply. The seven adults accused were sentenced as follows :

- J.K. Smith — seven and a half years' imprisonment with a non-parole period of three and a half years;
- A.P. Smith — six years and three months' imprisonment with a non-parole period of two years and nine months;
- 'S' (the mother of the 14 year old girl) — five and a half years' imprisonment with a non-parole period of two years and six months;
- Denis Penhaligon — four years' imprisonment with a non-parole period of one year and nine months;
- Nancy Adams — Three concurrent sentences of three years' imprisonment with a non-parole period of one year and three months;
- Nigel Homer — Three concurrent sentences of three years' imprisonment with a non-parole period of one year and three months.

The conspiracy charge against the 14-year-old girl was dropped in favour of various charges of supplying and possessing heroin. These related to her involvement in the supply of small amounts of heroin to users by arrangement near a block of shops where she was employed as a shop assistant. She was committed for trial by the ACT Childrens Court and having pleaded guilty in the ACT Supreme Court, she was placed on a good-behaviour bond.

During the sentence proceedings the Smiths admitted to having been involved in heroin dealing over a period of four or five years in Canberra and a number of other offences were taken into account pursuant to section 21AA of the *Crimes Act 1914*. Although the husband claimed that his drug dealing was to support both him and his wife's heavy heroin habit, he had been able to maintain property which was mortgage-free, despite being unemployed and not being in receipt of unemployment benefits. He also owned an expensive motor vehicle, and the contents of his house included good-quality furniture.

Appeals by the Crown against the sentences imposed on the Smiths were dismissed by the Federal Court. Although the Court stated that the sentencing judge may have been somewhat lenient in relation to both offenders, it was not persuaded that any appellable error in the exercise of the sentencing Judge's discretion had been demonstrated.

DNA fingerprinting

Mention was made earlier in this chapter of the prosecution of Applebee for offences involving sexual intercourse without consent, and the important part played by identification evidence obtained by a technique known as 'DNA fingerprinting' in securing his conviction. It is clear that such evidence will play an increasing role in providing evidence of identification.

It is impracticable in this short note to describe the scientific background to the technique of DNA fingerprinting. A simplified description can be found in an article by Kelly, Rankin and Wink entitled 'Method and Applications of DNA Fingerprinting : A Guide for the Non-Scientist' in *1987 Criminal Law Review 105*, and a detailed scientific discussion can be found in a series of research articles by Dr A.J. Jeffreys (the developer of the technique) and others in *Nature*, pages 314-318 [1985].

The value of DNA fingerprinting as a forensic tool lies in the fact that, like normal fingerprints, each person's DNA is unique. It is this uniqueness which enables DNA fingerprinting to provide an extremely accurate method of identification. It thus has distinct advantages over other more conventional forensic tests such as blood-group analysis and immunological tests. Blood-group analysis, for example, will usually only exclude rather than identify unless the comparison being made is of a rare blood group. DNA fingerprinting also has the distinct advantage that only tiny quantities of organic matter are required for analysis.

The applications of the technique in the legal arena are obvious, particularly in the criminal law field if the perpetrator of a crime has left traces of organic matter. In rape cases, for example, it will usually be possible to positively establish whether or not a suspect had sexual intercourse with the victim. It can be expected that in the face of conclusive proof of identification the defence to a prosecution will rarely be a denial of sexual intercourse, although obviously it will still be open to claim that the victim consented.

It is difficult to see how the accuracy of the technique itself can be called into question. Rather, any attack on such evidence will have to be directed either at the methods employed to extract the DNA or the actual 'reading' of the 'DNA patterns' obtained from the samples taken.

Despite the enormous potential of DNA fingerprinting as a method of identification, there are a number of related legal issues which will have to be resolved before such evidence will become common place in our criminal courts. Two are discussed below.

While the technique of DNA extraction is public knowledge, an important step in the analysis of DNA samples involves the use of radioactive substances known as 'probes'. The DNA probe developed and patented by DrJeffreys has been bought by the British company Imperial Chemical Industries, but it is understood that at least two other private organisations overseas have developed their own DNA probes. Apart from the fact that as a result most DNA testing hitherto has been undertaken by these overseas organisations, the resulting differences in analysis technique would seem to be a major impediment to the establishment of a national register of DNA patterns such as exists for normal fingerprints. As a first step in the establishment of such a register it would seem necessary for all jurisdictions in Australia to agree on an official 'standard' in the analysis of DNA samples.

The second issue concerns the authority of the police to obtain samples of organic matter from a suspect. This general area is at present being considered by the Review of Commonwealth Criminal Law which has tentatively recommended, in 'Discussion Paper No. 11 : Matters Ancillary to Arrest', that provision should be made permitting the compulsory medical examination of an arrested person if it is reasonably believed that the examination may provide evidence relating to the offence for which the person has been arrested. On the question of compulsorily obtaining body samples, the Review Committee considers that a distinction can be drawn between intimate samples (such as blood or urine) and non-intimate samples (such as hair or material under finger nails). Although there is no issue of self incrimination in compulsorily obtaining body samples, the Review Committee has tentatively recommended that the obtaining of intimate samples should only be possible either with the consent of the arrested person or pursuant to an order of a magistrate.

Of course, DNA fingerprinting is unlikely to have much impact in the Commonwealth arena for the simple reason that most Commonwealth offences are not of a kind where it is likely they could be committed in circumstances where any issue of identification could be resolved by the technique. DNA fingerprinting is likely to have its greater impact in the investigation of offences against the person, as demonstrated by the prosecution of Applebee. The new ACT Government will assume total responsibility for the criminal law applicable in the ACT in mid-1990, and at this stage it is uncertain whether any legislation resulting from the work of the Review Committee in this area will have any application in the ACT in the investigation of ACT, as opposed to Commonwealth, offences. For the present, section 353A(2) of the *Crimes Act 1900 (NSW)* in its application to the ACT permits a legally qualified medical practitioner, acting at the request of a police officer of or above the rank of sergeant, to conduct an examination of an arrested person. There is judicial authority on similar provisions in other jurisdictions that the power to conduct an 'examination' is not limited to mere scrutiny of the person in question but extends, for example, to the obtaining of samples of blood. However, it cannot be regarded as beyond doubt that the ACT courts would adopt such a construction of the ACT provision.

Part-heard matters

One matter of concern to the Canberra Office is the number of criminal cases that have been commenced in the ACT Magistrates Court but have not been finalised. These cases are aptly described as 'part heard'. In some cases the hearing time allocated proved insufficient to complete the case, and in others proceedings were adjourned to enable counsel to make written submissions. In still others the case was adjourned pending the handing down of a decision by the court. An unfortunate feature of these interrupted cases is that, due to the pressure of the court's other business, often it is not possible to resume the hearing for months, sometimes for many months. When these cases eventually resume, memories have faded.

Unfortunately, the increased workload involved in servicing this type of case sometimes itself leads to further delays, and so the problem becomes self-perpetuating.

There are a number of cases at present part heard before the Magistrates Court that first came before the Court prior to 1987. One case (involving a number of indictable offences) first came before the Court on 11 December 1985. The prosecution case was presented on 23 and 24 March 1988, and the proceedings were adjourned to await the presentation of written submissions. Since August 1988 the case has awaited a decision from the Court as to whether a prima-facie case has been established.

In yet another case proceedings were instituted in 1983, and the prosecution case was closed in March 1988. Since August 1988 the Court has been waiting for written submissions to be filed on behalf of the defendant.

Despite the Office's efforts to pursue these matters to a determination they remain unresolved. It is inconceivable that a criminal case could be permanently stayed on the sole ground that it was not possible for the existing court system to determine the matter in time to ensure the accused person a fair trial. Nevertheless, such cases cause the Canberra Office some disquiet. If they should be finally determined by a committal to the Supreme Court, they will commence their tenure in that jurisdiction already 'stale'.

A further factor which has contributed significantly to the time involved in a number of major committal hearings in the Magistrates Court during the year is the growing use of subpoenae directed to the police designed to gain access to any police documentation relating to the investigation that preceeded charges being laid. This has involved the expenditure of significant resources, initially by the police in identifying and locating documentation, and then by the Court in sifting through the documentation to identify any material that might be relevant to the proceedings. It is to be noted that this tactic has been adopted in cases where the full prosecution brief of evidence has previously been made available to the defence.

An example of the delay that can result in these circumstances is a committal proceeding which commenced on 19 January 1987. On that day a subpoena was returnable addressed to the AFP Commissioner requiring a large number of documents to be produced to the Court. The magistrate upheld a claim of legal professional privilege in relation to the material covered by the subpoena. This ruling was challenged by prerogative writ on behalf of the accused. On 19 February 1988 Kelly J in the ACT Supreme Court partially upheld the claim of privilege made on behalf of the Commissioner, but remitted the matter back to the magistrate for further consideration in relation to those documents not covered by the privilege claim. During the continuation of the committal proceedings counsel for the defendant on several occasions sought further rulings from the Supreme Court in relation to the operation of the subpoena. As a result, the committal proceedings were not concluded until October 1988. Unhappily this is not an isolated case.

Table 1

Matters Dealt With Summarily in the ACT in 1988-89 (i)

Description	*No. of defendants*	*No. of charges*	*Pleas of guilty*	*Outcome of hearings*		
				Pleas of not guilty	*Conviction*	*Acquittal*
Commonwealth Legislation	685	2043	1710	333	263	70
Crimes Act 1900	1793	2854	1842	1012	761	251
Miscellaneous ACT legislation	316	400	304	96	75	21
Poisons and narcotics	205	246	167	79	64	15
Traffic offences	5291	5384	4184	1200	1045	155
Total	8290	10927	8207	2720	2208	512

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 1988-89 (i)**

Description	*No. of defendants*	*No. of charges*	*Pleas of guilty*	*Outcome of hearings*		
				Pleas of not guilty	*Conviction*	*Acquittal*
Act of indecency without consent	5	6	1	5	2	3
Abduction	4	4		4		4
Assault	167	198	99	99	60	39
Assault occ. actual bodily harm	58	63	47	16	4	12
Breach of recognisance	37	43	27	16	16	
Cause offensive Noise	2	2	2			
Contravene CSO	11	11	10	1		1
Damage property	103	144	117	27	24	3
Dishonest use of computer	6	19	9	10		10
Escape lawful custody	13	13	6	7	7	
Handling stolen property	100	125	79	46	25	21
Harbouring escapee	1	1	1			
Indecent exposure	20	30	12	18	17	1
Make false instrument	33	119	105	14	12	2

Table 2 (Cont.)

Description	*No. of defendants*	*No. of charges*	*Pleas of guilty*	*Outcome of hearings*		
				Pleas of not guilty	*Conviction*	*Acquittal*
Malicious wounding	1	1		1		1
Obtaining by deception	6	6	1	5	3	2
Offensive behaviour	408	418	359	59	30	29
Possess housebreaking implements	4	4	2	2	2	
Possess offensive weapon	18	19	17	2		2
Public mischief	89	95	69	26	20	6
Robbery	9	9	6	3	1	2
Take and use motor vehicle	40	102	74	28	26	2
Theft	371	632	376	256	178	78
Trespass with intent	177	344	244	100	73	27
Unlawful possession of property	22	23	11	12	7	5
Use false instrument	26	291	52	239	238	1
Warrants of apprehension	42	87	87			
Other	20	45	29	16	16	
Total	1793	2854	1842	1012	761	251

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 1988-89 (i)

Description	*No. of defendants*	*No. of charges*	*Outcome of hearings*			
			Pleas of guilty	*Pleas of not guilty*	*Conviction*	*Acquittal*
Australian Federal Police Act 1979	296	343	195	148	116	32
Census and Statistics Act 1905	6	7	2	5	4	1
Companies Act 1981	44	91	84	7	3	4
Conciliation and Arbitration Act 1904	1	1	1			
Crimes Act 1914	151	312	199	113	104	9
Customs Act 1901	2	2	2			
Insurance Act 1973	7	20	9	11	9	2
Migration Act 1958	3	3	3			
Postal Services Act 1975	4	13	12	1	1	
Public Order (Protection of Persons and Property) Act 1971	16	16	14	2		2
Radiocommunications Act 1983	1	1	1			
Securities Industry Act 1980	1	3		3		3
Social Security Act 1947	112	1090	1063	27	19	8
Taxation Legislation	33	100	95	5	5	
Telecommunications Act 1975	8	41	30	11	2	9
Total	685	2043	1710	333	263	70

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

Table 4

***Commonwealth Crimes Act 1914* : Matters dealt with summarily in the ACT 1988-89 (i)**

			Outcome of hearings			
Description	*No. of defendants*	*No. of charges*	*Pleas of guilty*	*Pleas of not guilty*	*Conviction*	*Acquittal*
Damage property (s.29)	53	76	58	18	18	
False Pretences (s.29A)	1	3		3	3	
Forge & Utter (s.65-69)	38	85	39	46	42	4
Fraud (s.29D)	1	5		5	5	
Imposition (s.29B)	8	19	13	6	6	
Other	50	124	89	35	30	5
Total	151	312	199	113	104	9

Note : (i) A defendant may have been charged under more than one provision of the *Crimes Act 1914*.

Table 5

Poisons & narcotic drugs legislation : Matters dealt with summarily in the ACT 1988-89 (i)

			Outcome of hearings			
Description	*No. of defendants*	*No. of charges*	*Pleas of guilty*	*Pleas of not guilty*	*Conviction*	*Acquittal*
Administer amphetamine	2	2	2			
Administer heroin	14	14	9	5	5	
Possess amphetamine	17	21	17	4	4	
Possess cannabis	127	156	110	46	37	9
Possess cannabis resin	1	1		1	1	
Possess cannabis for supply	19	20	9	11	10	1
Possess cocaine	3	4	3	1		1
Possess heroin	12	18	9	9	6	3
Possess morphine	1	1		1	1	
Present false prescription	1	1	1			
Supply cannabis	4	4	3	1		1
Use cannabis	4	4	4			
Total	205	246	167	79	64	15

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

Table 6

Traffic offences : Matters dealt with summarily in the ACT 1988-89 (i)

Description	*No. of defendants*	*No. of charges*	*Outcome of hearings*			
			Pleas of guilty	*Pleas of not guilty*	*Conviction*	*Acquittal*
Culpable driving	7	8	1	7	6	1
Drive contrary to special licence	29	29	18	11	6	5
Drive in a manner dangerous	169	169	95	74	69	5
Drive under the influence	28	31	24	7	3	4
Drive unregistered vehicle	1226	1253	1103	150	143	7
Drive while licence cancelled	140	146	78	68	66	2
Drive without licence	386	398	351	47	44	3
Drive without third party insurance	952	975	650	325	317	8
Fail to report an accident	34	38	29	9	5	4
Fail to stop after accident	26	26	21	5	3	2
Negligent driving	482	488	337	151	120	31
Prescribed concentration of alcohol	1109	1115	994	121	109	12
Speeding	379	383	247	136	123	13
Speeding in a manner dangerous	5	5	5			
Other	319	320	231	89	31	58
Total	5291	5384	4184	1200	1045	155

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 1988-89 (i)

Description	No. of defendants	No. of charges	Pleas of guilty	Outcome of hearings: Pleas of not guilty	Outcome of hearings: Conviction	Outcome of hearings: Acquittal
Classification of Publications Act 1959	1	4		4	4	
Co-operative Societies Act 1939	7	7	7			
Dog Control Act 1975	46	53	48	5	4	1
Domestic Violence Act 1986	62	68	39	29	24	5
Gaming and Betting Act 1945	16	16	3	13	11	2
Gun Licence Act 1937	80	137	109	28	19	9
Hawkers Act 1936	13	15	13	2	1	1
Landlord and Tenant Act 1949	1	1		1	1	
Liquor Act 1975	63	67	63	4	2	2
Nature Conservation Act 1980	5	10	10			
Prevention of Cruelty to Animals Act 1959	5	5	3	2	2	
Public Health Act 1929	8	8	3	5	5	
Remand Centre Act 1976	1	1	1			
Scaffolding and Lifts Act 1957	1	1		1	1	
Water Pollution Act 1984	2	2	2			
Workmen's Compensation Act 1951	5	5	3	2	1	1
Total	316	400	304	96	75	21

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

6

International extradition and mutual assistance in criminal matters

International extradition and mutual assistance in criminal matters continue to be important and interesting areas of the work of the DPP.

The *DPP Act 1983* invests the Director with the functions of appearing in proceedings under the *Extradition Act 1988* and the *Mutual Assistance in Criminal Matters Act 1987* and to do anything incidental or conducive to the performance of those functions. However the role of the DPP in this area is different from its normal prosecutorial role. The DPP has a supervisory function in the conduct of Commonwealth prosecutions and may ultimately determine whether or not a prosecution should proceed. In extradition and mutual assistance matters the DPP acts on instructions. The DPP assumes the role of counsel while the Attorney-General's Department assumes that of instructing solicitor on behalf of the overseas country. Having said this it should be noted that, as required, the DPP does brief counsel from the private bar in extradition and mutual assistance matters.

The working relationship between the Attorney-General's Department and the DPP in these matters is especially important. In routine operational cases the relevant DPP

regional office deals directly with the case officer in the International Criminal Law Branch of the Attorney-General's Department. DPP Head Office is only directly involved when matters raise significant policy issues or difficult legal questions. This arrangement recognises the need for close liaison between the regional offices of the DPP and those instructing them in these matters.

The role played by DPP Head Office extends to coordinating the activities of the various regional offices and maintaining regular contact with the Attorney-General's Department. In February 1989 the DPP chaired a conference involving officers from the Attorney-General's Department and all DPP Offices. The conference discussed important matters of policy, practice and procedure arising in extradition proceedings and some problems were resolved.

The relationship between the Attorney-General's Department and the DPP permits the Department, as the agency responsible for administering the legislation, to employ its expertise in interpreting international treaties, matters of public policy and the general scheme of the legislation. The DPP applies its expertise in matters of evidence, substantive criminal law and practice and the procedure for conducting important litigation.

At the time of writing the Attorney-General's Department and the DPP are together preparing detailed notes on extradition proceedings which will ultimately include an annotated *Extradition Act 1988*, case notes, notes on practice and procedure, and precedent statutory forms.

Extradition legislation

On 1 December 1988 the *Extradition Act 1988* came into operation. The Act repeals the *Extradition (Commonwealth Countries) Act 1966* and the *Extradition (Foreign States) Act 1966*.

The principal object of the new Act is to codify the law relating to the extradition of persons to and from Australia. The Act has made many substantial changes to extradition law and procedure, removing a number of inconsistencies in the earlier law and simplifying procedural requirements. However, the Act has preserved existing safeguards for defendants and introduced certain new safeguards for them.

One of the most welcome reforms introduced by the Act is the streamlined procedure for review of and appeal from decisions made under the Act. The Act provides that an application for review may no longer be made under the *Administrative Decisions (Judicial Review) Act 1977*. This amendment removes the opportunity for defendants to bring duplicate appeal proceedings with the inevitable unwarranted expense and delay.

However, the Act does not resolve all problems in this area. The DPP has already had occasion to raise with the Attorney-General's Department a number of matters of

interpretation and policy concerning the new legislation. These include the provision concerning the prima facie evidence test, consent surrender to New Zealand, whether the presumption against bail is intended to apply pending determination of an application for review or appeal, and whether a police officer should be able to apprehend without warrant a person who has failed or is believed to be about to fail to comply with bail conditions.

International extradition cases

In the last year the DPP handled 29 extradition proceedings including both completed and current matters. Following are some of the significant cases handled by the Office during the year.

Zoeller

Extradition proceedings seeking Zoeller's return to the Federal Republic of Germany (FRG) were initially instituted in June 1987 when Zoeller was arrested pursuant to a provisional warrant under the *Extradition (Foreign States) Act 1966*. On 26 November 1987 Zoeller was committed to prison to await the warrant of the Attorney-General for his surrender. In March 1988 Zoeller was released from custody following a successful appeal to the Federal Court. Sheppard J found that the speciality undertaking in the extradition request did not comply with section 13(2) of the 1966 Act.

Following that ruling the FRG made a further request for Zoeller's extradition. A second set of extradition proceedings were instituted in September 1988 with Zoeller's provisional arrest. He immediately instituted proceedings in the Federal Court seeking a review of the magistrate's decision to issue a provisional arrest warrant and the Attorney-General's decision to issue a notice under section 15 of the 1966 Act. He was released from custody pending the hearing of the application. This application was unsuccessful, and Zoeller was re-arrested in April 1989. Zoeller has since appealed to the Full Federal Court and that appeal is still pending.

The second set of extradition proceedings was heard before a magistrate in April 1989 pursuant to the new *Extradition Act 1988*. On 10 May 1989 the Magistrate found that Zoeller was eligible for surrender under section 19 of that Act. Zoeller thereupon instituted further proceedings in the Federal Court pursuant to section 21 of the 1988 Act seeking a review of the magistrate's decision. These proceedings were heard on 25 and 26 May 1989 but, at the time of writing, no decision has been given. Zoeller was granted bail on 12 May 1989 pending the outcome of the Federal Court proceedings.

Wiest

Wiest was convicted on charges of forgery and fraud at Bonn in the FRG. He was present for most of his trial and was legally represented throughout. He left the FRG in late January 1987, during the course of his trial, and came to Australia.

Wiest was apprehended in Sydney in October 1987 under a warrant issued under the *Extradition (Foreign States) Act 1966*. On 27 April 1988 a magistrate ordered that Wiest be released on the basis that the requisition for his surrender contained a defect in the 'speciality' undertaking, which was the same as that identified by Sheppard J in the matter of Zoeller. A second warrant of apprehension was issued immediately, and was executed outside the court.

Wiest then applied to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* for orders preventing further steps being taken on the second warrant, on the grounds of abuse of process and issue estoppel. That application was heard by Davies J and was unsuccessful. Wiest then appealed against that decision. In the meantime, on 31 May 1988 a magistrate found Wiest liable to be surrendered on the second warrant. Wiest sought review of that decision. The application was heard by Pincus J and refused.

Wiest's appeals against the judgments of Davies and Pincus JJ were heard together by the Full Federal Court and were refused by a 2-1 majority on 21 December 1988. Wiest then sought special leave to appeal to the High Court, which was refused in February 1989. Wiest was eventually surrendered to the FRG during March 1989.

Winkler

Winkler was apprehended in Sydney in September 1987 under a warrant issued pursuant to the *Extradition (Foreign States) Act 1966* following a request by the USA. Winkler has been charged in that country with 34 offences involving fraud by use of interstate telegraphic fund transfer facilities.

Extradition proceedings against Winkler were delayed because the US arrest warrant did not comply with the requirements of the treaty between the US and Australia. The treaty requires that warrants be signed by a judge or judicial officer, whereas the warrant provided had been signed by the clerk of the issuing court. A second warrant was issued in proper form but outside the relevant time limit for the provision of materials under the treaty. This has given rise to legal issues. The evidence in support of the extradition request was also the subject of objections as to form and sufficiency.

The magistrate found that Winkler was subject to extradition on all charges. This decision was taken on appeal to the Federal Court, with Davies J finding that, although the magistrate had had jurisdiction to entertain the extradition request, the evidence produced in support of many of the charges was deficient. This decision is the subject of an appeal to the Full Federal Court.

Salerno

This matter concerns an application for the extradition of Salerno to Australia from the USA in respect of an alleged sales tax fraud involving approximately $2.4 million in lost revenue. Salerno had left the country while police investigations were still in

progress. In 1988 the DPP requested the Attorney-General to authorise the commencement of extradition proceedings.

Three warrants have been issued for the arrest of Salerno on a total of 70 charges of forgery, fraud and conspiring to defraud. Salerno was arrested in Fresno, California, in July 1988 and has since been denied bail. On 26 October 1988 a US court found that Salerno was eligible for extradition. Salerno sought judicial review of that finding. On 4 May 1989 the District Court for the Eastern District of California denied his petition.

On 5 May 1989 the US Deputy Secretary of State signed a warrant authorising the surrender of Salerno to the custody of Australian authorities. However, on 11 May 1989 Salerno filed a notice of appeal against the decision of the District Court. He is at present in custody pending the hearing of that appeal.

Agil

Agil is alleged to have committed four offences of criminal breach of trust contrary to the Penal Code of Malaysia. On 19 November 1987 a magistrate in the State of Penang issued warrants for his arrest and on 22 December 1987 Malaysia formally requested that he be extradited. A magistrate subsequently found Agil liable to be extradited to Malaysia. Agil then commenced proceedings in the Federal Court challenging that finding.

The documentation that had acompanied the formal request for extradition had included an affidavit from a Deputy Public Prosecutor in Malaysia who had been authorised to make the affidavit. This affidavit purported to provide the necessary undertaking as to speciality required by section 11(3) of the *Extradition (Commonwealth Countries) Act 1966*. However, the Federal Court found that it was doubtful whether the deponent had authority to give the undertakings set out in his affidavit and that the purported undertakings did not adequately comply with the requirements of the section. As a result, the court found that there was insufficient compliance with the requirements for speciality and ordered that Agil be released.

The points raised by this and other cases demonstrate a change in focus in challenges to extradition proceedings from an attack on the evidence produced to satisfy the prima-facie evidence test to an attack on the degree of compliance with formal statutory requirements. This casts an onus upon the Australian authorities to ensure that requesting countries comply with all requirements of the new legislation in order to avoid fugitives being discharged on technical grounds.

Mutual assistance in criminal matters

Previous annual reports have outlined the difficulties faced by the DPP in obtaining overseas evidence. Many of the major cases handled by the Office have an overseas aspect. Many narcotic prosecutions involve imported drugs, and revenue and other frauds may have an overseas loop built in to frustrate investigation and prosecution.

There has long been a need for improved international cooperation in the fight against crime and, in particular, organised crime. On 1 August 1988 the *Mutual Assistance in Criminal Matters Act 1987* came into effect.

The principal object of the new Act is to provide a legislative framework under which Australia can enter into arrangements with other countries to request and grant assistance in the investigation and prosecution of criminal activity. Previously Australia and other countries had cooperated informally through Interpol in the investigation of criminal offences, but there were limits to what could be achieved. At the request of an overseas country Australia could also arrange for evidence to be taken in Australia for the purposes of criminal proceedings pending in the requesting country. However, there was no obligation on other countries to reciprocate. When treaties have been concluded with other countries, those countries will be obliged to render assistance at Australia's request. Australia will also have reciprocal obligations.

It is the DPP's role to represent foreign governments in proceedings under the Act in Australian courts. In the last 12 months the DPP, through the Attorney-General's Department, has received requests to take evidence from England, Austria, Hong Kong, Switzerland, Turkey and Belgium. It is expected that the amount of work in this area will continue to grow as more and more foreign countries take advantage of the new legislation.

As one might have expected, the DPP has been involved in requests to take evidence in a wide variety of matters. Most have involved the taking of evidence for the purposes of overseas prosecutions. However, the DPP has also been involved in the taking of evidence for use in extradition proceedings in a third country and in one case a person was questioned about his alleged criminal activity.

Although the opportunities that the legislation presents for international cooperation between law enforcement agencies are enormous, not all mutual assistance work involves major crime. For example, in September 1988 a Mr Seth had his cigarette packet containing his lighter stolen in a kebab shop while travelling in Turkey. The lighter was valued at between $50-70. A person named Arslanoglu was charged with theft of the lighter and in November 1988 the Turkish authorities requested that the evidence of Mr Seth be taken in Australia. This was duly done.

7

Criminal assets

The aim of the criminal assets function of the Office is to ensure that offenders are deprived of the proceeds and benefits of crime and to ensure, where appropriate, that civil remedies are pursued to recoup losses attendant upon criminal activity.

It is now recognised that the traditional response of prosecution, followed by punishment, is seldom of itself an adequate response to large-scale criminal activity which is aimed at accumulating wealth. The motivation for such crime is greed and the aim is profit. To many offenders the risk of prosecution and imprisonment is part of the cost they are prepared to pay for eventually enjoying the fruits of their often lucrative criminal activities. It is axiomatic that, in conjunction with prosecutions, there be forceful and persistent action to deprive criminals of the benefits of their criminal behaviour. Crime becomes a far less tempting proposition if the criminal knows that the downside includes not only the risk of imprisonment but also the possible loss of any proceeds or benefits gained.

The Commonwealth is not alone in recognising that attacking the economic motive for crime is a powerful adjunct to prosecution. Most Australian States have enacted legislation aimed at recovering the proceeds of crime. The USA has been active in this field since the early 1970s. More recently countries such as the United Kingdom and Canada have also enacted confiscation legislation.

In the Commonwealth sphere, the main areas of criminal activity are large-scale narcotics offences and revenue fraud in its various forms. Stripping offenders of the proceeds or benefits obtained is particularly effective in helping to combat these types of crimes. The DPP has three main avenues of achieving this purpose:

- the civil remedies function;
- the *Proceeds of Crime Act 1987*;
- in narcotic cases, by seeking a pecuniary penalty under section 243B of the *Customs Act 1901*.

Since 1985 more than $66 million has been recovered in connection with taxation and other fraud on the Commonwealth through the exercise of the civil remedies function. Since 1987 more than $550 000 has been recovered through the use of the Proceeds of Crime Act. Importantly, a further $12.5 million has been restrained to meet possible confiscation orders, and more than $11 million has been secured in connection with proceedings under the pecuniary penalty provisions of the Customs Act. The total assets secured under these two pieces of legislation is more than $23 million.

Added to these figures is the deterrent effect which, while impossible to calculate in dollar terms, should not be underestimated.

While each avenue of recovery may have advantages in particular areas there is some overlap. For example, drug offenders seldom pay taxes and that can provide a basis for pursuing their assets. Conversely, the Proceeds of Crime Act can be particularly effective against some types of tax fraud. Part of the work of the criminal assets lawyer is to determine in each case the most effective way of recovering the proceeds of crime.

A number of other agencies play important roles in this area. In civil remedies taxation matters, naturally enough, the work of the ATO is essential for successful recovery, and all civil litigation has been conducted through the Australian Government Solicitor. In Proceeds of Crime Act and Customs Act matters it is usually the criminal investigation which discloses much of the evidence needed to bring recovery proceedings. The majority of these investigations are undertaken by the AFP and the NCA. An officer of the AFP must swear an affidavit in support of any application for a restraining order. The Official Trustee also has an important role in the scheme of the legislation. In many cases the Office of the Official Trustee takes control of property that is frozen until the matter is finally determined. Often that Office is also involved in intermediate steps aimed at discovering the nature and location of the defendant's property.

There is a Criminal Assets Branch in each regional office of the DPP. The DLS offices in Hobart and Darwin undertake only a small amount of criminal assets work at present.

Civil remedies

The DPP's civil remedies function is to take, or coordinate or supervise the taking of, civil remedies on behalf of the Commonwealth or authorities of the Commonwealth. This can be done in matters connected with or arising out of actual or proposed prosecutions, or a course of activity which is being considered for the purpose of deciding whether to institute a prosecution.

The civil remedies function involves no new powers of confiscation or recovery. It merely gives the DPP a role in the normal civil recovery process in respect of matters that it is prosecuting or that are being considered for prosecution. In these matters the DPP has access to information from a number of different sources which often includes information on actual or potential liabilities to the Commonwealth. The DPP is in a central position to assemble this information and to co-ordinate and supervise the activities of a variety of Commonwealth agencies. It is also in a position to coordinate the civil process with any related criminal prosecution.

To date, the DPP has used this coordination and supervision role in the exercise of its civil remedies function, rather than taking action itself. The civil remedies function can be divided into two main areas, recovery of taxes and non-tax recoveries.

Recovery of taxes

The concept of a prosecuting authority playing a central role in recovering debts as an adjunct to prosecution originated with the Special Prosecutors who were appointed in 1982. When the DPP took over prosecutions begun by the Special Prosecutors it also took over the related civil remedies work.

The DPP's civil remedies function was initially limited by the requirement that a prosecution had to be instituted before the function could be performed, and it applied only to cases or classes of cases in respect of which an instrument in writing had been signed by the Attorney-General. The first prerequisite in particular limited the ability of the Director to act in these matters. In many cases the key to successful recovery is quick action to secure assets before they can be dissipated. The requirement to wait until a prosecution had been instituted severely limited the DPP's ability to prevent the dissipation of assets.

In 1985 the DPP Act was amended to remove these limitations in respect of tax recoveries. The Act now directly provides for the DPP to act in relation to a taxation liability without the need for the Attorney-General to sign an instrument, and the function may be performed at a much earlier stage, namely, when a matter is under consideration with a view to prosecution.

The impetus for the civil remedies initiative arose from efforts to combat large-scale taxation fraud. Recovery of unpaid taxes continues to be the major area of civil remedies recovery. The following tables illustrate the tax recovery work over the past year.

Table A: Court Orders in tax matters in 1988-89

	Number of judgments entered	*Number of injunctions obtained*
Sydney	3	3
Melbourne	—	—
Brisbane	1	2
Perth	—	—
Adelaide	3	1
Canberra	—	—
Total	7	6

Table B: Judgments, amounts secured and amounts recovered in tax matters in 1988-89

	Judgments entered or leave to enter judgments	*Amounts secured by injunction or otherwise*	*Amounts received*	*No. of cases**
		$	$	
Sydney	6 547 226	400 000	1 123 458	7
Melbourne	—	4 525 894	5 823 011	10
Brisbane	424 059	5 722 146	4 304 845	8
Perth	—	3 757 000	3 107 000	7
Adelaide	589 123	222 573	569 200	3
Total	7 560 408	14 627 613	14 927 514	35

* The figures in this column are the numbers of cases in which amounts have been received.

The categories in table B are not mutually exclusive. Some of the amounts recorded in the first and second columns have been recovered already and are also included in the third column.

While amounts recovered and amounts secured are comparable to those for previous years, the number of judgments entered is down somewhat. This may indicate that there will be some reduction in amounts recovered in future years.

To date, a large part of recoveries have come from bottom-of-the-harbour cases, which involved fraud on an unprecedented scale. Not surprisingly as the number of prosecutions and recoveries to be completed in this area diminishes it may have a significant effect on amounts recovered in connection with the DPP's civil remedies function. While there may be a decrease in terms of dollars there will not necessarily be a corresponding reduction in work. In these cases the rewards for efforts in recovery are typically large. Future recoveries may not be as lucrative in terms of dollars. New areas of taxation fraud are being referred, in particular in the sales tax area. These are discussed in the chapter on major fraud. There is potential for civil remedies in these new areas but there may be some lead time before they result in recoveries.

The recovery of taxes has an important role to play in the effort to strip criminals of their ill-gotten gains, both in relation to taxation fraud and in other types of matter.

The fact is that few criminals pay tax on their income and the raising and enforcement of default assessments can be an effective and cost-efficient way of removing some or all of the proceeds from the offender.

An example of a case where prosecution for a non-taxation offence led to substantial taxation recovery was the first case to be prosecuted under the *Cash Transaction Reports Act 1988*. The defendant was charged and pleaded guilty to two offences under section 24(2) of the Cash Transaction Reports Act in relation to the operation of two bank accounts in false names. He had telegraphically transferred approximately $450 000 to Singapore through these accounts between 1 July 1988 and the date of his arrest in early October 1988.

The matter was brought to the attention of the ATO, which conducted a full scale audit and issued a default assessment to the defendant for approximately $382 000. Subsequently the defendant returned amended personal assessments showing a very large taxable income for the period 1981 to 1988. The ATO then raised amended assessments in the sum of $2.8 million and a mareva injunction was sought.

The injunction sought was granted and, in addition to the usual orders, an order was made that the defendant deliver up to the Registrar of the Supreme Court of Queensland approximately $500 000 in gold coins and bullion into which the defendant had converted the proceeds of sale of real estate owned by his associated entities. The defendant subsequently settled his tax liability and the settlement included provision for him to deliver the gold coins and bullion to the ATO. The tax debt was paid in full.

The defendant was sentenced to concurrent terms of three months' imprisonment on each of the offences under the Cash Transaction Reports Act. One of the matters the court took into account at sentence was the fact that the defendant had settled his tax liability.

At the time the defendant opened the accounts the Cash Transaction Reports Act had not been passed and it was not an offence to open an account in a false name. However, the Act makes it an offence both to open and to operate an account in a false name. When police executed a search warrant on the defendant's premises they located a newspaper article that provided an analysis of the Cash Transaction Reports Bill and included a description of the offences which were later to be embodied in section 24 of the Act.

The investigation of another taxpayer resulted from evidence given to the Fitzgerald Inquiry and documents seized by it. This person was the owner of a large number of brothels, and the evidence and documents showed that the only income that had been returned by the taxpayer and his entities for several years related to payments by credit card. Large amounts of cash income had not been declared.

The investigation showed that the taxpayer had a history of tax evasion and of fleeing to avoid paying tax. Indeed, the taxpayer had left his birth place, the United Kingdom,

in his thirties never having lodged a tax return despite having been in almost continuous employment. He had twice fled from New Zealand when under investigation by the New Zealand Inland Revenue Department, and still owes a large amount of tax there.

Because of his background and other factors, including his possession of three current passports, it was feared that the taxpayer was preparing to flee Australia. There had been considerable publicity given to the service of amended assessments on other Fitzgerald Inquiry subjects, and the taxpayer's only major asset, a property worth $2 million, was up for sale.

In close cooperation with the New Zealand Inland Revenue Department evidence was obtained for a mareva injunction. In a closely coordinated operation the amended assessments were served, the injunctions obtained and departure prohibition orders and numerous section 218 notices were all served almost simultaneously. The Court granted the mareva injunction even though the assessment was not payable for 30 days.

When faced with the assessment and the injunctions the taxpayer settled his taxation affairs. More than $600 000 was recovered.

Non-tax recoveries

The DPP also has a similar role in non-tax recoveries connected with or arising out of actual or proposed prosecutions or a course of activity which is being considered for the purpose of deciding whether to institute a prosecution. Unlike tax recoveries, the function in this area is dependent upon the Attorney-General signing an instrument in respect of a matter or class of matters.

A total of 26 instruments have been signed since the enactment of the DPP Act, 17 of which have been since the extension of the civil remedies function in 1985. Three class instruments have been signed covering respectively social security, medifraud and nursing home fraud. One specific instrument was signed this year allowing for the performance of the function in relation to a contract with the Commonwealth to refurbish an ex-RAAF Hercules aircraft to assist in famine relief in Ethiopia.

Results in non-tax matters are shown in tables C and D.

While recoveries in this area may not be on the same scale as recoveries in taxation matters, the exercise of the civil remedies function in non-tax matters fulfils an important part of the office's integrated approach. Since 1985, when the function commenced, a total of more than $2 million has been recovered in non-tax matters.

A case, in which a defendant is alleged to have defrauded the Department of Social Security of approximately $240 000 over a period of years, provides an example of the exercise of the function in non-tax matters. Over $193 000 has now been recovered against the defendant by civil remedies action.

The defendant was first arrested in 1983 and charged in connection with the receipt of social security benefits under five different names. She was convicted in November

Table C: Court orders in non-tax matters in 1988-89

	Number of judgments entered	*Number of injunctions obtained*
Sydney	2	2
Melbourne	—	1
Brisbane	—	—
Perth	4	1
Adelaide	4	1
Canberra	—	—
Total	10	5

Table D: Judgments, amounts secured and amounts recovered in non-tax matters in 1988-89

	Judgments entered or leave to enter judgments	*Amounts secured by injunction or otherwise*	*Amounts received*	*No. of cases* *
	$	$	$	
Sydney	57 000	38 513	128 479	5
Melbourne	—	24 214	302 731	13
Brisbane	—	—	168 346	4
Perth	51 000	45 000	33 800	4
Adelaide	146 103	1 782 020	347 130	7
Canberra	—	—	—	—
Total	254 103	1 889 747	980 486	33

* The figures in this column are the numbers of cases in which amounts have been received.

1984. The total amount defrauded was alleged to be approximately $135 000. On 30 June 1988, four days before a civil action to recover that sum was due to be heard in the Supreme Court, the defendant was declared bankrupt on her own petition and admitted the debt being sued for. During the course of an examination under the *Bankruptcy Act 1966* information was obtained about the location of certain property and written records. Examination of those records showed that the defendant was receiving social security benefits under six more false identities. All of these claims had been made after her original convictions in November 1984. The total amount defrauded in relation to the second round of offences was $105 000.

The defendant's modus operandi was to assume the maiden name of a deceased person, usually taken from death notices in a newspaper, and either claim that identity or claim to be the de facto of a deceased male. In her claims as a de facto the defendant applied for birth certificates of other females and combined those first names with the surname of the deceased male. Investigations also revealed that the defendant had recently purchased an unencumbered house using another identity. The defendant has subsequently pleaded guilty to six charges under the *Crimes Act 1914* and is awaiting sentence.

Proceeds of Crime Act 1987

The Proceeds of Crime Act, unlike the civil remedies function, involves new powers for the courts to freeze and order the confiscation of assets in association with the prosecution of indictable offences. The Act commenced on 5 June 1987 and its principal objects, as set out in section 3, are:

- to deprive persons of the proceeds of, and benefits derived from, the commission of offences against the laws of the Commonwealth or the Territories;
- to provide for the forfeiture of property used in or in connection with the commission of such offences; and
- to enable law enforcement authorities to trace such proceeds, benefits and property.

The Act is conviction-based, which means that no final order in respect of property can be made unless and until a person has been convicted, or had a case found proven, in respect of an indictable offence against Commonwealth or Territory law.

Where a person is convicted of an indictable offence a court may make two types of confiscation order. A court may order that 'tainted property' be forfeited to the Commonwealth i.e. property used in or in connection with an offence or the proceeds of, or property derived from the proceeds of, an offence. A court may also make a pecuniary penalty order against a person requiring that he or she pay a penalty equal to the benefits the person derived from the commission of an offence. An order of this kind becomes a civil debt to the Commonwealth and may be enforced against any property of the person whether or not the property is connected with the offence.

There are separate provisions in relation to what are called 'serious offences'. These are defined to mean :

- a narcotics offence involving more than a traffickable quantity of drugs;
- an organised fraud offence which is created by section 83 of the Proceeds of Crime Act; or
- a money-laundering offence in relation to the proceeds of a serious narcotics offence or an organised fraud offence.

Where a person is convicted of a serious offence any property which has been restrained under the Act, and which remains restrained at the end of a period of six months after the date of conviction, is automatically forfeited to the Commonwealth at the end of that period. To avoid automatic forfeiture a person must have a court lift the restraining order prior to the end of the six month period. To do that the person must show that the property was not used in, or in connection with, any unlawful activity and was not derived by any person from any unlawful activity, and that the defendant's interest in the property was lawfully acquired.

In order to prevent the assets of criminals being dissipated while proceedings are on foot, the Act provides that a Supreme Court may order that a person not dispose of

property and also, if satisfied that the circumstances so require it, may direct the Official Trustee to take custody and control of the property. These orders may be sought from the time a person is charged with an offence or up to 48 hours prior to a charge being laid.

Before it can make a restraining order, a court has to be satisfied that there are reasonable grounds for believing that the person committed an indictable offence, and that the property concerned is tainted, or that the person derived a benefit from the commission of the offence. In the case of serious offences it is only necessary to show that there are reasonable grounds for believing that the defendant committed the offence. The court is empowered to make provision for restrained assets to be used to meet the defendant's reasonable living and business expenses and reasonable expenses in defending a criminal charge. When seeking restraining orders the Commonwealth has invariably been required to give an undertaking with respect to the payment of damages or costs.

The decision to seek a restraining order is a difficult one for a number of reasons. In many cases if assets are not restrained at an early stage they will simply not be available to meet any final orders that may be made. Many people facing serious charges will hide, transfer, consume or otherwise ensure that their assets are not available to meet any final order. If this is allowed to happen it would largely defeat the objects and purpose of the Act. On the other hand, the intrusion involved in preventing a person dealing with his or her property prior to conviction is obvious.

To be effective, restraining orders normally need to be obtained at the time of charging or shortly thereafter. Once a person is alerted by the laying of charges, the dissipation of assets can quickly follow. Quick decisions have to be made at an early stage about the likelihood of ultimate conviction as well as the interpretation of often novel and untested requirements of the Proceeds of Crime Act. Given these factors, and the requirement to give undertakings as to damages, wherever possible restraining orders are sought over assets that are not likely to depreciate in value or lead to other losses. Real estate generally fits this description, while operating businesses do not. The DPP generally agrees to allow any bona-fide sale by a defendant of restrained assets provided the proceeds of the sale, or sufficient of them to cover any likely confiscation order, are themselves restrained. The DPP has exercised restraint in its dealings under the Act and will continue to do so. A decision to seek a restraining order involving tainted property or an estimated pecuniary penalty exceeding $100 000 can generally only be made at the highest levels within the DPP.

Given the novelty of the legislation and the timing and nature of the decision to seek a restraining order, it will not be possible to accurately predict the final outcome in all cases, despite the greatest of care. Recent decisions in two large matters have confirmed this to be the case. One, in which restraining orders were set aside, involved the interpretation of a now repealed section of the Proceeds of Crime Act. In the

other, restraining orders lapsed because the prosecution was discontinued at the committal stage as a result of evidentiary problems.

As the Act is conviction-based, it will take a considerable time for many matters to be completed and recoveries effected. In larger and more serious matters it may take a number of years before the prosecution is completed and final orders can be sought under the Proceeds of Crime Act. The proceeds application in such matters may themselves involve large-scale, long-running and complex litigation.

As anticipated, recoveries in the early years have been confined mainly to smaller matters with a quick turn-around time and to matters settled without the need to seek final orders. This will change over time as larger matters reach completion.

Table E: Proceeds of Crime judgments and recoveries 1987-89

	Number of judgments	*Amount of judgments*	*Amount recovered from judgments*	*Amount received from settlements*
	$	$	$	$
Sydney	6	148 694	41 780	226 985
Melbourne	5	145 877	62 059	10 290
Brisbane	1	46 538	46 538	100 144
Perth	3	469 000	40 000	7 000
Adelaide	—	—	—	—
Canberra	—	—	—	23 498
Total	15	810 109	190 377	367 917

During 1987-89 settlement was effected in 16 matters without the need to complete the proceeds of crime action.

The average amount ordered to be paid in the 15 judgments was approximately $54 000 and the average amount received in matters settled was approximately $23 000.

The first large confiscation order under the Proceeds of Crime Act was made in the Supreme Court of Western Australia on 16 May 1989. Seaman J ordered that Dr John Walsh pay to the Commonwealth a pecuniary penalty of $329 000 and declared that two valuable pieces of real estate found to be under his effective control were available to satisfy the order.

Dr Walsh had earlier been convicted of a number of offences arising from the submission by him of false claims to the Health Insurance Commission and the Department of Veterans' Affairs. He pleaded guilty to 10 counts of imposition, 10 counts of making a false statement under the *Health Insurance Act 1973* and two counts of fraud. It was alleged that Dr Walsh had set aside time each day to fill in false claims for treating patients. Thousands of false claims were generated over nearly four years. On checking 26000 of his bulk bill claims authorities found 93.8 per cent appeared to be false. It worked out at an average of more than 35 false claims per working day. He was sentenced to a minimum of 23 months' imprisonment.

The pecuniary penalty of $329 000 was assessed as the benefit to Dr Walsh from the

false claims after adjustment to present day values and deducting tax paid in respect of those benefits.

Novel provisions of the Proceeds of Crime Act were used to obtain orders that property not under Dr Walsh's legal ownership but within his effective control be made available to meet the debt. The court found that these properties were under Dr Walsh's effective control despite steps taken by him to distance himself from the companies that owned them and a trust relating to them.

This case illustrates the utility of the provisions of the Proceeds of Crime Act dealing with property under the effective control of a defendant. It would have been difficult, if not impossible, to recover against the properties through general insolvency laws. Action is now being taken to execute against the properties to satisfy the pecuniary penalty order.

At this stage the best guide to likely recoveries under the Proceeds of Crime Act is the net value of restrained assets available to meet estimated potential confiscation orders. The net value is an estimate of the value likely to be available to meet any confiscation order, making allowance for any prior encumbrances on the assets.

Table F: Restraining Orders current at 30 June 1989

	Number of restraining orders	*Estimate of potential confiscation orders*	*Net value of property restrained*
Sydney	37	$5 460 081	$5 681 030
Melbourne	13	4 931 000	5 054 000
Brisbane	8	544 333	550 900
Perth	3	720 000	550 000
Adelaide	1	36 000	40 000
Canberra	3	263 975	710 000
Total	65	$11 955 389	$12 585 930

The average potential confiscation order is $184 000, which is considerably higher than the average value of judgments and settlements to date. This reflects the fact that most of the large matters are still working their way through the system.

The Proceeds of Crime Act contains a number of provisions for orders to assist in gathering information. These provisions are available both before and after conviction, or even before a person has been charged, as long as it is alleged that an indictable offence has been committed. There are basically three types of orders under the Act — production orders, search warrants and monitoring orders.

The aim of production orders is to assist in obtaining property tracking documents. These are documents which are relevant, for example, to identifying, locating or quantifying property of the alleged offender. Production orders can be obtained from a judge of a Supreme Court of a State or Territory and may provide either that documents be produced to a police officer or be made available to a police officer for inspection.

As an alternative to production orders, the Act provides for the issue of search warrants to seize property tracking documents. The main advantage of a search warrant is that the possessor of the document is not put on notice as is the case with a production order. In broad terms search warrants may be obtained in the same circumstances as production orders, but before a search warrant can be granted the judge must also be satisfied that the use of a production order would not be effective. This is likely to be the case where documents are sought from suspected offenders or persons associated with them.

One of the more innovative provisions of the Proceeds of Crime Act is the monitoring order. Such an order requires a financial institution to inform officers of either the AFP or the NCA about transactions conducted through an account held by a person with the institution over a specified period not exceeding three months. These orders are only available in relation to serious offences within the meaning of the Act. It is an offence to make an unauthorised disclosure of the existence or operation of a monitoring order. As with production orders and search warrants, monitoring orders may only be issued by a judge of a Supreme Court.

In addition to these information gathering powers, the Act also provides for search and seizure in relation to tainted property. The scheme provides for warrants to search a person's clothing and search land and premises for tainted property. Any property seized must become the subject of a restraining order within 14 days or be returned. Under the provisions warrants may be issued by a magistrate in person or, in an emergency, by telephone.

Details of orders obtained to date under the information gathering provisions are set out in the following table.

Table G: Information gathering orders to 30 June 1989

	Production orders	*Search warrant (property tracking documents)*	*Monitoring orders*	*Search warrant (tainted property)*
Sydney	20	7	—	—
Melbourne	4	2	—	—
Brisbane	—	3	11	6
Perth	3	—	—	—
Adelaide	—	—	—	—
Canberra	—	2	—	—
Total	27	14	11	6

Section 243B Customs Act

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

One such instrument covers, among other things, proceedings to recover a pecuniary penalty under Division 3 of Part XIII of the Customs Act. This Division empowers the Federal Court to order a person who has engaged in a prescribed narcotic dealing to pay the Commonwealth a pecuniary penalty which is assessed as the value of benefits derived from that dealing. An amount ordered to be paid is deemed to be a civil debt due by the person to the Commonwealth and the order may be enforced as if it were an order made by a court in civil proceedings. Under section 243E the court may freeze the assets of a defendant pending completion of the substantive proceedings.

The Customs Act provisions were the forerunner to the Proceeds of Crime Act and the legislation is similar in a number of respects. Recent amendments to the Customs Act draw on the provisions of the Proceeds of Crime Act to improve the scheme in Division III, particularly in relation to the restraint of assets and lifting the corporate veil. The amendments are contained in the *Crimes Legislation Amendment Act 1989* and came into operation on 28 July 1989.

To date, all proceedings under section 243B have been taken in the name of the Commissioner of the AFP and undertakings as to costs and damages have been given by the Commissioner on behalf of the Commonwealth. The recent amendments allow actions to be taken in the name of the DPP.

The most notable differences between the Customs Act provisions and the Proceeds of Crime Act are that the Customs Act provisions apply only to dealings in narcotics and that they are not conviction-based. The proceedings are civil in nature and the court has to be satisfied that the person engaged in a prescribed narcotics dealing, which is defined to include such things as importing, conspiring to import, possessing and selling narcotic goods in contravention of the Customs Act. The civil standard of proof applies, although a court is likely to require a high degree of satisfaction given the gravity of the facts to be proved. While proceedings are not conviction-based, in most cases to date there have been associated criminal charges.
Although used less often since the enactment of the Proceeds of Crime Act, the pecuniary penalty provisions of the Customs Act have continued to play an important role in stripping drug offenders of the fruits of their illegal activity. For example, in a large drug matter investigated by the NCA it was decided that State charges should be laid and the Proceeds of Crime Act therefore had no application. Substantial assets located in two States have been placed under the control of the Official Trustee pursuant to orders obtained under section 243E of the Customs Act. During another large drug investigation, arrests had to be made at a less than opportune time because of fears that the defendants had been tipped off about the investigation. Assets had to be secured quickly. There was evidence that the defendants were involved in the drug trade but at that stage their ultimate conviction could not be confidently predicted. Section 243E of the Customs Act was used to secure the assets.

Cases on hand as at 30 June 1989 are shown in the following table.

Table H: Customs Act Section 243E orders as at 30 June 1989

	No. of cases	*No. of persons*	*Value of property restrained*
			$
Sydney	8	13	8 037 000
Melbourne	8	11	1 010 000
Brisbane	1	9	1 400 000
Perth	—	—	—
Canberra	—	—	—
Adelaide	2	2	870 000
Total	19	35	11 317 000

On 14 August 1989 pecuniary penalty orders totalling $7.25 million were made in the matter of Cornwell and Bull, which is the largest section 243B matter currently in progress. An application in the matter was filed in the name of the Commissioner of the AFP on 24 October 1986 in the Federal Court at Sydney seeking orders that Cornwell and Bull pay pecuniary penalties in respect of benefits derived by them as a result of their involvement in the importation of two tonnes of cannabis by yacht from Thailand during May 1985. The drugs were not recovered.

Cornwell and Bull were arrested overseas and extradited to Australia during 1986. Both subsequently pleaded guilty to charges of conspiracy to import a commercial quantity of cannabis contrary to section 233B(1) of the Customs Act. On 16 September 1987 Cornwell was sentenced to a total of 23 years' imprisonment with a minimum term of 14 years and Bull was sentenced to a total of 18 years' imprisonment with a minimum term of 11 years.

After the original section 243B application was made a number of orders were obtained pursuant to section 243E directing the Official Trustee in Bankruptcy to take control of property allegedly owned by Cornwell. Property placed under the control of the Official Trustee included race horses, a horse stud, real estate and shares. The estimated total value of these assets is around $3 million. Also shares in the United Kingdom and bank accounts in Jersey have been secured by injunctions obtained on the basis of the section 243E orders. The estimated value of this overseas property is around $125 000.

In addition, as the result of an inter-governmental request for mutual assistance, the District Prosecutors Office in Zurich has frozen funds which it is alleged are the proceeds of drug trafficking and are beneficially owned by Cornwell. These are located in various Swiss bank accounts and total approximately $1 million. It is expected that the Swiss authorities will confiscate most if not all of those funds.

Cornwell used professional advisors both in Australia and overseas for the purpose of concealing the nature and location of his property holdings. Elaborate corporate structures were set up involving companies in Australia, the United Kingdom, the Channel Islands, Hong Kong, the Seychelles, Gibraltar and Panama. It has only proved possible to understand these structures as a result of extensive financial investigation in Australia and overseas with detailed analysis of the resultant data. The pursuit of

the money trail was further complicated by the extensive use of false names by the defendant and his associates. A total of 23 witnesses (including Cornwell and Bull) were examined before the Registrar of the Supreme Court pursuant to section 243F of the Customs Act in relation to the nature and location of the defendants' property.

At the hearing of the application for a pecuniary penalty order, Cornwell and Bull submitted that their part in the conspiracy was limited to transporting the cannabis from where it was landed on the north coast of NSW to a hotel in Sydney. They submitted that the benefit derived by them from the operation was 10 per cent of the value of the cannabis imported, which was the payment they received for their role in the operation. They alleged that this 10 per cent was sold for approximately $700 000 and Cornwell submitted that the penalty against him should be $350 000.

The Court found that in fact Cornwell had been a principal in the importation, which comprised 345 packets each containing approximately five kilograms of cannabis. He was the owner of the cannabis after it was imported and was free to dispose of it as he wished. The value of the benefits derived by him was accordingly assessed as being equivalent to the value of the cannabis itself. On the assumption that Cornwell would have to sell the cannabis in large lots to get rid of it quickly the court assessed its value to Cornwell at $4000 per kilogram. The total amount of cannabis imported was approximately 1725 kilograms and the court ordered Cornwell to pay a pecuniary penalty of $6.9 million.

Further orders were made relating to the sale of property under the control of the Official Trustee to pay the pecuniary penalty. The proceeds of the sale of a unit at Noosa Heads, money in a solicitor's trust account and a yacht were excluded from the orders pending determination of their ownership.

The court found that Bull's part in the conspiracy was as an assistant to Cornwell and it was agreed between the parties that the benefit to him from the operation was $300 000. A pecuniary penalty for that amount was ordered against him.

Case reports

Following are descriptions of some of the other cases dealt with.

In a matter in Melbourne seven persons have been charged with offences arising from the alleged importation of cocaine. In addition, some of the defendants have been charged with possessing and trafficking in heroin. Restraining orders were obtained under the Proceeds of Crime Act against all the property of four of the defendants on the day of the arrest or shortly thereafter. Assets so far identified and subject to the restraining orders have a value of approximately $1.4 million. A high level of cooperation was provided by relevant authorities in Switzerland, Austria and Czechoslovakia and some bank accounts believed to have been involved in the transfer of funds overseas by certain of the defendants have been blocked. Bank accounts will be examined as part of the ongoing process of identifying assets both within and outside Australia.

A person has been charged with fraud on the Commonwealth in relation to the operation of a number of nursing homes between 1984 and 1988. The fraud was allegedly perpetrated by the submission of false claims to the Department of Community Services and Health in respect of expenditure on staff and contracts for supplies and services resulting in overpayments of between $2 million and $3 million. Early liaison between the AFP, the Official Trustee and the DPP enabled a clear picture of the individual's assets to be obtained prior to his arrest. This process was further assisted by the execution of a search warrant obtained under section 73 of the Proceeds of Crime Act on the date of the defendant's arrest. A restraining order was obtained under the Proceeds of Crime Act covering assets valued at approximately $2 million.

Restraining orders have been obtained under the Proceeds of Crime Act against the property of two persons charged with conspiring to defraud the revenue by concealing taxable capital gains from real estate investments. The value of the property restrained is approximately $400 000. Attempts had been made to conceal the defendant's ownership of some of the property. This case confirms the value of financial analysts who, by assessing material obtained by means of search warrants, were able in conjunction with AFP officers and tax auditors to locate substantial property holdings which otherwise may not have been detected.

Abraham Saffron was convicted in October 1987 for a tax related conspiracy. Appeals by him against conviction and sentence were dismissed by the NSW Court of Criminal Appeal in October 1988 and a subsequent application to the High Court for special leave to appeal was refused. The amount of primary tax alleged to be involved in relation to Saffron and an associated company was approximately $1.1 million in respect of which additional taxes of approximately $4 million have been imposed.

Restraining orders where obtained under the Proceeds of Crime Act against five properties owned by companies controlled by Saffron. These were three commercial sites in Sydney and two Perth hotels.

In the proceedings in the NSW Supreme Court Saffron challenged the restraining orders, primarily on the ground that any pecuniary penalty order against him would be a form of 'double-dipping' prohibited by the Act because his conduct had already been the subject of the imposition of penalties, namely additional taxes, by the Commissioner of Taxation. Those penalties, incidentally, had not been paid. In February 1989 the Supreme Court rejected this argument and continued the restraining orders. Saffron thereupon appealed to the NSW Court of Appeal which accepted the 'double-dipping' argument, allowed the appeal and set aside the restraining orders. The relevant provisions of the Proceeds of Crime Act had been amended before the matter came on for hearing, although the case was heard under the old provisions.

A defendant was charged in relation to a small quantity of heroin found in her house. Investigations and analysis revealed that, although the defendant's only known lawful

source of income for the past seven years has been social security benefits, her known expenditure in the past three and a half years totalled almost $300 000. This included expenditure of over $85 000 in the last six months of 1988 alone. An application was made to the Federal Court seeking a pecuniary penalty under section 243B of the Customs Act. At the same time orders were obtained under section 243E directing the Official Trustee to take control of all the property of the defendant. This included an unencumbered house, a late model Ford LTD sedan, a 100 horsepower half cabin cruiser and trailer, a Kawasaki jet ski, a Kawasaki 750cc motorcycle and sundry electrical goods and jewellery. The total value of property subject to the section 243E order is approximately $300 000. The Federal Court proceedings for a pecuniary penalty are continuing.

Neil Chidiac was charged on 31 March 1988 with an offence under section 233B of the *Customs Act 1901*. It was alleged that he conspired with other persons to import a traffickable quantity of heroin into Australia between 1 December 1984 and 4 July 1985. The amount of heroin involved was estimated at between one and two kilograms.

On 15 February 1989, in the District Court of New South Wales in Sydney, Chidiac was found guilty of the offence charged. On 24 February 1989 Chidiac was sentenced to 20 years' imprisonment with a minimum term of 14 years. He has subsequently appealed against his conviction and sentence.

On 3 May 1988, following Chidiac's arrest, a restraining order was obtained under section 43 of the Proceeds of Crime Act over all of Chidiac's assets. Chidiac's known property consisted of a house, a BMW sedan and a Ford motor vehicle. The restraining order was subsequently varied to allow for the sale of the property with the balance of the settlement funds, after payment of expenses and a mortgage, to be placed under the control of the Official Trustee.

The offence of which Chidiac was convicted is a serious offence within the meaning of the Proceeds of Crime Act. The effect of this was that all of his property under restraint would be automatically forfeited to the Commonwealth six months after his conviction unless he obtained an order under section 48(4) declaring that the property was not to be automatically forfeited. To obtain such a declaration, Chidiac needed to satisfy the Court that the property was not derived directly or indirectly by any person from any unlawful activity and that his interest in the property was lawfully acquired.

Chidiac did not obtain an order under section 48(4) and property owned by him, with an estimated value of approximately $650 000, was forfeited to the Commonwealth on 15 August 1989. The property cannot be disposed of or otherwise dealt with by the Commonwealth pending the determination of Chidiac's appeal in the criminal proceedings.

On 9 March 1987 Carlo Razzi, Patricia Razzi, Allan McLean and Elvio Lorenzelli were arrested and charged with offences relating to the importation of 5.5 kilograms of

heroin on 7 March 1987. They were also subsequently charged with conspiring to import five kilograms of heroin in 1986.

McLean pleaded guilty to all charges relating to these importations and to certain other importations to which he confessed after his arrest. He was sentenced in the NSW Supreme Court on 7 August 1987 to a total of 24 years imprisonment with a minimum term of 16 years.

Committal proceedings against the Razzis and Lorenzelli ran from 20 July until 3 September 1987 resulting in the committal of all defendants to stand trial on all charges. Carlo Razzi and Lorenzelli subsequently pleaded guilty and, on 28 June 1988, were each sentenced to a total of 22 years' imprisonment with a minimum term of 13 years. It was decided not to proceed with the criminal charges against Mrs Razzi and she was accordingly discharged.

On 11 March 1987 orders were sought in the Federal Court against the Razzis, McLean and Lorenzelli under section 243B of the Customs Act for the imposition of pecuniary penalties. At the same time orders were obtained under section 243E for the Official Trustee to take control of all the property of each defendant. The section 243B proceedings against McLean were resolved by deed of settlement.

On 24 August 1989 the Federal Court ordered that the other three defendants pay pecuniary penalties to the Commonwealth in respect of their involvement in drug importations. It was alleged that the Razzis and Lorenzelli derived benefits from a series of narcotic importations between 1982 and 1986. The narcotics involved totalled about 20 kilograms of cannabis resin and seven kilograms of heroin. The total wholesale value was estimated at $1.3 million. The Court assessed the benefits on the basis of the value of the narcotics and ordered pecuniary penalties against the defendants in respect of the importations that each was found to have been involved in.

Carlo Razzi was ordered to pay to the Commonwealth pecuniary penalties totalling $579 000 in relation to his involvement in four importations dating back to 1982. Elvio Lorenzelli was ordered to pay pecuniary penalties totalling $594 000 in relation to his involvement in three of the importations. Patricia Razzi was ordered to pay a pecuniary penalty of $165 000 in respect of her involvement in one of those importations in November 1986. Further orders were made relating to the sale of property under the control of the Official Trustee to pay the pecuniary penalties.

The pecuniary penalty order was made against Patricia Razzi notwithstanding that she has not been convicted of any offence. The Court was satisfied that she had been engaged in a prescribed narcotic dealing within the meaning of the Customs Act and had derived a benefit therefrom. She was granted a stay of proceedings for 28 days to consider an appeal in the matter.

8

Some operational issues

Proposals for reform of the criminal justice system in NSW

In May 1989 the NSW Attorney-General's Department issued a discussion paper containing proposals for the reform of the criminal justice system in NSW.

The discussion paper set out a number of 'preferred options' which were considered as representing the most effective and just reforms to the criminal justice system that could be readily implemented. The most radical of the preferred options was that committal proceedings be abolished. It was proposed that the decision whether to commit for trial be made by the DPP for NSW (and accordingly the Commonwealth DPP in the case of Commonwealth offences). The DPP would also decide whether an indictable matter should be dealt with summarily or on indictment where summary disposition was available. The disclosure of the prosecution case that at present takes place in the context of committal proceedings would be replaced by a comprehensive scheme of pretrial disclosure. In addition, an accused would have a limited right to require cross-examination before a magistrate of certain categories of prosecution witnesses (e.g. where the witness could give evidence of identification of an accused, or the witness was an accomplice) although for the purposes of any such cross-examination the magistrate would act merely as a 'referee'.

The discussion paper made recommendations in a number of other areas. It was proposed, for example, that an accused be required to disclose to the prosecution and to the court the general nature of his or her defence and the areas in which the prosecution case was disputed. A failure by the accused to comply with this requirement, or a departure by the accused from the nature of his or her disclosed defence, would entitle either the trial judge or, with leave, the prosecution to refer to this and to invite the jury to draw the appropriate inference. Proposals were also made in relation to mandatory time limits on the commencement of a trial. It was also proposed that provision be made for summary 'back-up' charges to travel with related indictable matters so that in certain circumstances they could be dealt with by the superior court in conjunction with the indictable offences.

In a sense the radical nature of the proposal to abolish committal proceedings is explicable on the basis that every other attempt at reform in NSW designed to reduce the backlog of cases has been a conspicuous failure. The criminal justice system in NSW is currently in a state of crisis due to lengthy delays in obtaining dates for committal hearings. The 'Report on a Review of the NSW Court System' by Coopers and Lybrand issued in May 1989 indicates that the average delay between arrest and committal in custody cases is 22 weeks, and it is obviously longer in non-custody cases. Further, regrettably it is not uncommon for committal hearings in NSW to be split into several widely-separated blocks of dates which are designed around a particular magistrate's commitments. In the prosecution conducted by this Office of Goldspink and others, for example, the committal proceedings commenced on 2 September 1985 but did not conclude until 5 May 1989 — over three and a half years later — with the matter taking up 146 hearing days within that period.

Although NSW has a 'paper committal' system which is similar to that in operation in Vic., it has simply not worked with the efficiency of the Victorian system. There are no incentives to comply with the spirit and intent of the paper committal system, and all too frequently the NSW profession has conspicuously failed to do so. For example, the defence may indicate that it requires all witnesses to give evidence in full, rather than have the magistrate rely on the witnesses' statements, but then cancel that request in respect of many of the witnesses at the last minute. Sometimes it appears that defence lawyers have undertaken little or no prior preparation, and indeed it appears that some defence lawyers will not read the hand-up brief, or even give it to the accused, until put in funds. All too frequently the committal hearing is characterised by a desultory cross-examination of witnesses by the defence, with the hearing degenerating into a pro-forma calling of witnesses which does nothing to benefit the defence and merely wastes valuable court time.

The uncharitable might see an explanation for the far greater efficiency of the Victorian committal system as against that of NSW lying less in the public spirit of the Victorian profession than in the very real tactical advantages that can be gained in

NSW by delay. Prosecution witnesses may die or their memories fade, and the longer the delay the more likely it will be that the prosecution will not be able to resist a charge bargain proposal or an application to enter a no bill. A sentencing court is less likely to impose what would otherwise have been the appropriate sentence if the case is already stale by the time it comes before the court.

This Office has provided the NSW authorities with a submission commenting on the various proposals made in the discussion paper.

With respect to the main proposals concerning the abolition of committal proceedings, while accepting that the problem of delay in NSW was particularly acute, and that the present committal system was a contributing factor in that delay, it was considered that the discussion paper had not made out a sufficient case for the abolition of committal proceedings. Further, the abolition of committal proceedings would require a considerable increase in the resources of the State DPP if it was to undertake the 'vetting' function at present performed by magistrates. This proposal, if implemented, would also have resource implications for the Commonwealth DPP. Properly conducted committal proceedings generally ensure that any subsequent trial is run on far tighter lines than is the case where there has been no committal. They also promote the entering of pleas of guilty once the accused has had an opportunity to see the strength of the prosecution case. To abolish committal hearings, on the other hand, would tend to lead to more trials, which would be lengthier and more costly.

While the DPP accepts that the present system requires urgent modification to ensure that it is able to function efficiently and fairly to both the prosecution and the defence, it considers that there are a number of worthwhile reforms to the present committal system which could be tried. For example, there should be no absolute right to cross-examine witnesses; rather an accused should require leave before doing so. Witnesses whose evidence is essentially uncontradicted, and who are accepted as being credit-worthy, should seldom be required to be available for cross-examination.

On the other hand, if the proposal to abolish committal proceedings is to be implemented, the DPP considers that a number of improvements could be made. As mentioned above, it has been proposed that an accused have a limited right to require certain categories of prosecution witnesses to attend for cross-examination before a magistrate, albeit the magistrate would act merely as a referee. The DPP considers that ideally such cross-examination should not be restricted to particular categories of witnesses. Alternatively, provision should be made requiring a witness to testify if either the witness has declined or has been unable to provide a written statement, where both the prosecution and the defence consent, or on the application of either the defence or the prosecution, if the magistrate considers that exceptional circumstances exist and it is in the interests of justice that the witness be examined.

War Crimes Amendment Act 1988

The *War Crimes Amendment Act 1988* (WCAA) was assented to on 25 January 1989 and came into force on that date. With the enactment of this legislation there is a prospect of new and complex prosecutions for the DPP. Any prosecutions instituted are likely to encompass difficult issues of municipal and international law. It is fair to say that any such prosecutions will stimulate widespread interest both at home and abroad.

In recognition of the novel and complex issues of a practical nature that could arise in any prosecutions under the WCAA the DPP was consulted by the Attorney-General's Department at various stages in the development of the legislation. In this regard, section 7(4) provides that a number of separate crimes will constitute a single war crime if they are of the same, or similar character, form or are part of a single transaction or event, and if each of them is also a war crime by virtue of either section 7(1) or 7(3). This provision was inserted as a result of concerns expressed by this Office about the practical difficulties in framing an indictment for a crime committed on a mass scale, for example the deportation of a large number of persons or mass murder.

It should be noted that an offence under the WCAA may only be prosecuted in the name of the Attorney-General or the Director. This is intended to avoid vexatious or mischievous prosecutions being instituted.

Prior to the enactment of the WCAA the Government established the Special Investigations Unit (SIU) which is charged with the responsibility of investigating persons in Australia who may have committed war crimes during World War II. The SIU is located in Sydney and is headed by Mr R.F. Greenwood, QC. Liaison has been established between the DPP and and the SIU, and DPP lawyers have been briefed by the SIU regarding investigations being carried out in a few cases. The purpose of this liaison is to enable the DPP to obtain some knowledge of those cases regarded by the SIU as ones which may, depending upon the results of completed investigations, be recommended for prosecution. This arrangement is consistent with that which the DPP has with any other investigative body working upon important and complex cases. At the time of writing no briefs of evidence have been received by the DPP from the SIU.

It has been decided between the DPP and the SIU that, once a case has been fully investigated, if the SIU has formed the view that there is sufficient evidence to warrant consideration whether a prosecution should be instituted, the Unit will provide the prepared brief to the DPP. The DPP will then assess the brief and decide whether a prosecution should proceed and, if so, on what charge or charges.

Apart from liaising with the SIU, the DPP has undertaken considerable research on certain legal issues in an attempt to ensure that the Office is as prepared as possible should a prosecution eventuate.

Reparation orders

Pursuant to section 21B of the *Crimes Act 1914* a sentencing court, in addition to any penalty it may impose in respect of the offence, may order an offender

> (c) to make reparation to the Commonwealth or to a public authority under the Commonwealth, by way of money payment or otherwise, in respect of any loss suffered, or any expense incurred, by the Commonwealth or the authority, as the case may be, by reason of the offence; or
>
> (d) to make reparation to any person, by way of money payment or otherwise, in respect of any loss suffered by the person as a direct result of the offence.

Section 239(7) of the *Social Security Act 1947* similarly makes provision for a court to make a reparation order against a person convicted of an offence against section 239(1) of the Social Security Act.

Neither section 21B or section 239(7) provides any procedure or mechanism for the enforcement of the debt created by the making of a reparation order. Recourse must therefore be had to section 18A of the Crimes Act which picks up the laws of the relevant State or Territory with respect to the payment of amounts ordered to be paid by offenders.

This Office considers that the mechanism within section 18A for the enforcement of a reparation order is unsatisfactory in a number of respects. First, it results in significant disparities in the treatment of federal offenders throughout Australia. Federal offenders ordered to pay reparation may, depending on the jurisdiction in which the order was made, be treated as either civil debtors or quasi-criminals, with different sanctions for failure to comply with the order. Secondly, in those jurisdictions where enforcement of a reparation order is dealt with by criminal recovery procedures, failure to pay the reparation ordered may be followed by imprisonment in default. However, a reparation order is not intended to be a punishment, but rather as compensation for loss. To imprison an offender for failure to pay the reparation order is reminiscent of imprisonment for debt, and in the view of this Office is unacceptable. Further, the practical effect of imprisonment in default is that the victim (almost invariably the Commonwealth or a Commonwealth agency) does not recover the loss, and the Commonwealth incurs further expense reimbursing the States for the cost of imprisonment.

In view of the above, in 1988 this Office recommended to both the Attorney General's Department (which administers the Crimes Act) and the Department of Social Security that section 21B of the Crimes Act and section 239 of the *Social Security Act 1947* be amended to provide that reparation orders made under those sections could only be enforceable as civil judgments. Such amendments would have the additional advantages of allowing enforcement action to be at the discretion of the Commonwealth agency concerned, and of allowing those agencies a measure of flexibility in recovering amounts ordered to be paid by way of reparation. In both

cases the DPP recommendation was viewed favourably, and indeed the necessary amendment to the *Social Security Act 1947* was passed in the 1989 Autumn Session of the Parliament. At the time of writing it is understood that the necessary amendment to section 21B will be introduced in the 1989 Budget Session as part of the Government's proposed legislation dealing with the sentencing of federal offenders.

A consequential amendment is also necessary to section 20A of the Crimes Act. At present where an offender is either discharged under section 19B or released under section 20 of that Act, such discharge or release must be conditional on compliance with any reparation order that may also have been made by the court. However, failure without reasonable cause or excuse to comply with such a condition exposes the offender to the possibility that he or she will be sentenced to a term of imprisonment. An amendment to the Crimes Act provision would seem necessary to ensure that a term of imprisonment cannot be imposed for failure to comply with a reparation order payment of which is a condition attaching to release under either section 19B or section 20.

Pending the necessary amendments the Office decided as an interim measure that reparation orders would only be sought in those jurisdictions where they are enforced as civil judgments or where the enforcement process is akin to that for civil judgments. In particular, reparation orders would not be sought in those jurisdictions where enforcement may result in imprisonment in default.

Administrative Decisions (Judicial Review) Act 1977: application to committal proceedings and prosecution decisions

Previous annual reports have referred to the problems that have been caused by an accused resorting to the *Administrative Decisions (Judicial Review) Act 1977* (ADJR) to delay the prosecution of Commonwealth offences.

In May 1989 the Administrative Review Council submitted a Report to the Attorney-General reviewing the ambit of the ADJR Act in which, among other things, it recommended that decisions of magistrates in committal proceedings should be excluded from review under the Act. The Council noted that most of the submissions it received which addressed this issue expressed support for the exclusion of such decisions from the ambit of the Act.

In its submission the DPP also sought the exclusion of other decisions taken in connection with the prosecution of offences, such as the decision to institute or carry on a prosecution, to consent to a prosecution or to file an indictment. In the view of the DPP, simply to remove decisions of magistrates in committal proceedings from the ambit of the Act without also excluding prosecution decisions would result in defendants, wishing to delay their prosecution, changing the target of their attack from the committal proceedings to the various decisions taken in connection with the prosecution of offences.

Regrettably the Council has recommended that prosecution decisions should continue to be reviewable under the Act. In justifying its position the Council relied on the decision in Newby v Moodie (1989) 83 ALR 523 where the Full Federal Court indicated that the same attitude would be taken to applications for review of prosecution decisions as were taken by the Court in relation to applications for review of committal proceedings, namely, that an order of review would be granted only in the most exceptional cases.

With the greatest respect, the Council has missed the point. While it is true that the Federal Court has consistently said that only in exceptional cases would 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 Act there is an obligation on the Court to entertain it. Even though the Federal Court has sought to list these matters quickly, and has generally dealt expeditiously with applications, some delays are inevitable. These will be considerable if unsuccessful applicants avail themselves of their rights of appeal. The fact remains that the range of decisions which are subject to review under the ADJR Act has provided fertile ground for defendants to delay, to their advantage, criminal proceedings against them. Exclusion of committal proceedings alone from the ambit of the Act will provide little amelioration of the situation.

The question whether prosecution decisions should be subject to the ADJR Act involves no issue of principle, for the procedures and processes associated with the conduct of a criminal prosecution necessarily provide an adequate review of prosecution decisions. All that would be achieved by the retention of prosecution decisions within the ambit of the ADJR Act would be the provision of an additional review mechanism which defendants can exploit to delay and frustrate the prosecution process.

The Council's Report notes that Mr Justice Pincus, who was a member of the Bench in Newby v Moodie, has also supported the exclusion of prosecution decisions from the ambit of the ADJR Act.

Staff turnover and salaries — lawyers

Difficulties in recruiting and retention of lawyers continue to be a major concern for the Office. In the Sydney Office in particular the turnover rate is now approximately 40 per cent per annum. This is unacceptably high. Equally worrying is that many resignations from the Sydney Office have been at the middle and senior levels, with the consequence that the average level of legal experience has declined dramatically. In the Sydney Office there are now only some ten lawyers who have been with that office for more than three years.

The situation is not as bad in other regional offices, but similar patterns are developing. In most regional offices there has also been a significant decline in the number of applicants responding to advertisements.

We are often told by legal staff that the nature of the work is very interesting and satisfying, and that facilities and support services to lawyers are good. Rather, the problem centres on inadequate salary and the limited career path and prospects at the senior levels. The base salary for lawyers recruited at the Legal Officer level at present is $26 744 compared with salaries on offer to law graduates in the private sector in excess of $30 000. Indeed, the leading city firms are now offering starting salaries to graduates well in excess of $35 000 with the prospect of rapid salary increases. Even if it is possible to match the private sector starting salary, the limited career path reduces the number of quality applicants. In this regard, the most noticeable differences in salary occurs for experienced lawyers. Private sector solicitors with about five to six years' experience earned about $30 000 per annum in 1984 but are now earning up to $90 000. DPP lawyers with similar experience are likely to be Principal Legal Officers earning $50 538. This only represents an increase in salary of approximately $9500 on 1984 levels. Secondly, for many DPP lawyers, no matter how experienced, their career path with the Office effectively stops at the Principal Legal Officer level for there are a limited number of positions in the DPP in the Senior Executive Service. In any event, such positions involve a broader administrative and management role and do not suit lawyers whose career interest is as legal specialists. Most lawyers in fact seem to prefer to work as legal professionals rather than as managers.

The Office is seeking to establish a career structure that incorporates salaries equivalent to Senior Executive Service positions but which would enable officers to specialise as legal practitioners. Greater flexibility in relation to salary advancement and employment contract arrangements are also necessary.

Prosecutions for offences committed within the parliamentary precincts

Section 10 of the *Parliamentary Precincts Act 1988* provides

> The functions of the Director of Public Prosecutions in respect of offences committed in the precincts shall be performed in accordance with general arrangements agreed between the Presiding Officers and the Director of Public Prosecutions.

The text of an arrangement dated 19 August 1988 entered into between the former Director and the Presiding Officers is set out at appendix 5.

The arrangement does not contemplate that the Presiding Officers will assume any responsibility for decisions relative to the institution or conduct of prosecutions for offences committed within the Parliamentary precincts. Indeed, clause 10 makes it clear that the arrangement does not affect the performance of the functions or the exercise of the powers of the Director under the DPP Act consistent with the prosecution policy statement or any directions or guidelines given under section 8 of the DPP Act. The main purpose of the arrangement is to identify that special interest

which may arise from the circumstances in which a particular offence is committed which not only entitles the Presiding Officers to advance any views they may have touching the question whether the public interest warrants a prosecution for the offence, but indeed obliges the DPP to seek their views before deciding whether a prosecution should proceed.

Prosecution of welfare fraud offences in WA

During the year representations were received by this Office and Ministers from various quarters concerning the imprisonment of female welfare fraud offenders in Western Australia. Considerable attention was also given to this issue by the Perth media.

The issues covered in the representations were wide-ranging, and included the role of the Department of Social Security in the investigation of welfare fraud offences, the adequacy or otherwise of legal representation and the availability of legal aid. However, the general tenor of the representations in so far as they concerned matters touching on the functions of this Office was the claim that in many cases female offenders who had been imprisoned in Western Australia in the 1987-88 financial year had been persons who were economically disadvantaged, and who had reluctantly committed offences out of need rather than greed. Indeed, one correspondent referred to the female offenders as persons who had taken 'the enterprising step of not declaring their earnings in order to retain a real chance of improving their family's standard of living'. This claim, however, was not borne out by an analysis of the facts in those cases where female welfare fraud offenders had been imprisoned in the 1987-88 financial year.

Many of those cases disclosed a deliberate pattern of dishonesty whereby the Department of Social Security was defrauded of often very large amounts over extensive periods. In many of the cases it was difficult to see any significant mitigating circumstances. Thirteen of the 26 female offenders who were imprisoned were either married or in stable de facto relationships at the time of committing the offences and their spouse was either in full-time employment or claiming benefits for them. Of the cases where the offender was either single or separated at the time of the offences, most were in full-time employment, and a number of the cases involved multiple claims. In eight cases which involved the offender failing to declare income from employment the offender was employed either under a maiden name or a false name. In some cases the offender went to considerable lengths to avoid detection. Finally, a number of the offenders had prior convictions for dishonesty, in one case for welfare fraud.

Some of the representations took this Office to task for taking what was regarded as an 'unreasonably hard line' at sentence. However, such claims misconceived the role of the prosecution at sentence. If the circumstances of a case fall within a particular

category that the courts have determined should be dealt with in a particular way then it is incumbent on the prosecutor to draw this to the attention of the sentencing court.

Of course, it is a matter for the sentencing court to determine what punishment to impose. In this regard, the appellate courts on a number of occasions have referred to the fact that frauds on the social security system must be viewed seriously because they threaten the basis of the system itself. It has also been said that a sentencing court must also take into account that such offences are difficult to detect, and that the penalties imposed should reflect a concern for the protection of the revenue. A custodial sentence may well be appropriate in the case of a serious fraud which is not accompanied by substantial mitigating factors.

During the 1987-88 financial year our Perth Office received a total of 417 matters for prosecution, 192 involving female offenders. Of those, 161 had been dealt with and convictions recorded as at 4 October 1988. Of those 161 female offenders, 29 received custodial sentences, an imprisonment rate of 18 per cent. It should also be noted that the 161 cases involving female offenders concerned fraud totalling approximately $1 million. Finally, it should be noted that during the same period 44 male welfare fraud offenders were imprisoned.

The transcription of tape-recorded interviews

Mention is made elsewhere in this report of the Interim Report of the Review of Commonwealth Criminal Law on 'Detention before Charge'. One of the more important recommendations in that report concerns the tape-recording of interviews with suspects.

The Review Committee has proposed that, if it was reasonably practicable to tape-record an interview with a suspect, then generally speaking evidence of any confessional statement made to the police should be inadmissible in proceedings against that person unless the questioning of that person was tape-recorded. If it was not practicable to tape-record the interview then the police should be required to make a written record of anything said by the suspect in the course of the interview which should then be read back to the suspect, with this 'read back' itself being tape-recorded. If these requirements are not complied with, or there is insufficient evidence of compliance, then a court should have a discretion to admit evidence of the confessional statement only if it is satisfied that, in the special circumstances of the case, its admission would not be contrary to the interests of justice.

The introduction of a system of tape-recording interviews with suspects will ensure far greater fairness, both for accused persons in protecting them against the risk of false confessions being alleged against them, as well as for the police in protecting them against false allegations of fabricating confessions. However, it will also have other beneficial effects. While there will, of course, be some cost involved in establishing and maintaining the necessary infrastructure (e.g. recording equipment, interview

rooms, training police in the new techniques involved) there will be savings in police resources for the present system of typing what is said in an interview is most time consuming. A system of tape-recording interviews will also involve savings for the criminal justice system generally. It can be expected that it will lead to an increase in the number of guilty pleas, which should also be indicated in a more timely fashion. Further, it can be expected there will be a significant reduction in a number of voir dires. Overseas experience indicates that when an interview with a suspect has been recorded the question of what was or was not said during the interview virtually ceases to be an issue in the trial.

Much of these savings would be lost, however, if it was necessary for a transcript of a tape-recorded interview to be prepared in all cases. It has accordingly been recognised that transcription should be kept to a minimum; rather to the extent practicable reliance should be placed instead on the actual tape.

While the Review Committee did not specifically address this issue, it did recommend that the proposed law should provide that the suspect should be entitled to receive a copy of the tape free of charge, as well as a transcript of the tape-recording if one was prepared.

In 1988 the Victorian Parliament passed the *Crimes (Custody and Investigation) Act 1988* which, among other things, has made provision for the tape-recording of interviews with suspects on broadly similar lines to those recommended by the Review Committee. This Act came into force on 15 March 1989 and, by reason of the *Judiciary Act 1903*, applies to the investigation in Victoria of indictable offences against Commonwealth law. Accordingly, it was necessary for our Melbourne Office to determine when it would require a full transcript of a tape-recorded interview to be prepared. This was done in consultation with the Chief Magistrate in Victoria and the AFP.

It has been decided that, unless exceptional circumstances exist, a full transcript will only be required in committal matters, and in contested summary matters if contested. In practice this will mean that a full transcript will only be necessary in a small number of prosecutions conducted by our Melbourne Office.

If a summary prosecution is not to be contested our Melbourne Office will require the police to provide a copy of the tape of the interview and a summary of the admissions made by the accused and of any other matters arising from the interview that are considered relevant, e.g. matters of mitigation or aggravation. The summary should contain references to the relevant tape counter readings.

While the Melbourne Office's arrangements have kept the requirement for a full transcript down to the bare minimum, this has resulted in a reasonably significant increase in 'prosecutor time' required for undefended summary matters. Under the previous system the prosecutor preparing a mention list could quickly read through

the typed record of interview for each matter, highlighting relevant portions. Now, however, the prosecutor is often required to listen to substantial portions of the tape of the record of interview, particularly if the summary provided is insufficient. While these are still early days, our Melbourne Office has estimated that the preparation time in respect of mention matters has approximately doubled. However, it is hoped that this can be reduced once the police become more experienced in preparing a sufficient summary of the taped interview.

Review of the DDP's prosecution policy

The DPP is at present reviewing the 'Prosecution Policy of the Commonwealth' which was presented to the Parliament by the Attorney-General in February 1986. This document sets out the guidelines that are applied by the DPP in the making of some of the more important decisions in the prosecution process. The guidelines have now been in operation for some three and a half years and it is therefore timely that this review be conducted to see if any changes are necessary to take account of the experience gained in the period they have been in operation.

In addition, some changes to the guidelines are necessary to take account of recent amendments to the DPP Act. In the area of indemnification of witnesses, for example, the amendments effected by the *Crimes Legislation Amendment Act 1989* have conferred on the Director the power to grant a 'transactional' indemnity, as well as recasting section 9(6) of the Act as a 'use/derivative use' indemnity provision. Those amendments also conferred on the Director the power to grant an ex officio indictment.

The most important sections of the 1986 guidelines are those dealing with the actual criteria to prosecute, and hitherto the review has concentrated on what, if any, changes appear to be necessary in this area.

As is made clear in paragraph 2.12 of the guidelines, the criteria to prosecute cannot be reduced to something akin to a mathematical formula, and that indeed it would be undesirable to attempt to do so. All the criteria can achieve is to provide guidance on the general principles to be applied in the exercise of the discretion whether to institute or proceed with a prosecution.

While it is now generally accepted that there are two fundamental considerations involved in the decision whether to prosecute — that the evidence is sufficient to justify a prosecution, and that the public interest requires a prosecution — it is the first of these considerations that has occasioned prosecuting authorities the most difficulty. How much evidence must there be before a prosecution will be justified; is a prima-facie case sufficient, or is more required and if so, what?

Most prosecuting authorities in Australia would not dispute that the existence of a prima-facie case, of itself, is an inadequate standard of the sufficiency of evidence. As

observed by a former English DPP, Sir Thomas Hetherington, in evidence to the UK Royal Commission on Criminal Procedure:

> The universal adoption of a "bare prima facie case" standard would not only clog up our already over-burdened courts but inevitably result in an undue proportion of innocent men facing criminal charges.

Rather, it is now generally agreed that the standard of sufficiency of evidence, no matter how it is expressed, must have regard to the prospects of securing a conviction.

Before discussing some possible alternatives to the criteria in the 1986 guidelines, it may be useful to outline the reasons for adopting the criteria in the form that they appear in the 1986 guidelines.

The 1986 guidelines replaced, in so far as the DPP is concerned, the guidelines issued by the Commonwealth Attorney-General in 1982. The standard of sufficiency of evidence in the 1982 guidelines was, first, that there should be a prima facie case and, secondly, that 'a prosecution should not normally proceed unless there is a reasonable prospect of conviction'. This was equated with it being 'rather more likely than not that the prosecution will result in a conviction'. Similarly, the guidelines issued by the UK Attorney-General in 1983 stated the standard of sufficiency of evidence as: 'whether there is a reasonable prospect of conviction; or put another way, whether conviction is more likely than an acquittal before an impartial jury properly directed in accordance with law'. Although in both cases the basic test of sufficiency of evidence was a reasonable prospect of securing a conviction, it was apparently considered that that of itself was an insufficiently precise standard by which to determine sufficiency of evidence. It was thought to require elucidation, and understandably in both the Commonwealth and the United Kingdom it was that elucidation — that a conviction be more likely than not — that became the test that was applied in practice.

The 'more likely than not' test (the so-called '51 per cent rule') has been criticised, however, as setting too high a standard. In deciding whether a conviction is more likely than not, the prosecutor is no longer concerned with whether the arbiter of fact could convict on the evidence to be adduced by the prosecution, but whether, at the end of the day, the arbiter of fact is likely to convict. The prosecutor must not only make an assessment of the strength of the prosecution case on paper but also make some prediction as to the likely impact the prosecution witnesses will have on a jury. He or she must also take into account the impact of any likely defence, and sometimes how a particular offence or offender will be perceived by a jury. In some cases the prosecutor, no matter how experienced he or she is and no matter how dispassionately he or she approaches their task, will simply be unable to say whether a conviction or an acquittal is the more likely result. Should a prosecution proceed in such a case?

The 1982 guidelines were equivocal. In stating that a prosecution should not 'normally' proceed unless there was a reasonable prospect of a conviction, the 1982

guidelines appeared to countenance proceeding with a prosecution although the prospects of securing a conviction were something less than 'more likely than not'. However, the 1982 guidelines provided no real guidance as to the circumstances which might justify proceeding with a prosecution in such circumstances. It was this deficiency which the 1986 guidelines sought to address.

If it can be said with reasonable confidence that a conviction is more likely than not then the fact that there are public interest factors in favour of a prosecution, and none against, strictly speaking will be irrelevant, for they can only confirm a decision which is already justified on the evidence. However, public interest factors may be crucial in deciding whether a prosecution will be justified in those cases where, on the best judgment one can make, it is impossible to say whether a conviction or an acquittal is the more likely result. It was for this reason that the main test of sufficiency of evidence in the 1986 guidelines was subsumed within the public interest consideration so that whether a conviction was the more likely result became the dominant factor in determining whether the public interest required a prosecution. In such 'hard cases' it might still be appropriate to proceed if there were public interest factors in favour of a prosecution provided a conviction was reasonably open on the evidence.

Nevertheless the incorporation of the 'sufficiency of evidence' test within the public interest consideration is open to the criticism that it is somewhat artificial. The public interest consideration has traditionally been regarded as separate from considerations relative to the sufficiency of evidence, and it would seem for this reason that at least some prosecutors have found the criteria in the 1986 guidelines difficult to apply.

If there should be changes to the criteria in the 1986 guidelines, what form could they take?

Two formulations of a sufficiency of evidence test now have some currency in Australia and England. The first is the bare 'reasonable prospects of conviction' test advanced by the Victorian Shorter Trials Committee. The second is the 'realistic prospect of conviction' test applied by the new UK Crown Prosecution Service.

The Victorian Shorter Trials Committee in its 1985 report recommended the adoption of a 'reasonable prospect of conviction' test, but shorn of any reference to that being equated with a conviction being more likely than not. The Committee stated (at paragraph 3.53 of its report) that it did not agree that 'reasonable prospect of conviction' was to be equated with a 51 per cent chance of a conviction being sustained. It may be something less than that and is not appropriately expressed in mathematical terms'. The Committee recommended that the test be cast in the negative (i.e. a prosecution should not proceed if there is not a reasonable prospect of securing a conviction) for the reasons that such a 'negative' formulation 'makes the test more readily understandable and avoids any suggestion that cases must or should proceed simply because a "strength of case" criterion has been satisfied'. It is this

'negative' formulation of the reasonable prospects test that has been adopted by the NSW Director of Public Prosecutions.

Under the 'Code for Crown Prosecutors' which has been adopted for the new UK Crown Prosecution Service the test of 'evidential sufficiency' is 'whether there is a *realistic* prospect of a conviction'. As is the case with the test recommended by the Victorian Shorter Trials Committee the 'more likely than not' side of the equation has been abandoned.

Viewed in isolation it is difficult to discern any meaningful difference between a test which requires that there be a 'reasonable prospect' of a conviction and one which requires that that be a 'realistic prospect'. However, it is clear from other sections of the Code that it will operate differently from the test in the UK Attorney-General's 1983 guidelines. The reference in the 1983 guidelines to the assessment of the sufficiency of evidence being made on the assumption that the case will be tried 'before an impartial jury' has been omitted, and it is tolerably clear that the UK prosecutor may now take into account the potential for a jury to reach its verdict on the basis of extraneous factors. However, query whether this is appropriate from the viewpoint of prosecution policy.

A third alternative would be to retain elements of the 'more likely than not' test but to approach the question of sufficiency of evidence from the other direction i.e. a prosecution should not proceed if an acquittal is more likely than not.

Mention should also be made of the test formulated by Mansfield and Play in their book *The Director of Public Prosecutions : Principles and Practice for the Crown Prosecutor* published in 1987 (although written prior to the publication in 1986 of the Code for the UK Crown Prosecution Service). The authors proposed that the 'reasonable prospects' test in the then UK Attorney-General's guidelines be abandoned in favour of one which required the prosecutor to be satisfied that there was no reasonable prospect of a directed acquittal on the charges on which he or she intended to proceed. The reason advanced by the authors for such a change was essentially that the UK Attorney-General's criteria required the prosecutor to predict the unpredictable. This was considered by the authors to be the basic criticism of the UK Attorney-General's test. The authors claimed that their proposed test had the virtue that the prosecutor should be able to predict whether the evidence he or she proposes to adduce will be sufficient to pass the judge if there should be a submission of 'no case to answer'. It is considered, however, that such a test is inappropriate as the final determinant of sufficiency of evidence. It would require a prosecutor to proceed where, for example, there was a clear prima facie case although it was equally clear to the prosecutor that the potential accused would be able to produce witnesses establishing a good defence to the charge. Nevertheless, the authors 'half-time' test would have merit as a *first step* in determining whether the evidence is sufficient to proceed with a prosecution. The 1986 Commonwealth Guidelines provide that the

initial consideration in the exercise of the discretion to prosecute is whether the available evidence establishes a prima-facie case. For the purposes of this initial consideration it is said that there will be a prima-facie case where a jury, acting reasonably, could be satisfied of the defendant's guilt beyond reasonable doubt on the assumption that the prosecution evidence is accepted without reservation. However, this is less stringent than the authors 'half-time' test which requires the prosecutor to have regard not only to the quantity of the evidence available but also, to some extent at least, to its quality. Although there is some evidence to prove a particular element of the offence, that evidence may be so inherently weak or liable to be discredited in cross-examination that no reasonable arbiter of fact could safely convict on it.

It is expected that the review of the guidelines will be completed in the first half of 1990. The revised guidelines will, of course, be made public.

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 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 operational experience in relation to proposals for criminal law reform. This chapter outlines some of the areas in which the DPP has been active in 1988-89.

During the year the DPP was consulted during the development phase of a number of items of Commonwealth legislation which have now been enacted. This was principally with respect to the *Crimes Legislation Amendment Act 1989*. Apart from amending the DPP Act (discussed in Chapter 1) that Act also amended the *Crimes Act 1914* by inserting a series of offences relating to the use of computers as well as establishing a 'spent convictions scheme'.

The DPP has also been consulted in the development of a number of proposals for legislation which it is expected will have been introduced into the Parliament by the time this report is tabled. These principally concerned proposals for legislation dealing with the sentencing of federal offenders and the disentitlement of a Commonwealth officer convicted of a corruption offence to superannuation benefits.

Obviously the first-mentioned is of particular importance to the DPP. Notwithstanding the Commonwealth's general policy of applying State sentencing laws to federal offenders, the 'mesh' between State law and the overlay of Commonwealth law has all too frequently proved to be less than satisfactory. A number of the deficiencies in existing law in this area result from the fact that the State laws upon which Commonwealth legislation relies have become increasingly diverse and complex. Although many of these deficiences have been known for some time, the necessary overhaul of Commonwealth legislation in this area has been delayed while the Australian Law Reform Commission (ALRC) completed its inquiry into its sentencing reference. Any hope that the ALRC would be able to provide sensible solutions to the present problems was quickly dashed upon a reading of the Commission's much delayed discussion papers and the ensuing report. Fortunately, however, the Attorney-General's Department has taken up the task.

During the year the DPP made a number of recommendations for changes to existing legislation, including the following.

Appeal against sentence in the ACT

In November 1988 it was recommended that the *Magistrates Court Ordinance 1930* (ACT) be amended to permit the prosecution to appeal against a sentence imposed by the ACT Magistrates Court. At present only the offender has a right to appeal against a sentence.

The community has a clear interest in seeing that appropriate sentences are imposed on offenders. When a magistrate has fallen into error in the sentencing process then there should be provision for an appellate court to intervene at the instance of the prosecution to correct that error if it is otherwise proper to do so. It is relevant that with recent changes to the law in NSW, the ACT is the only jurisdiction in which the prosecution does not have a right of appeal against a sentence imposed at the summary level. The lack of such a right in the ACT is particularly acute given that, with the wide jurisdiction of ACT magistrates to summarily deal with indictable offences, only a very small percentage of sentences are imposed by the ACT Supreme Court. The Crown has had a right to appeal against a sentence imposed by a superior court judge for many years.

The Customs Act 1901

The DPP has also proposed that action be taken to update the list of drugs in Schedule VI of the *Customs Act 1901* to include a number of drugs that are known to be abused. The importation, possession etc. of drugs which are listed in that Schedule constitute offences under section 233B(1) of the Customs Act. One drug not listed in the Schedule that has been known for some time to be abused is MDMA, commonly known as 'ecstasy'. During the year the fact that ecstasy had not been scheduled created difficulties for our Sydney Office following the discovery of over 32 kilograms of ecstasy that had been secreted in a vehicle prior to its importation into Australia.

Fortunately the available evidence was considered sufficient to justify both defendants in that case being charged with offences of supplying a prohibited drug contrary to section 25(2) of the *Drug Misuse and Trafficking Act 1985* (NSW) as ecstasy (MDMA) was added to Schedule 1 to that Act in 1988. However, we cannot always expect to be in a position to rely on some State offence to make up for the deficiencies in Commonwealth legislation.

There is provision for new drugs to be added to Schedule VI by regulation, which is certainly the most expeditious means of adding new drugs once they are known to be abused, either overseas or in Australia. The Attorney-General's Department, however, takes the view that the addition of new drugs by regulation rather than Act of Parliament cannot be justified on criminal law policy grounds in view of the severe penalties provided in section 235(2) of the Customs Act. On the other hand, that Act is usually amended on several occasions each year, and it should be possible for new drugs to be added by amendment of the Act reasonably soon after they come to notice.

Other matters

Action has also been taken on a number of recommendations made by the DPP in previous years. When enacted the Law and Justice Legislation Amendment Bill 1989, which was introduced into the House of Representatives towards the end of the 1989 Autumn Session, will amend the *Evidence Act 1905* to permit evidence obtained overseas for the purposes of, for example, committal proceedings to be also used for the purposes of any subsequent trial or related civil proceedings (see DPP annual report for 1987-88 at pages 122-123). On a related issue, the DPP recently provided its support to a proposal to examine the desirability of using video-link facilities to obtain evidence from witnesses either interstate or overseas. Quite apart from the potential for considerable savings in both time and cost in obtaining evidence in such a manner, in certain cases involving witnesses resident overseas it may be the only practicable way their evidence can be put before an Australian court. The DPP has also proposed that consideration be given to taking evidence by means of video, that is, where the evidence of the overseas witness is recorded on video and then 'played back' during the court proceedings in Australia.

The *Law and Justice Legislation Amendment Bill 1989* also makes provision for reference appeals by the Crown following the acquittal of an accused who has been tried on indictment in the Supreme Court of the ACT (see DPP annual report for 1986-87 at pages 72-73). Reference appeals enable questions of law of general application to be resolved by an appeal court without at the same time placing the former accused in jeopardy of being retried if the appeal court should hold that the trial judge erred.

Officers of the DPP also participated during the year in the work of the ACT Criminal Law Consultative Committee.

The DPP would like to record its appreciation to the Attorney-General's Department for its willingness to consult with the Office in relation to proposals for legislation of concern to the Office and to take our comments into account, even if it does not always agree with us.

Review of Commonwealth Criminal Law

The Review of Commonwealth Criminal Law was established by the Attorney-General in February 1987. The Review Committee comprises the Rt Honourable Sir Harry Gibbs, GCMG, KBE, the Honourable Mr Justice R.S. Watson and Mr A.C.C. Menzies OBE.

It is pleasing to note that since our last annual report the Review Committee has delivered two interim reports, the first dealing with computer crime and the second with detention before charge, and that the recommendations contained in the interim report on computer crime have already been implemented by the *Crimes Legislation Amendment Act 1989*.

The DPP continued to contribute to the work of the Review Committee during the year. That contribution has taken two forms. First, in advance of the issue of a particular discussion paper the Office has sometimes provided the Review Committee at its request with a preliminary submission identifying gaps or anomalies in the existing law in the area to be covered by the discussion paper. Secondly, the DPP has provided comments on most of the discussion papers issued to date.

Following is a summary of the views that have been conveyed to the Review Committee during the year under review.

General principles relating to criminal responsibility

Last year's annual report referred to the anomalous distinction that exists in this area depending on whether the charge is of an offence under the *Crimes Act 1914* or not. As to offences under the *Crimes Act 1914*, section 4 of that Act provides that the principles of the common law with respect to criminal liability apply. However, for non-Crimes Act offences section 80 of the *Judiciary Act 1903* requires a State court to apply the general principles of criminal liability under the common law but as modified by the statute law of that State. In Discussion Paper No. 21 the Review Committee observed (at paragraph 2.6) that 'it is plainly unsatisfactory that rules so fundamental and important as those which govern criminal responsibility should vary according to the statute creating the crime and it may further be thought to be undesirable that those rules should, in the case of Commonwealth offences, vary from State to State'. The Review Committee has stated that it does not favour the option that either the common law or the law of the State in which the offence is tried should determine the principles of criminal responsibility applicable to all Commonwealth offences. Rather it has tentatively indicated that the preferred course is to codify the law in this area for Commonwealth purposes.

The DPP endorses without reservation the Review Committee's tentative view that codification is the preferred course. All too frequently the common law is neither accessible, comprehensible, consistent nor certain. While the common law does have a capacity to develop the criminal law in new directions to meet novel fact situations or to accommodate changing values, too often that development is slow, haphazard and inconsistent. There is perhaps no better illustration of this than the meaning of 'recklessness' in England since the decision of the House of Lords in Caldwell (1982) AC 341. For at least certain offences (for example, damage to property) recklessness now embraces inadvertent as well as advertent risk taking.

The advantages of codification over the existing somewhat fluid mix of statute and common law principles can be clearly illustrated by the position at common law of the mental element in crime.

Two of the central concepts in criminal responsibility are recklessness and intention. The present unsatisfactory position with respect to recklessness has already been mentioned. The meaning of intention, which has never been entirely clear, is now in a state of considerable confusion following the House of Lord's decisions in R v Moloney (1985) AC 905 and R v Hancock (1986) AC 455. Depending upon the particular offence in question intention may have a narrow or a wide meaning, or something in between!

Uncertainty in such a fundamental area of the criminal law, involving as it does the liberty of individuals, ought not be tolerated. A code, on the other hand, would fix these mens rea words with certain meanings which, furthermore, would be consistent with each other.

The DPP has indicated to the Review Committee that the future consolidating law should define the fault terms 'purposely', 'intentionally', 'recklessly', 'negligently' and 'carelessly'. While in most cases it will be sufficient to rely on the defined fault terms, they would not be exhaustive of the fault terms that could be employed in any future offence. However, if a non-defined fault term must be used those responsible for the drafting of offences should not use ambiguous fault terms such as 'wilfully', 'falsely', 'corruptly' or 'perversely'.

Codification also presents the opportunity to provide a solution to the often difficult question whether an offence is one of strict liability, or whether it is one of basic or specific intent. Parliament rarely states expressly whether an offence is one of strict liability. More usually the courts are forced to discern by reference to the statute and its subject matter whether the presumption that mens rea is an ingredient of a statutory offence has been impliedly displaced. For the purposes of any Commonwealth 'code' on the other hand, it could be provided that for all future offences a predetermined fault will apply to all non-fault elements of an offence unless express provision is made to the contrary.

Although almost all Commonwealth prosecutions are conducted in State and Territory courts, the DPP sees no reason why those courts should have any difficulty in operating under a Commonwealth 'code'. While any code may contain language with which those courts and the legal profession may not, at least initially, be familiar, and may occasionally contain principles and concepts that are different from those under State law, it is assumed that any Commonwealth codification in this area by and large would be a restatement of existing law. Codification ought not be approached as presenting the opportunity to 'tinker' with the content of well settled and largely uncontroversial principles.

The DPP provided the Review Committee with a number of detailed submissions prior to the issue of this Discussion Paper, and at the time of writing the DPP has provided the Review Committee with comments on a number of the specific issues raised in the Discussion Paper (the mental element in crime, the age of criminal responsibility and the defences of insanity and intoxication).

Omnibus provisions to replace provisions in common form in particular Acts

This matter was the subject of Discussion Paper No. 14.

The Commonwealth statute book is replete with instances of common form offences which often do no more than duplicate an offence of general application in the *Crimes Act 1914*. A classic example is the various 'false statement' offences which are to be found in numerous Commonwealth statutes. Very often there is no discernible pattern in the incidents of those offences on such matters as the mental element, penalties and onus of proof.

The DPP considers that to the extent practicable these common form offences should be replaced by omnibus offences in the future consolidating law.

It is recognised, however, that in some instances it will be necessary to retain a common form offence. For example, it may not be possible to replace a common form offence without using vague or convoluted language. Alternatively, in some cases it may be necessary to retain a common form offence because an exceptional penalty is required for the purposes of the particular Act. If, for whatever reason, a common form offence is to be retained then to the extent practicable it should have the same incidents on such matters as onus of proof, penalties, mental element etc. as the omnibus offence.

Penalties

The Review Committee made a number of tentative recommendations in the area of penalties, the subject of Discussion Paper No. 18, most of which the DPP agrees with. In particular, the DPP fully supports the proposal that the maximum fine applicable to any Commonwealth offence be regulated by a penalty unit system on the lines of that in the *Penalties and Sentences Act 1981* (Vic.). At present the amount specified as the maximum fine sooner or later will cease to be realistic with erosion in the value of

money. When that occurs a more realistic penalty can only be substituted by amendment of the particular Act. Apart from the fact that keeping individual penalties continuously under review is a most time consuming process, inevitably some penalties get 'left behind'. On the other hand, a penalty unit system enables the value of the penalty unit to be varied by amendment of the one Act. A penalty unit system also encourages a more principled approach to the fixing of monetary penalties.

The Review Committee also considered whether Commonwealth law should provide for any sentencing options not already provided under Commonwealth law. This Office is of the view that any future Commonwealth legislation in this area should continue the existing policy of intra-State rather than inter-State parity of treatment of federal offenders. Accordingly, whether Commonwealth law should provide for a particular sentencing option will initially depend on whether that option is available under the law of the State concerned. It would be quite impractical for the Commonwealth to endeavour to administer a sentencing option or options not provided for under State law.

The Australian Law Reform Commission in its Report No. 44 on 'Sentencing' made a number of recommendations in this area which, if implemented, would alter the basis upon which certain sentencing options available under State or Territory law would be applied to federal offenders. For example, the ALRC proposed that a court be able to order that a federal offender serve a maximum of 500 hours of community service, which is higher than the maximum under State or Territory law. The DPP agrees with the Review Committee that, quite apart from whatever intrinsic merit the ALRC's proposals might have, any departure from the requirements of State or Territory law may make it more difficult to negotiate or retain arrangements with the States and Territories under section 3B of the *Crimes Act 1914*.

The Review Committee indicated at paragraph 3.28 of the Discussion Paper that provision should not be made for a higher maximum penalty for a second or subsequent conviction for the same offence; rather the maximum penalty should be set 'at such a level that a sentencing court is left with a sufficient margin of discretion to deal appropriately with any case coming before it of an offence under the relevant provision'. While the DPP agrees with the Review Committee that such a provision of general application would be inappropriate, it considers that such an approach can be justified in exceptional cases [for example, as is at present the case under section 235(2) of the *Customs Act 1901*].

The Review Committee sought comment on whether provision should be made for increases in penalties where a firearm is used in the commission of a Commonwealth offence. The view of the DPP is that the appropriate course is to review all penalties for offences which necessarily involve an element of violence to ensure that they are sufficiently high to enable an appropriate penalty to be imposed in a worst case. Such a worst case should not be regarded as limited to the use of a firearm or, indeed, any

offensive weapon. However, in fact there are very few offences against Commonwealth law which necessarily involve the use of violence.

The DPP sees no need to make any special provision for other offences which could conceivably be committed in circumstances involving the use of violence, including the use of firearms or other offensive weapons. Comprehensive provision has been made under State and Territory law for offences against the person, and the DPP is confident that an appropriate charge would be available under State or Territory law to reflect the circumstance of aggravation not covered by the Commonwealth offence. In an appropriate case a charge could be laid for the relevant Commonwealth offence in conjunction with the appropriate charge under State or Territory law.

Offences relating to the administration of justice

At the request of the Review Committee the DPP provided the Committee with a detailed submission in advance of the issue of Discussion Paper No. 16, which dealt with offences relating to the administration of justice.

At present there is a certain amount of overlap between the law of criminal contempt and the offences in Part III of the *Crimes Act 1914*, which deals with offences relating to the administration of justice. In the main the overlap exists in the area of conduct, outside the court, which has a tendency to interfere with the administration of justice. Generally speaking, such conduct will also constitute one or other of the offences in Part III if done with the specific intent of perverting the course of justice. The Australian Law Reform Commission in its Report No. 35 'Contempt' has made a number of recommendations, the effect of which if implemented would substantially reduce the overlap between contempt and criminal conduct. However, in the absence of any indication whether the ALRC's recommendations are to be implemented and, if so, when that might be, the Office's submissions on this topic proceeded on the assumption that Part III of the Crimes Act and the law of contempt would continue to co-exist for the forseeable future.

There are a number of offences at common law dealing with conduct which tends to obstruct, pervert or defeat the course of justice. Apart from perjury, the most important of those offences is attempting (or conspiring) to obstruct, pervert or defeat the course of justice (although strangely the existence of a substantive offence, independent of conspiracy, was not finally acknowledged at common law until R v Grimes [1968] 3 All E R 179). Although the boundaries of the common law offence are uncertain, it is a wide offence of general application penalising, for example, the fabrication, concealment or destruction of evidence, preventing a witness from giving evidence, pursuading a person to make a false statement to the police to mislead them in their investigations, and threatening a witness with a view to inducing that witness not to testify.

Much of the content of the common law offence of attempting to obstruct etc. the course of justice is the subject of specific offences in Part III with the residue of the

common law offence making up the offence under section 43. That section makes it an offence to attempt 'in any way not specifically defined in the Act, to obstruct, prevent, pervert, or defeat the course of justice in relation to the judicial power of the Commonwealth'. The thrust of the DPP's recommendations in this area was that the content of the residual offence in section 43 should be the subject of specific offences, albeit still retaining an offence on the lines of section 43 to guard against the possibility that the specific offences might not prove to be exhaustive of conduct interfering with the administration of justice.

There are also a number of gaps in the coverage of the offences in Part III. For example, the residual offence in section 43 does not penalise conduct tending to interfere with the course of justice in relation to the judicial power of a Territory, rather than the Commonwealth, even though that conduct is committed with the intention of interfering in a matter of Commonwealth concern, for example, proceedings before a Territory court for an offence under a Commonwealth Act.

Again, it is unclear whether some of the specific offences in Part III apply where proceedings have not been instituted, even though what was done was with the specific intent required for the offence concerned. Of course, if they do not apply then resort may be had to the residual offence under section 43 as the common law offence of perverting etc. the course of justice may be committed when no proceedings have been instituted providing they are imminent, or investigations are under way which may result in the institution of proceedings. On the other hand, it is unclear whether the residual offence under section 43 can apply where the conduct complained of takes place after the conclusion of proceedings (as where a juror is the subject of reprisals on account of a jury's decision). The reported cases on the common law offences of attempting or conspiring to pervert the course of justice have all concerned acts which had a tendency to affect the administration of justice in a particular case, as opposed to the administration of justice more generally.

Following are the views the DPP has conveyed to the Review Committee on some only of the more important issues raised by the Discussion Paper.

In relation to the offence of perjury (section 35 of the *Crimes Act 1914*), the DPP considers that the equivalent offence in the future consolidating law should retain the requirement that the false statement must be 'material' to the proceedings. If any false testimony concerned a matter that was so irrelevant to any issue before the court as to be immaterial it is difficult to see what public interest would be served by prosecuting. Retention of the requirement for materiality affords a protection against unnecessary prosecutions.

Similarly, the DPP sees no compelling reason for perjury to extend to true testimony which, however, the witness believes to be false, although such conduct constitutes perjury at common law. In the nature of things the course of justice will not have been

impeded by a witness giving 'truthful' testimony even though the witness believed that testimony to be false.

The DPP considers that where false evidence is given other than on oath or its temporal equivalent, criminal liability should arise only where the witness has been warned of the obligation to tell the truth and of the consequences of not doing so.

To establish a charge of perjury at common law there must be two witnesses to disprove a material fact sworn to by the accused, or corroboration of the testimony of a single witness to that effect except, it would appear, where that single witness is proving a confession by the accused. Although this requirement for corroboration in perjury prosecutions is of some antiquity, in the view of the DPP it is difficult to justify. Although it is said that the requirement avoids the possibility of liability being determined on the basis of 'oath against oath', if the evidence of the only witness available to establish a perjury charge is uncorroborated then that is a matter which ought to go to the weight to be attached to that evidence rather than its admissibility. The requirement should be regarded as a legal curiosity which ought have no place in a modern statement of the criminal law.

A related question is whether a person should be liable for contradictory testimony per se, that is, where a witness has given two contradictory statements, one of which must be false, but it is not possible to establish which one. In a number of jurisdictions (for example, NSW and the ACT) the position has been altered by statute permitting a jury to find the accused guilty of perjury in such a case, and the DPP has recommended that similar provision be made in the future consolidating law.

Finally as to perjury, while the present offence under section 35 requires that the accused must know the statement to be false, the DPP considers that liability should also exist where the accused was reckless as to the falsity of the statement.

The offence under section 36A of the *Crimes Act 1914* is concerned with the protection of witnesses. However, no special provision has been made to protect jurors and other participants in legal proceedings, such as judges and legal practitioners. The Review Committee has tentatively indicated that it should be a specific offence to take reprisals against jurors as well as witnesses, but does not consider that the necessity for similar protection in relation to judges, members of tribunals, legal practioners and court officials has been demonstrated. The DPP disagrees. While accepting that instances of reprisals against other participants in judicial proceedings may be rare, indeed perhaps unknown in the Commonwealth arena, the DPP considers that such an extension is justified on principle. In this regard, as discussed earlier there is a question whether the residual offence under section 43 of the *Crimes Act 1914* is sufficiently wide to penalise reprisals taken against a participant in legal proceedings after those proceedings have concluded.

The offences under section 36A draw no distinction between reprisals taken against a witness with the intention of punishing the witness for anything said or done by the

witness in the proceedings, and reprisals taken against a person simply because that person attended as a witness (for example, where an employer dismisses an employee because the latter was absent from work while appearing as a witness). The DPP considers that the latter conduct is less serious, and accordingly should be the subject of a separate offence punishable by something less than the five years' imprisonment at present provided for under section 36A.

The Review Committee raised the question whether, in respect of the offence of taking reprisals, special provision should be made regarding dismissal from, or prejudice in, employment. While the Review Committee acknowledged that any such special provision is strictly unnecessary, nevertheless it considered there may be some advantage in a provision on the lines of section 23(2) of the *Environment Protection (Impact of Proposals) Act 1974*. Dismissal from, or prejudice in, employment is a common form of reprisal, particularly against witnesses, and the DPP can see some justification for specific provision being made on the lines of section 23(2) which would, of course, not detract from the scope of the general offence. However, as the Review Committee has observed, if a provision on the lines of section 23(2) is included there is the further question whether a reverse onus provision on the lines of section 23(3) of the Act should also be included. Under that provision the onus is on the employer to establish that the dismissal of a person was not by reason of his or her appearance as a witness. Viewed in isolation it may be possible to justify such a reverse onus provision on the basis that the reason for the dismissal etc. would often be a matter peculiarly within the knowledge of the employer. On the other hand, to enact such a reverse onus provision in the particular case of dismissal from, or prejudice in, employment would give rise to an anomaly in that, in respect of other kinds of reprisal action the prosecution would be required to establish that the conduct taken against a witness was with the intention of punishing that person. The DPP considers that if any specific provision is to be made for dismissal from, or prejudice in, employment no reverse onus provision should be enacted.

Section 36A of the Crimes Act is also deficient in that it does not cover the situation where a person other than the witness is the subject of the reprisal although the intention is to punish the latter (as where the spouse of a witness is assaulted with the intention of punishing the witness on account of the latter's testimony in particular proceedings).

The DPP considers that it should be a specific offence to seek to improperly influence a participant in judicial proceedings by any means whatsoever with the intention of affecting the outcome of current or future judicial proceedings.

The Review Committee has tentatively recommended against any offence involving the taking of reprisals against a party to litigation because of the difficulties involved in keeping such an offence within acceptable limits (for example, where the reprisal action would otherwise have been lawful, as where a company decides not to do

further business with another company with which it had just fought an unsuccessful legal action). The DPP considers, however, that these difficulties can be met by expressing the mental element for such an offence in terms of a purposive intent.

The publication of a statement which has a tendency to interfere with the administration of justice in a particular case is at present punishable as a contempt, and is also a breach of the residual offence under section 43 if done with an intent to interfere with the administration of justice. Consistent with the DPP's view that the content of the residual offence under section 43 should be the subject of specific offences, the future consolidating law should make it a specific offence to publish a statement which not only has a tendency to interfere with the administration of justice but is intended to do so. Liability should be limited, however, to publication to the public at large. Prejudicial publications to a participant only would be caught by the proposed offence of using improper persuasion in relation to judicial proceedings.

Curiously, it is only a specific offence under section 41 of the *Crimes Act 1914* to conspire with another to charge any person falsely, although no doubt such conduct when committed by a person alone can be the subject of a charge under section 43. Clearly the equivalent of section 41 in the future consolidating law should be recast as a substantive offence with reliance on the general conspiracy provisions to charge an agreement to commit that offence. However, any substantive offence drawn on the lines of section 41 would require that the innocent person be actually charged. This would be too narrow, given that it can be expected that a false accusation will not usually lead to charges being laid. It should be an offence if a person gives a false indication that another has committed an offence which the first-mentioned person knows or believes he did not commit, if the first-mentioned person intends thereby that the authorities will be induced to pursue a criminal investigation in relation to the person accused. Thus it would still be an offence even though the person making the false accusation does not want the innocent person to be charged with an offence, but simply wishes, for example, to divert suspicion away from the true offender.

Drug offences

The most important issues raised by Discussion Paper No. 13 : Drug Offences, concerned the content and scope of the offences under section 233B(1) of the *Customs Act 1901*, and the penalties provided for those offences.

A number of the offences under section 233B(1) contain their own 'built-in' inchoate or accessory offences. Thus, under paragraph 233B(1)(c) it is an offence if a person, without reasonable excuse, possesses as well as attempts to obtain possession of narcotic goods. Again, it is an offence under paragraph 233B(1)(b) to import any narcotic goods into Australia and it is an offence under 233B(1)(cb) to conspire to import narcotic goods into Australia. However, section 233B(1) has not made exhaustive provision for preliminary conduct or complicity in offences under the

section. Thus, for example, reliance must still be placed on section 7A of the *Crimes Act 1914* to charge an incitement to import narcotic goods, albeit such an offence is at present punishable by the ludicrously inadequate penalty provided in section 7A.

It can be expected that the future consolidating law will contain provisions of general application dealing with preliminary conduct and complicity, and accordingly the equivalent of section 233B(1) in the future consolidating law should deal only with 'substantive' conduct, that is, the importation, possession etc. of narcotic goods.

There is the question, however, whether an exception should be made by specifically preserving the effect of the decision in R v Shin Nan Yong (1975) 7 ALR 271. At common law a person cannot be liable as an accessory to a crime which has not in fact been committed. In Shin Nan Yong, however, it was held that Shin Nan Yong had been properly convicted of being knowingly concerned in an importation of narcotic goods although the person who had been charged with the actual importation of the narcotic goods had been acquitted. The offence under section 233B(1)(d) of being knowingly concerned in an importation of narcotic goods was itself a substantive offence. The prerequisite for liability under the paragraph was that there had been an 'importation' of narcotic goods, and it was strictly speaking irrelevant whether the person responsible for actually importing the narcotic goods had also committed an offence under paragraph 233B(1)(b).

It is clear that a person charged as an accessary to an offence of importing narcotic goods may still be criminally liable under common law principles notwithstanding that the person charged as a principal in that importation is acquitted. If the person charged as an accomplice instigated the perpetration of the act of importation by another, and that other person is acquitted for want of mens rea, then the 'accomplice' can properly be regarded as a constructive principal via the doctrine of innocent agency.

On the other hand, there is uncertainty whether a person who instigates, encourages or assists another to commit the actus reus of a crime may still be criminally liable when the perpetrator of that act is immune from criminal responsibility for a reason other than want of mens rea [compare Bourne (1952) 36 Cr. App. R. 125 and Cain v Doyle (1946) 72 CLR 409].

While the DPP considers it desirable that the effect of the decision in Shin Nan Yong be preserved in the future consolidating law, it would not seem necessary to expressly provide for this particular situation if the future consolidating law contains a provision of general application extending the doctrine of innocent agency to situations where the perpetrator of the act has a defence (such as duress) or is immune from conviction by reason of some special and extraneous circumstance (such as diplomatic immunity or, as was the case in Cain v Doyle, the immunity of the Crown in right of the Commonwealth).

Section 233B(1) was recently amended to include a new offence [paragraph 233B(1)(aa)] governing the case where a person without reasonable excuse 'brings, attempts to bring, or causes to be brought into Australia' narcotic goods. The paragraph was inserted because of doubts whether the word 'imports' in paragraph (b) of the section extends to the situation where a person arranges for goods to be brought into Australia with the intention that they be carried on to another country. However, the Review Committee has raised the possibiity of an argument that the new paragraph (aa) may not apply where the narcotic goods intended for onward transit to another country are brought in the hold of an aircraft which lands in Australia in the course of an onward flight and from which the goods are never unloaded. The Office has agreed with the Review Committee that the paragraph should be amended to remove any doubt whether it applies to such a case.

At paragraphs 6.6 — 6.10 of the Discussion Paper the Review Committee has raised the question whether the future consolidating law should expressly define the mental element necessary to constitute possession of narcotic goods for the purpose of the equivalent of paragraph 233B(1)(ca) in that law. There are two extreme approaches which, in the view of the DPP, can be immediately rejected. They are that it would be sufficient for the prosecution to prove physical possession, leaving it to an accused to prove that he or she did not know, believe or suspect the existence or nature of the narcotic goods. The other extreme would require the prosecution to prove actual knowledge by the accused of the existence and nature of the narcotic goods.

The approach favoured by the DPP is that the prosecution must prove that the accused was in physical possession of the narcotic good, and was aware of its existence or of the likelihood of its existence and that it was or was likely to be a narcotic good. Such an approach is more consistent with the decision of the High Court in Kural v R (1987) 162 CLR 502 and Saad v R (1987) 70 ALR 667.

Prior to the release of Discussion Paper No. 13 the DPP raised with the Review Committee whether there should be some expansion in the scope of Commonwealth narcotic offences to include trafficking in narcotic goods that have been imported.

The offences under section 233B(1) by and large concentrate on conduct relating to the importation or exportation of narcotic goods, leaving it to the States and the Territories to proscribe conduct involving the actual supply of illegal drugs, whether or not they have been imported. There is some overlap, however, in the case of possession of narcotic goods that have been imported. Although possession for the purposes of supply is not an element of the Commonwealth offences, an offender who has been convicted of possession of a traffickable quantity of narcotic goods is liable to the higher penalties provided by section 235(2) of the Customs Act unless he or she can satisfy the sentencing court that the offence was not committed for any purpose related to the sale of, or other commercial dealing in, the narcotic goods.

Not infrequently AFP investigations uncover sufficient evidence to sustain State supply charges as well as Commonwealth importation charges. While there are now arrangements in place in most jurisdictions providing for joint trials on Commonwealth and State charges, it would be administratively more convenient for both the DPP and the AFP if Commonwealth charges were available which directly reflected both the importation and supply aspects of a defendant's conduct.

Further, in some cases it has been decided after committal that the available evidence will only support a trial on State supply charges. If the case is then handed over to the State prosecuting authorities often it is still necessary for input from this Office, which sometimes can be substantial. There can be inefficiencies in such cases, and in some cases the investigating police have expressed regret at the loss of continuity of prosecution lawyers.

Accordingly, the DPP has recommended that there should be an offence of supplying prohibited imports that are narcotic goods. Of course, it should be made clear that such an offence is not intended to apply to the exclusion of State or Territory offences dealing with the possession, supply or conveyance of illegal drugs.

The Review Committee has raised for consideration whether it should be an offence to recruit a person to import or export narcotic goods, or to carry narcotic goods which have been imported into Australia. The DPP sees no need for such an offence. We cannot envisage a situation where such a person would not be liable for the appropriate inchoate offence or complicity in the substantive offence of another.

As to the penalty for offences against section 233B(1), the Office has indicated to the Review Committee that the present three tier penalty structure should be retained, rather than have a general maximum penalty which, under the government's present policy, would have to be one of life imprisonment.

Under section 235(2) there are a number of 'factors' which govern the maximum penalty that may be imposed. Although those factors do not constitute elements of the various offences under section 233B(1), in Rv Meaton (1986) 160 CLR 359 a majority of the High Court held that they were 'circumstances of aggravation' which were required to be pleaded by the prosecution and proved to the satisfaction of the jury in a defended matter before an offender could be exposed to the applicable maximum penalty. The majority decision has been previously criticised by the DPP (see DPP annual report for 1985-86 at pages 39-41). On the other hand, the DPP has no real objection to the proposition that it is desirable as a matter of policy that the existence of these circumstances of aggravation should be found by the jury in a defended matter and not the trial judge alone. Accordingly, if the penalty structure in section 235 of the *Customs Act 1901* is to be reproduced in the future consolidating law, the opportunity should be taken to say so in unambiguous terms. However, the DPP would like to see an exception in the case of 'prior convictions'. The proof of a prior conviction is a purely formal matter and we do not consider that there would be

any injustice if the existence of a prior conviction was to be found to the satisfaction of the judge. This, after all, is the present position where there is a plea of guilty to the offence charged but the defendant puts the prosecution to proof of prior convictions.

Finally, the DPP is strongly of the view that it is not appropriate that the circumstance of mitigation set out in paragraph 235(3)(b) be pleaded in the indictment and found by the jury. The question whether an offence involving a traffickable quantity of narcotic goods was committed for any purposes related to the sale of, or other commercial dealing in, those narcotic goods will often be a matter peculiarly within the knowledge of the accused. It is recommended that such matters should be established by the accused who seeks to take advantage of them, which is the present position. It is further recommended that the future consolidating law should contain a provision stating that proof of the absence of commercial purpose lies on the accused on the balance of probabilities.

Matters ancilliary to arrest

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, were dealt with in Discussion Paper No. 3: Arrest and Related Matters. A summary of the DPP's views on the main issues raised by that Discussion Paper are set out in last year's annual report at pages 138-140.

While chapter 6 of that Discussion Paper dealt briefly with the question whether the police should have certain powers ancillary to arrest, this area was dealt with in greater detail in Discussion Paper No. 11: Matters Ancillary to Arrest. This Discussion Paper dealt, amongst other things, with the power to search (including a strip search and an intimate search), compulsory medical examinations and the identification of suspects.

The DPP does not consider that the police should have an unqualified power to search an arrested person and clothing worn by such a person. Such a power should be subject to a requirement of reasonable cause. The search of an arrested person should only be authorised where a police officer reasonably believes that it is necessary to do so for the purpose of ascertaining whether the person has anything in his or her possession :

(i) which may present a danger to himself or herself or to others;

(ii) which may be used to assist that person to escape from lawful custody; or

(iii) which relates to the offence for which the person has been arrested.

Further, the power to search an arrested person should be subject to the limitation that the search should only be to the extent necessary for the relevant purpose. Where the search takes place away from a police station it should not authorise a police officer to require the arrested person to remove any of his or her clothing in public other than outer coat, jacket or gloves.

The police should be empowered to make a strip search of an arrested person without warrant if there is reasonable cause, the search is only to the extent required for the

relevant purpose, the search is carried out by an officer or officers of the same sex as the arrested person and, if the strip search is conducted away from a police station, it is not carried out in public.

As to whether the police should be empowered to conduct an 'intimate' search, it is now relatively common place for couriers to import narcotic drugs secreted in body cavities, and it is clearly essential that the AFP be empowered to arrange for intimate searches.

In the Commonwealth arena it will usually be the case that the police would wish to conduct such a search to confirm or dispel a suspicion that the person has a prohibited narcotic substance secreted within his or her body. On the other hand, it is not inconceivable that a person who has been arrested in respect of a Commonwealth offence that is not drug related could have something secreted in a body cavity which could be used to harm either himself or herself or some other person, something which relates to the offence for which the person has been arrested, or something which may be used to assist that person to escape from lawful custody. Accordingly, and bearing in mind that an intimate search of an arrested person should only be permitted if there is reasonable cause, the DPP considers that any provisions authorising intimate searches should not be limited to drug offences.

On the other hand, such searches may be quite degrading and accordingly there is a need to balance the proper needs of those whose duty it is to enforce the law against the right of a citizen not to be subjected without good cause to intrusions which are intensely personal. In the DPP's view that balance can be achieved by providing that the police may only arrange for an intimate search either with the consent of the person concerned or pursuant to an order of a magistrate. Further, the power to arrange for an intimate search should only be available where the person concerned is under arrest.

The Australian Law Reform Commission considered the question of intimate searches in its Report on Privacy (Report No. 22). Under the ALRC's proposals an intimate search without the consent of the person could only be conducted after the expiration of a period of detention not exceeding 48 hours. The purpose of that detention would be to allow any concealed material to be naturally evacuated, and thus avoid the need for an intimate search. However, 48 hours may be too short a period for concealed material to be naturally evacuated, and if the ALRC's recommendations were to be adopted some provision would have to be made for extension of the initial period of detention. In any event, the ALRC's proposals are flawed in that they assume that drugs will either be swallowed or placed by the person in his or her anal passage. Clearly, however, drugs can be concealed by a woman in her vagina and in such a case detention would serve no useful purpose.

The DPP does not consider that minors should be exempt from the authority to arrange an intimate search. Such an exemption would merely incite those in the drug trade to use minors as couriers.

As to the compulsory medical examination of an arrested person, the DPP considers that the provisions in this area in the Criminal Investigation Bill 1981 were deficient in that they drew no distinction between the obtaining of samples from external as opposed to internal parts of the body. The DPP considers that it should only be possible for the police to obtain samples from internal parts of the body, or to obtain dental impressions, either with the consent of the arrested person or pursuant to an order of a magistrate. However, the DPP can see no justification for requiring that the taking of samples from external parts of the body (e.g. samples of hair or material under fingernails) can only be performed on the order of a court if the arrested person does not consent. Such procedures are little different from personal searches, and in both cases may only be performed if there is reasonable cause. Further, the DPP can see no need for a requirement that the obtaining of all samples must be performed by a medical practitioner. A nurse, for example, would be a suitably qualified person to obtain a blood sample, and the obtaining of certain samples, for example hair, would require no particular qualifications.

At paragraph 3.7 of the Discussion Paper the Review Committee has raised the question whether it is practicable for provision to be made for the compulsory taking of samples of urine or semen pursuant to a court order. The DPP assumes that the former would be practical but the latter not. Accordingly, although an arrested person should be entitled to refuse to provide a sample of semen, a court or jury should be able to draw such inferences as appear proper from such a refusal made without good cause. The DPP considers that this is a more appropriate response to the impracticability of requiring compulsory samples of semen than making it an offence to refuse or fail to provide such a sample.

Finally, as to the identification of suspects, while it may be inappropriate for matters of fine detail relating to the identification of suspects to be spelt out in legislation, the DPP sees merit in the approach adopted in the United Kingdom under the *Police and Criminal Evidence Act 1984* (UK). Rather than have the procedures to be employed in the identification of suspects dealt with in police standing orders and the like, under the *Police and Criminal Evidence Act 1984* the police operate under a Code of Practice which has been approved by Parliament.

Bribery and corruption

Offences involving bribery and corruption were dealt with in Discussion Paper No. 19. Prior to the release of this discussion paper the DPP provided the Review Committee with a number of preliminary submissions.

The DPP agrees with the tentative view of the Review Committee that the provisions as to bribery of officers contained in particular Acts and regulations should be repealed, with reliance in any future consolidating law being placed instead on general bribery and corruption provisions similar to those in the *Crimes Act 1914*. Those offences, however, should not reproduce the present overlap between section 73 and

73A of the *Crimes Act 1914*. This Office has also agreed that a provision equivalent to section 88 of the Crimes Act (buying and selling offices) and a provision prohibiting collusive agreements should be included in any future consolidating law, as should a provision based on section 4 of the *Secret Commissions Act 1905* (secret gifts to agents). This Office also offered views on a number of subsidiary points related to the issues raised by the Review Committee, and in particular whether the term 'corruptly' or some substitute expression should be included in the definition of the offences. With respect to this last point, the DPP considers that if the future legislation clearly prescribes the necessary physical and mental elements of the bribery and corruption offences, there would then be no need to include an additional mental element of 'corruption' or any substitute expression.

The DPP does not, however, agree with the Review Committee's tentative view that there is no need for the creation of a new specific offence of a Commonwealth officer knowingly having an undisclosed interest in any matter in which the officer substantially participates. In addition, the DPP is also of the view that the Commonwealth should legislate to deal with bribery of an officer, member or employee of an organisation registered under the Conciliation and Arbitration Act, to proscribe bribery of foreign government officials by persons ordinarily resident in Australia, and to create specific offences relating to bribery and corruption in the Commonwealth's contract, tendering and auction process.

As part of this exercise, the Review Committee also sought views on the need for special powers for the investigation of suspected bribery and corruption. This Office was of the view some further investigation powers are needed, for example:

- the power to examine financial records of a person or to require the production or listing of all such records or accounts; and
- the power to enter any premises on warrant and seize any records, accounts or other material relating to suspect transactions.

The opportunity was also taken to emphasise that bribery and corruption thrives on secrecy. It was noted that there is a danger that unnecessary secrecy provisions in legislation may prevent the proper flow of intelligence between agencies having law enforcement responsibilities and thereby aid the hiding of corruption; in short, there should be provision for the appropriate exchange of, and access to, information relating to corruption or which would assist in the fight against corruption.

The legal regimes of Australia's external territories

In 1988 the House of Representatives Standing Committee on Legal and Constitutional Affairs commenced an inquiry into the legal regimes of Australia's external Territories. In January 1989, at the request of the Committee, this Office provided a formal submission in writing. The submission primarily dealt with the

adequacy of the criminal laws (substantive, evidentiary and procedural) applicable to the external Territories.

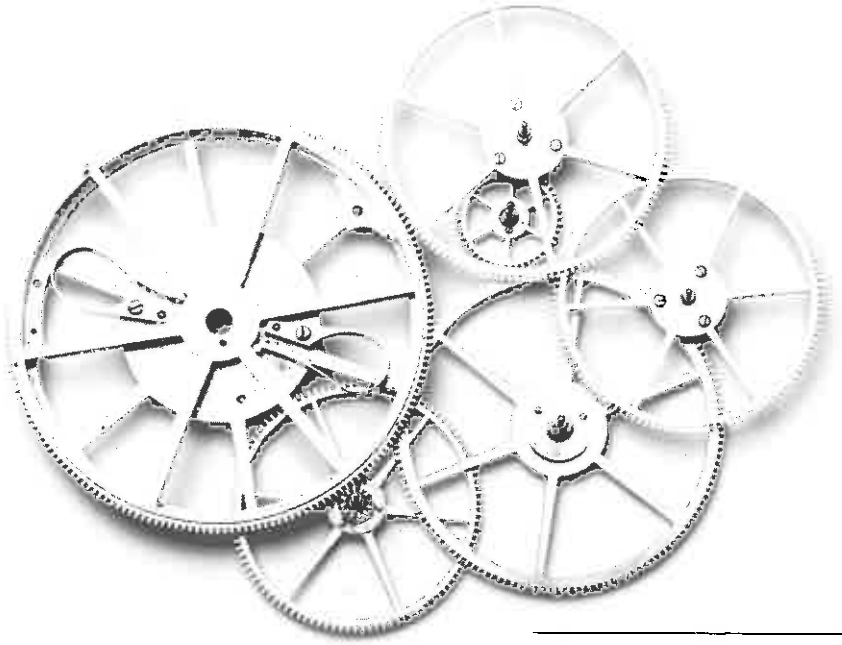
Of the external territories being considered by the Committee, the Office made no comment on the criminal laws of Norfolk Island as the DPP is not responsible for the prosecution of offences against the criminal laws of that Territory.

With respect to the Territories of the Coral Sea Islands and of Ashmore and Cartier Islands, the relevant Commonwealth legislation governing those Territories (the *Coral Sea Islands Act 1969* and the *Ashmore and Cartier Islands Acceptance Act 1933*) provide that the laws from time to time in force in, respectively, the ACT and the NT apply to those external Territories. Accordingly, although they are for all intents and purposes uninhabited, any persons present on them are treated in the same manner, in so far as the criminal law is concerned, as residents of the ACT or the NT, and as such the Office had no submissions to make in respect of them.

However, given this Office's recent experience with respect to Christmas Island and the prosecution for murder of Toh and Chong (referred to in the 1987-88 annual report), submissions were made with respect to the criminal laws of the Territory of Christmas Island. This submission also covered the Territory of Cocos (Keeling) Islands as the legal regime on that Territory is identical to that on Christmas Island in so far as the criminal law is concerned. The submission largely expanded on the points made in this Office's 1987-88 annual report. In summary, the DPP recommended that the criminal laws of Singapore, in so far as they apply on Christmas Island and the Cocos (Keeling) Islands, should be repealed and replaced by one of the laws in operation on the mainland. Given that both Territories are closest to WA and are served by the WA legal infrastructure, this Office recommended that Western Australian criminal law should apply. On 20 June 1989 two senior officers of the DPP attended a hearing of the Committee and expanded, in oral evidence, on the issues raised in the DPP's submission.

It is of interest to note that in handing down its decision in the Toh and Chong appeal (referred to elsewhere in this Report) the Full Court of the Federal Court expressed the view that it was inappropriate and incongruous for an Australian Territory to have as its criminal law principally the Singapore Penal Code 'frozen at a moment some 30 years ago'. French J. commented:

> I recognise the practical difficulties facing a trial judge who has to explain the [criminal law on Christmas Island] ... to a jury in an intelligible fashion. These difficulties are a product of an outdated legal regime whose continuance requires close scrutiny ... The Penal Code differs in significant respects from the criminal law as codified or otherwise applicable in Australia. It embodies a style of drafting which is not found in contemporary Australian statutes. And in the crucial area of culpable homicide and murder it is ... at its weakest. The difficulty in giving intelligible directions on this aspect must mean that for those who are subject to it and for the Crown the prospect of a fair and properly informed verdict is diminished. In that as in other areas of the law, the people of Australia's external territories in Christmas Island and the Cocos (Keeling) Islands are entitled to the benefit of expeditious reform.



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Administrative support

The administrative support structure remains similar to previous years. However, staff turnover in the senior positions has led to some changes in priorities and working arrangements. Implementing the Office Structures Review (OSR) was probably the most significant and time consuming administrative exercise begun during the year involving as it did nearly all DPP staff in some way.

Administrative policy and operational guidelines are being developed to aid the further devolution of administration to State offices. Decisions on most operational matters are now undertaken locally. Head Office continues to perform a coordinating and advisory role providing assistance when necessary.

Other public service wide initiatives such as purchasing reforms, Privacy Act requirements, new financial reporting, fraud control and security guidelines have greatly affected the work of DPP staff. The proportion of administrative support staff compared to operational staff is low and there is limited scope to absorb the work generated by such additional activities.

Much work remains to be done to refine administrative support systems but the DPP is fortunate to have high calibre and dedicated staff who respond positively to new challenges.

Personnel management

As discussed earlier in this report the problem of recruitment and retention of high quality legal staff, particularly at the middle and senior levels, continues to be a major concern. It is hoped that this can be addressed under the National Wage Case Structural Efficiency Principle (SEP). To this end senior DPP staff are participating in a joint working party established by the Attorney General's Department to develop options. After discussion with the relevant association (through the Department of Industrial Relations) the favoured option will be put before the Industrial Relations Commission. It is clear that higher levels of remuneration for senior lawyers will need to be an essential part of any proposal put forward under SEP.

The overall demand on staffing and associated funds proved slightly higher than expected during 1988-89, and it was necessary to supplement salary funds from administrative expenditure to a small degree to meet workload commitments. While this was manageable during this year, planning for 1989-90 indicates that the reduction in staff levels resulting from the application of the efficiency dividend and second tier trade offs will place considerable pressure on staff numbers. Overall management within the staff budget will be difficult should workloads increase. It is hoped that future monitoring and planning will be enhanced by the computerisation of all personnel records during 1989-90 using the Attorney-General's personnel management system, NOMAD.

Second Tier Wage Agreement

Implementation of OSR, which affects Administrative Service Officers in the DPP, has proceeded in all offices. Working parties made up of management and union representatives were established in all offices to coordinate implementation. The working parties report to a national steering committee which also comprises management and union representatives.

The first phase of the project, involving awareness sessions for all staff and training in facilitation skills and participative work design for members of working parties, had started in all offices by November 1988. The working parties then began to review work and jobs in the DPP.

Recommendations made by the Sydney and Melbourne working parties were endorsed by the national steering committee in early 1989. The implementation of those recommendations is well advanced and it is expected that they will be in place early in 1989-90. A major recommendation made by both working parties was that legal and administrative staff combine to form teams. At present there are teams of legal staff and a team of support staff in each office, but the latter teams are supervised by Administrative Service Officers and their work is allocated through that supervisor. It has been decided that administrative staff will be assigned to the legal teams, with the Senior Legal Officer in the team becoming the supervisor of all members of the team.

The assumption by legal staff of a supervisory role is in line with the Second Tier Wage Agreement between the Australian Government Lawyers' Association and the Government. The objectives of the team approach are to enhance the working relationship between legal and administrative staff, to provide administrative staff with work which will develop their skills, and to free legal staff from administrative duties.

It is expected that the other working parties will report early in 1989-90 and that implementation of OSR will have been completed in all offices by December 1989. It is proposed to evaluate the project in mid-1990.

A training needs information system has been developed, based on a training needs survey carried out at the commencement of the Office Structures Implementation (OSI) project. The system is designed to determine whether an officer has had training in the basic skills required for his or her nominal classification and then identify that person's future training needs.

A handbook called 'On-the-Job Training' has also been prepared for DPP staff. The handbook has been endorsed by the Australian Clerical Officers' Association and the Australian Public Service Association and is being published by the Department of Industrial Relations for distribution throughout the Australian Public Service. A module has also been developed for an on-the-job training workshop.

Implementation of OSI has been more time consuming than either staff or management had envisaged. However, the projected outcome of better designed jobs, work practices and communication within the office should be of benefit to all staff.

Industrial democracy

A national industrial democracy committee meeting, held in June, was the first chaired by the new Director. MrWeinberg expressed strong support for the principles of industrial democracy and has directed that it be treated with the importance and attention it deserves in all DPP offices.

During the year, only the Sydney office continued to hold formal meetings with staff associations. In the other regions, meetings and discussions were held as required. At the national meeting the Director stated that he favoured regular meetings for all offices so that there could be a forum for staff even if there were no apparent workplace concerns.

The industrial democracy plan was reviewed in March. A report was prepared which listed achievements against objectives and provided for the addition to the plan of further initiatives.

The major achievements to date have been:

- the development and implementation of an Equal Employment Opportunity program (EEO);

- the elimination of smoking in the workplace; and
- the control of occupational overuse syndrome.

The implementation of OSI has been a major exercise in industrial democracy. There has been extensive involvement by staff in work and job design. Continued participation will be encouraged and progress in this area will be kept under review as part of the industrial democracy plan.

Equal Employment Opportunity

The new Director has provided support for the concept of Equal Employment Opportunity (EEO) both by his public statements and by promising financial resources as they are needed.

A report on the current status of EEO was tabled at the June meeting of the National Industrial Democracy Committee. The current EEO program is being reviewed with the objective of either updating it or producing a new program. However, the review will take some time due to the diversion of resources to OSI. Staff associations will be consulted during the review process. The information needs of EEO are also being taken into account in programs designed to enter DPP staffing records on to NOMAD, to develop personnel-ADP systems and to set up a training database as part of OSI.

The implementation of OSI should help solve some of the problems in this area. The proposed changes should provide better career paths and greater job satisfaction for staff at all levels in the administrative structure, but particularly in the lower clerical and keyboard groups, areas staffed predominately by women. Women lawyers are also continuing to advance progressively within the DPP, with women now occupying positions in the Senior Executive Service in both Melbourne and Brisbane.

There were no EEO-related grievances lodged during the year.

Staff development and training

Staff training in the administrative area has been linked closely with OSI. Emphasis has been placed on giving staff the opportunity to attend a wide variety of courses and seminars on skills enhancement and personal enrichment.

Phong Bui, a Computer Systems Officer Grade 5, was selected to participate in the 1989 intake of the Executive Development Scheme. Mr Bui's first work placement was with the Joint Statutory Committee on Public Accounts.

Legal training continues to be given high emphasis in all offices. There was an average of two training days per staff member for 1988-89.

Staffing at 30 June 1989

	Perm		*Temp*	
	Male	*Female*	*Male*	*Female*
Full-time				
SES	24	2	—	—
Other	141	189	15	22
Sub Total	165	191	15	22
Total	356		37	
Part-time				
SES	—	—	—	—
Other	2	7	1	3
Sub Total	2	7	1	3
Total	9		4	

Grand Total 406 (unpaid inoperative staff are not included in this total).

The above figures include:

Paid inoperative staff	— 13
Contract staff (under DPP Act)	— 5
Agency	— 7
Director	— 1

Staff as at 30 June 1989

	Full-time			
	Perm		*Temp*	
	Male	*Female*	*Male*	*Female*
Director	1			
Senior Executive Service				
Level 6	1			
Level 4	4			
Level 3	3			
Level 2	10	1		
Level 1	5	1		
Principal Legal Officer	41	17		1
Senior Legal Officer	34	20	1	2
Legal Officer	12	12		
Administrative Service Officer	59	154	2	4
Computer System Officer	8	3		
Other	2	5		3
Total	180	213	3	10

The proportion of staff dedicated to administrative support is (for 1988-89) 22.6 per cent.

Staff Allocation and Usage by Office

Office	*Approved Average Staffing 88-89*	*Actual Average Staffing 88-89*	*Allocation 89-90*
HO	43	48.60	44.5
NSW	154	143.74	143
Vic.	110	110.86	107.5
Qld	45	46.69	44
WA	34	32.36	31
SA	N/A	N/A	28
ACT	35	33.72	35
Total	421	415.97	433

Staff Allocation and Usage by Program

Program	*Estimate 1988–89*	*Actual 1988-89*	*Estimate 1989–90*
Prosecutions	—	245	256
Criminal Assets	72	68	72
Executive and Support	—	103	105
Total		416	433

Library services

Staffing

During the year, a new position was created in Head Office with the title of Library Services Manager. The occupant of the position has overall responsibility for the administration of the DPP Library network throughout Australia. In other staffing arrangements, new librarians were appointed in Sydney and Melbourne and a new librarian position was created in Adelaide.

Accommodation

Changes to the Melbourne library that were forecast in last year's annual report are still awaited, and the Melbourne collection is still not suitably housed. Minor changes were made to the Brisbane library which reduced space problems but the Canberra Office library is approaching the point where extra space will have to be found. During the year substantial work went into planning and establishing a library in the new office in Adelaide. The project was completed on schedule and library accommodation in Adelaide is satisfactory.

Library management

Last year's annual report foreshadowed an investigation into the feasibility of using automated library management packages to provide control over acquisitions, budgeting, expenditure, circulation, cataloguing and information retrieval. A number of packages was examined but all were rejected because of the uniformally high costs involved. The investigation is continuing.

Last year's report also foreshadowed a possible strengthening of the library network by electronically linking some of the libraries. That project is still planned, but is dependent on the establishment of a Wang computer network between offices.

DPP libraries maintain access to a number of legal and other databases, both public and in-house. These are used extensively by lawyers and other members of staff. The libraries also place considerable reliance on the Australian Bibliographic Network (ABN) for cataloguing, inter-library lending and information retrieval. During the year ABN provided the opportunity for the DPP to produce its Library catalogue in book form as an alternative to the microfiche used previously. It is expected that this will prove a popular option with library users.

DPP libraries have been included in a survey of Australian Public Service (APS) libraries conducted by the Australian Federal Libraries Committee (AFLC). That Committee was established as a result of the 1987 Efficiency Scrutiny into the Rationalisation of Departmental Library Services in the APS, more widely known as the Block Report. Cabinet gave the AFLC a brief to assess the performance of APS libraries and to recommend strategies to achieve rationalisation and greater efficiency. The brief gives the AFLC a number of tasks, including identifying primary resource centres, examining approaches to resource sharing, and assessing the feasibility of recording all holdings of surveyed libraries on ABN.

Financial management

During the year, a number of administrative changes were made to implement the DPP's Financial Management Improvement Plan. The implementation of OSI has also seen a devolution of functions to line areas, which will continue as the review is put into effect.

Financial reforms

Accounting functions and related delegations have been devolved as far as possible to line areas, with resulting efficiencies in processing. The full benefits of the reforms will be realised as OSI is finalised.

During 1988-89 a Fraud Control Implementation Plan was prepared to complement the existing Fraud Control Assessment Plan. The various line areas are preparing the necessary systems and procedures to implement the new control measures required under the Plan.

The use of credit cards has been implemented successfully in some offices and will be expanded to cover all offices in 1989-90.

The DPP continues to use the approved travel agent for travel by DPP staff and the arrangement has worked well. However, travel arrangements for clients of the DPP, and particularly witnesses, are made by officers of the DPP. The complexity of such travel, and the need to provide a quick response to court demands, makes it impractical to use an outside agency.

Management information systems

During 1988-89 two significant ADP accounting systems were implemented within the DPP, a new standardised finance ledgers system and a fines and costs system.

In previous years various finance ledger systems have been used throughout the regions. A standard finance ledgers system has now been developed and installed in all offices. The system records details of finance obligations, payments made and counsel retained. It will become the primary source of financial information for the DPP. The development of this system has facilitated the devolution of accounting functions to line areas. Line areas can now input data directly into the system and make inquiries or obtain reports from it.

The automated fines and costs system has been installed in all offices to manage the recovery of fines and costs, a responsibility which now largely rests with the DPP.

All payments received are processed through DPP bank accounts and subsequently paid either to consolidated revenue, for matters administered by the DPP, or disbursed to client agencies, for matters administered by them. The Fines and Costs system records details of amounts awarded, amounts paid and disbursed and amounts written-off. It also provides reconciliations of accounts as required. The efficiencies that will be achieved through the system, in conjunction with cooperative arrangements being negotiated with various courts and client agencies, should be reflected in the financial records of client agencies as well as the DPP. It is expected that a significant backlog of cases taken over with the transfer of the fines and costs function will be cleared during 1989-90.

Training

Training is an integral part of the process of devolving financial functions and responsibilities to the regional offices.

Much work has already been done on developing financial procedures and policies and issuing user documentation to DPP staff. High priority will be given in the next financial year to developing a DPP Financial Handbook to draw together and update policies and procedures presently in force and develop new policies and procedures in areas where they are needed.

During 1988-89 work began on a set of audio training tapes to explain the fines and costs system. The tapes are intended to complement existing user manuals and are to be used to train new staff and provide a reference for existing staff. If this project is successful, similar tapes may be made for other ADP accounting systems.

Training activities are coordinated through Head Office to ensure a consistent approach and the maintenance of high standards. This process involves frequent visits by Head Office staff to all offices to review progress and assist as necessary. To facilitate this, a position of Finance Systems Officer will be established within Head

Office, as part of the OSI process, to provide training and support to all offices, as well as performing day to day functions. Head Office staff will also take on a supplementary audit role as part of the process of ensuring that standards are maintained.

Accounts processing

In previous financial years an officer of the Attorney-General's Department has acted as Authorising Officer on behalf of the DPP. Batches of payment claims were directed to the Department which processed them and sent them on to the Department of Finance. The authorising function was taken over by the DPP in December 1988 and the DPP now deals directly with the Department of Finance. This has led to increased efficiency through the elimination of double handling.

Budget management

Audited financial statements for the DPP are included at the end of this report. This is the first time this has been done, although some information has not been included in the statements because some systems were not in place in time to record data in the required format. Systems are being developed to ensure that all necessary information will be available for 1989-90.

The devolution of functions has placed greater responsibility upon State Deputy Directors and their staff to manage their budgets and staffing resources. Head Office sets broad parameters but otherwise financial responsibility largely rests with each office.

Late in 1988-89 the DPP obtained $200 000 (in addition to an appropriation of $3 653 000) from the advance to the Minister for Finance to meet legal expenses falling due towards the end of the year. The timing of legal expenses is traditionally difficult to predict as the DPP is essentially a reactive organisation and has little control over matters such as the timing of court sittings, the length of hearings, and the nature of the case put forward by a defendant. Such matters often determine when accounts will fall due for payment.

The DPP also transferred $75 400 into salaries from administrative expenses in 1988-89 to meet unforeseen payments to staff on resignation. There was an offsetting saving of $90 500 under administrative expenses, after allowing for a 20 per cent oncost factor.

Program budgeting

The DPP has three approved programs for resource management :

- Prosecutions — which covers those areas of the organisation directly involved in the prosecution of offences, including legal registries and fines and costs sections;
- Criminal assets — which covers those areas involved in the coordination and undertaking of activities which aim to recover the proceeds of crime; and

- Executive and support — which covers areas involved in the exercise of statutory responsibilities, and those support areas which cannot be directly costed to either of the first two programs.

Work is continuing on the task of refining program objectives and evaluating performance. This is being done in conjunction with the development of a Corporate Plan. Considerable work remains to be done. The DPP is largely dependent on the nature and type of matters referred to it by other agencies and performance information will reflect this factor.

An assessment of performance in each program area is shown in the relevant sections of this report.

Automatic data processing

Automatic data processing (ADP) has become increasingly important within the DPP. Computers are being used in a wide variety of applications for both legal and administrative support, as well as for word processing.

During the year improvements to the ADP system were made in accordance with the Information Needs Analysis study performed the previous year. A strategic plan is currently being developed. A major issue to be addressed in the strategic plan is the integration of systems by rationalising existing applications and ensuring that future systems are compatible with them. In particular, this year there was a rationalisation and standardisation of legal and administrative support systems with the major effort directed towards litigation support, criminal assets, case management, fines and costs, and accounting systems. The changes in these areas are detailed below.

There has been a substantial growth in ADP usage in the DPP as a result of an increasing awareness of computers on the part of both legal and support staff and increasing enthusiasm for their use. The need for immediate access to information in the courts has seen greater use of 'laptop' personal computers and the ever growing range of text retrieval and database management systems should result in the technology being used in many more cases.

The implementation of the Second Tier Wage Agreement (OSI), which requires multiskilling of Administrative Service Officers within the DPP, will see a further increase in the use of computer terminals and computer applications. Suitable training is a high priority.

Litigation support

Computers are used extensively in major cases for the compilation of indexes to evidence, exhibits, transcript and witness statements. Computers are also being used increasingly in case presentation. They are already widely used to prepare graphics and spread sheets to help explain cases to juries. They have also been used as a direct visual aid and are increasingly likely to fill that role. The ADP section will devote time in 1989-90 to developing and implementing a standard litigation support package.

This will rationalise the demand on the time of programmers and will be especially useful to those offices which do not have resident programmers.

Criminal assets

The main ADP support in this area is provided by financial analysts who utilise PC technology to trace and link assets. However, two programs were developed this year to aid in monitoring recovery matters. One of these is at the pilot stage.

A large amount of time has been spent in obtaining and analysing electronically stored data from client departments and this area of activity is certain to grow in importance and resource usage.

Legal information referencing

The DPP has continued to use the mainframe computer maintained by the Attorney-General's Department to access STATUS. STATUS is a text retrieval system which includes the SCALE databases supported by the Department. It also gives access to INFO ONE Legal databases, a number of major court transcripts, inter— office reference material, legal opinions and current awareness information. Our thanks go to the Attorney-General's ADP support staff for their assistance to the Office during the year.

Case management

This system is important to the functioning of the Office at a number of levels. It facilitates the monitoring of cases within the branch offices, allows management to measure workload and workflow, and provides statistics for the annual report. The system underwent a major enhancement during the year which involved restructuring the database to simplify and improve data input and reporting features. The restructure also provides a basis on which improvements can be made in the areas of criminal assets, the maintenance of comparative sentencing statistics and the management of witnesses.

Fines and costs

This system was established following a transfer of the function of collecting fines and costs from the Attorney-General's Department to the DPP. The system monitors all payments collected from offenders as a result of prosecutions, automates the allocation of these to the relevant government department, and highlights non-paying offenders for follow-up action. The system has produced a dramatic improvement in the collection of monies owed to the Commonwealth. Effort can now be concentrated on pursuing defaulters rather than on keeping the accounts in order.

Accounting

The DPP's accounting systems were further improved during the year to cope with the take over by the DPP of the processing of creditors, a task previously performed by the Attorney-General's Department, and to meet new requirements of the Department of Finance. This involved a rationalisation and standardisation of systems as well as their enhancement. The enhancement process will continue in 1989-90.

Pay/personnel

Arrangements commenced this year to transfer the DPP's pay-personnel functions to the NOMAD pay-personnel system on the IBM mainframe maintained by the Attorney-General's Department. This will greatly benefit the DPP Offices by providing access to up to date information. The arrangements will replace a number of minor DPP personnel computer systems, although some specific personnel systems will be developed in-house.

Equipment, software and communications

The DPP has proceeded to build upon its existing equipment and software. The DPP uses Wang VS minicomputers in all State Offices, as well as a growing number of personal computers. As indicated above, the DPP also makes use of the IBM 3081 mainframe of the Attorney-General's Department for certain tasks.

The main software used by the Office are Speed II, an application development tool which operates on the Wang VS computers, and STATUS, which is used for text retrieval on the IBM.

During the year a successful pilot project was undertaken which linked DPP Head Office, the Sydney Office and the IBM mainframe. It is planned that all the branch office Wang VSs will be networked as soon as funds permit. This will replace outdated arrangements which link the offices directly to the IBM mainframe. That system has encountered problems due to equipment failure and difficulty in isolating faults. The proposed network will also provide direct benefits to the regional offices allowing online access to each office's information and greater support from the Information Systems Section in Head Office.

The Adelaide Office of the DPP was provided with full computer support from its opening in July 1989. The Office initially had a small Wang VS minicomputer with PC terminals connected by a communications link to Head Office in Canberra. This has since been upgraded to a larger capacity Wang VS. The Office is able to utilise all of the DPP's existing computer applications and provide computer support for litigation.

Personal computers are being increasingly used in the DPP as Wang terminals replace standard VS terminals. This allows for multifunctional terminals having access to PC applications, Wang VS applications and, as the VS network progresses, access to the IBM mainframe.

Continuing developments in computer technology have required the ADP section to regularly evaluate new equipment and software packages with a view to meeting the growing demands of the DPP.

Recruitment

The ADP section had a significant turnover of staff this year, mainly at the higher levels. The novel and challenging work of the section has attracted a good standard of

applicants to replace losses in Head Office, although there were fewer suitable applicants for vacant positions at regional level.

Accommodation

The DPP places considerable emphasis on maintaining a pleasant, efficient, safe and healthy work environment. Most offices have now reached desirable standards. Refurbishment of the Head Office in Canberra was completed during the year but unfortunately the new fitout for the Melbourne office is not yet complete.

It remains DPP policy to provide legal staff with separate office accommodation and, with one or two exceptions, that policy is being implemented.

Purchasing reforms

This office is currently reviewing all financial delegations and will incorporate the purchasing reforms. The DPP is gradually devolving purchasing action and decision making to specific work areas including libraries, ADP and personnel. Purchases of plant and equipment, furniture and fittings and some other items and services previously arranged in Head Office are now the responsibility of the State offices.

The DPP is relatively small and most purchasing requirements are routine. ADP equipment and software, office equipment and library requirements are the most significant purchases in addition to general stores. Most items are available under standing offer contracts arranged by the Department of Administrative Services. There should be no need for extensive guidelines in relation to purchasing in the DPP. It is envisaged that the services of the Purchasing and Sales Group of the Department of Administrative Service will be used for any major purchases that may arise.

One other area of significant expenditure relates to the engagement of legal counsel. The general policy is to brief from as wide a range of counsel with appropriate expertise as possible. Brief fees are negotiated in accordance with the complexity and duration of the brief but are generally below prevailing market rates. This office is currently engaging two counsel on a set fee for a fixed period which should have the effect of substantially reducing the overall costs per matter.

Appendixes

Appendix 1: Appointments, authorisations or delegations made by the Director under various Acts as at 30 June 1989

Audit Act 1901: appointment of various officers for the purposes of 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 ACT: 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 the 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.

Criminal Procedure Code of the Colony of Singapore in its application to the Territory of Cocos (Keeling) Islands: 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 District Court and the Magistrates Court of the Territory of Cocos (Keeling) Islands.

Director of Public Prosecution 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 section 9(4) of the DPP Act
- authority to sign indictments for and on behalf of the Director for offences against the law of the Commonwealth
- authority 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 the 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.

Veterans' Entitlements Act 1986: delegations to various officers of the power to consent to prosecutions under that Act.

Appendix 2: Statement under section 8, *Freedom of Information Act 1982*

Under section 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 organisation 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 database 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;
- relevant press releases;
- copies of the texts of various public addresses or speeches made by the Director;
- DPP Bulletin;
- Prosecution Policy of the Commonwealth : Guidelines for the making of decisions in the prosecution process.

(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, is 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 3: Freedom of Information statistics 1988-89

Requests on hand at 30 June 1988	1
Requests received during 1988/89	5
Granted in full	4
Granted in part	1
Access refused	0
Requests withdrawn	1
Requests outstanding 30 June 1989	0
Response time	0 – 30 days
Fees charged	$125

Appendix 4 : Commonwealth and ACT legislation requiring consent to a prosecution

Adoption of Children Act 1965 (ACT)
Air Navigation Regulations*
*Airports (Surface Traffic) Act 1960**
Approved Defence Projects Protection Act 1947
*Australian Bicentennial Authority Act 1980**
Australian Security Intelligence Organisation Act 1979
Australian Capital Territory Taxation (Administration) Act 1979
*Banking Act 1959**
Banks (Shareholdings) Act 1972
*Broadcasting Act 1942**
Canberra Showground Trust Act 1976 (ACT)
Canberra Theatre Trust Act 1965 (ACT)
Children's Services Act 1986 (ACT)
Classification of Publications Act 1983 (ACT)
Crimes Act 1900 (NSW) as amended in its application to the Australian Capital Territory*
Crimes Act 1914
*Crimes (Aircraft) Act 1963**
Crimes At Sea Act 1979
Crimes (Biological Weapons) Act 1976
Crimes (Foreign Incursions and Recruitment) Act 1978
*Crimes (Hijacking of Aircraft) Act 1972**
Crimes (Hostages) Act 1989
Crimes (Internationally Protected Persons) Act 1976
*Crimes (Protection of Aircraft) Act 1973**
Crimes (Torture) Act 1988
*Crimes (Taxation Offences) Act 1980**
Defence Force Discipline Act 1982
Defence (Special Undertakings) Act 1952
Defence (Transitional Provisions) Act 1946
Defence (Visiting Forces) Act 1963
Education Act 1937 (ACT)
Extradition Act 1988
*Family Law Act 1975**
Financial Corporations Act 1974
Fisheries Act 1952
Foreign Takeovers Act 1975
Geneva Conventions Act 1957
Health Insurance Commission Act 1983

*Home Savings Grant Act 1964**
*Home Savings Grant Act 1976**
Honey Industry (Election of Board) Regulations
Immigration (Unauthorised Arrivals) Act 1980
Industrial Research and Development Incentives Act 1976
Independent Air Fares Committee Act 1981
*Insurance Act 1973**
Insurance Contracts Act 1984
International Organisations (Privileges and Immunities) Act 1963
Maintenance Act 1968 (ACT)
Migration Act 1958
National Service Act 1951
*Navigation Act 1912**
Objectionable Publications Act 1958 (ACT)
Patents Act 1952
*Police Offences Act 1930 (ACT)**
Prices Surveillance Act 1983
Public Accounts Committee Act 1951
*Public Order (Protection of Persons and Property) Act 1971**
*Public Works Committee Act 1969**
Registration of Births, Deaths and Marriages Act 1963 (ACT)
Scout Association Act 1924
South Pacific Nuclear Free Zone Treaty Act 1986
*Telecommunications (Interception) Act 1979**
Torres Strait Fisheries Act 1984
Trade Practices Act 1974
*Veterans' Entitlements Act 1986**

Legislation marked with an asterisk indicates that the Director has been authorised to consent to a prosecution. In some cases other senior DPP lawyers have been authorised to consent to a prosecution where that course has been available.

Appendix 5

An Arrangement made this Nineteenth day of August 1988 by the Presiding Officers of the Parliament of the Commonwealth of Australia with the Director of Public Prosecutions

WHEREAS by section 10 of the *Parliamentary Precincts Act 1988* the functions of the Director of Public Prosecutions in respect of offences committed in the Parliamentary precincts shall be performed in accordance with general arrangements agreed between the Presiding Officers and the Director of Public Prosecutions.

NOW IT IS HEREBY ARRANGED as follows:

1. This arrangement shall come into force on the commencement of section 10 of the *Parliamentary Precincts Act 1988*.
2. In this arrangement, unless a contrary intention appears, words and expressions shall have the same meaning as in the *Director of Public Prosecutions Act 1983* or the *Parliamentary Precincts Act 1988*.
3. 'Parliamentary officer' means a person performing the duties of the Usher of the Black Rod or the Serjeant-at-Arms.
4. This arrangement applies to any offence against a law of the Commonwealth committed in the precincts.
5. Subject to clause 6, where either:
   (a) a prosecution is instituted in respect of an offence to which this arrangement applies and the prosecution is referred to the Director for the purpose of the Director carrying on the prosecution; or
   (b) a brief of evidence concerning an offence to which this arrangement applies is submitted to the Director for the purpose of the Director deciding whether a prosecution should be instituted;

   the Office of the Director of Public Prosecutions shall inform a parliamentary officer accordingly.
6. Where it is not practicable having regard to the exigencies of the particular prosecution to inform a parliamentary officer in accordance with clause 5 prior to the completion of the prosecution, the Office of the Director of Public Prosecutions, as soon as practicable thereafter, shall inform a parliamentary officer of the result of the prosecution.
7. Subject to clause 8, where an offence to which this arrangement applies has been committed in circumstances which appear to the Director to directly or indirectly affect, concern or involve either House of the Parliament or its Members in such a way that it is appropriate for the Director to consult with the Presiding Officers on the question whether the public interest warrants a

prosecution, the Director shall so consult with the Presiding Officers prior to making any decision that a prosecution not be instituted for the offence, or to discontinue a prosecution for the offence which has already commenced.

8. There shall be no obligation on the part of the Director to consult with the Presiding Officers pursuant to clause 7 where the only reason for not instituting a prosecution, or for discontinuing a prosecution, is insufficiency of evidence. In such a case, however, the Director shall inform the Presiding Officers of the decision not to institute a prosecution, or to discontinue the prosecution, and provide the Presiding Officers with a statement of reasons.

9. Notwithstanding clauses 7 and 8 the Director shall consult with the Presiding Officers at their request in relation to any prosecution or proposed prosecution for an offence to which this arrangement applies.

10. Nothing in this arrangement shall be taken to affect the performance of the functions or the exercise of the powers of the Director under the *Director of Public Prosecutions Act 1983*:

    (a) consistently with the guidelines for the making of decisions in the prosecution process set out in the document entitled 'Prosecution Policy of the Commonwealth : Guidelines for the Making of Decisions in the Prosecution Process' presented to the Parliament in February 1986 by the Attorney-General or, if guidelines are issued in substitution for those set out in that document, consistently with those later guidelines; and

    (b) subject to any directions or guidelines given under section 8 of the *Director of Public Prosecutions Act 1983*.

11. This arrangement may be varied from time to time by further arrangement.

12. This arrangement may be terminated by mutual agreement, or by either the Presiding Officers or the Director giving the other party not less than one month's notice to that effect.

IN WITNESS WHEREOF the parties have executed this arrangement on the day and year first above written.

Signed by THE HON. JOAN CHILD,
the Speaker of the House of
Representatives.

Signed by Senator
THE HON. KERRY WALTER SIBRAA,
the President of the Senate.

Signed by IAN DOUGLAS TEMBY, QC,
the Director of Public Prosecutions.

AUSTRALIAN AUDIT OFFICE

Medibank House,
Woden
Telephone (062) 83 4777

GPO Box 707
Canberra, ACT 2601
Facsimile (062) 851223

Please quote F88/743

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
AUDIT REPORT ON FINANCIAL STATEMENT

In accordance with sub-section 50(1) of the Audit Act 1901, the Director of Public Prosecutions has submitted for audit report the financial statement of the Office of the Director of Public Prosecutions for the year ended 30 June 1989.

Sub-section 50(2) of the Act provides that the financial statement shall be prepared in accordance with financial statements guidelines and shall set out:

a) particulars of the receipts and expenditures of the Consolidated Revenue Fund, the Loan Fund and the Trust Fund during the financial year in respect of the Office, and

b) such other information (if any) relating to the financial year as is required by the financial statements guidelines to be included in the statement.

The part of the financial statement prepared in accordance with paragraph 50(2)(b) of the Act is not subject to audit examination and report unless the Minister for Finance has declared that it is to be subject to full examination. At the date of this report the Minister had not made a declaration in respect of the Office of the Director of Public Prosecutions.

The part of the financial statement prepared in accordance with paragraph 50(2)(a) of the Act which is subject to audit has been prepared in accordance with the policies outlined in Notes 1(a), 1(b)(i), 1(c) and 1(f) and has been audited in conformance with the Australian Audit Office Auditing Standards.

In accordance with sub-section 51(1) of the Act, I now report that the part of the statement prepared in accordance with paragraph 50(2)(a) is, in my opinion:

- in agreement with the accounts and records kept in accordance with section 40 of the Act, and

- in accordance with the financial statements guidelines issued by the Minister for Finance.

AUSTRALIAN AUDIT OFFICE

JRMartin

J.R. Martin
Assistant Auditor-General
22 September 1989

OFFICE OF THE COMMONWEALTH
DIRECTOR OF PUBLIC PROSECUTIONS

FINANCIAL STATEMENTS

1988 - 89

SEPTEMBER 1989

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

FINANCIAL STATEMENTS 1988-89

CONTENTS

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

FINANCIAL STATEMENTS 1988-89

STATEMENT BY THE DIRECTOR

AND

PRINCIPAL ACCOUNTING OFFICER

CERTIFICATION

We certify that the financial statements are in agreement with the accounts and records of the Office of the Director of Public Prosecutions and, in our opinion, the statements have been prepared in accordance with the Financial Statements Guidelines for Departmental Secretaries, except as indicated in note 1(g) to the statements.

Mark Weinberg
Director

Signed
Dated 18/9/89

T McKnight
Acting Senior Assistant Director
Administrative Support
Branch

Signed
Dated 15/9/89

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

AGGREGATE STATEMENT OF TRANSACTIONS BY FUND
FOR THE YEAR ENDED 30 JUNE 1989

This Statement shows aggregate cash transactions, for which the DPP is responsible, for each of the three funds comprising the Commonwealth Public Account (CPA).

1987-88 ACTUAL $		1988-89 BUDGET $	1988-89 ACTUAL $
	CONSOLIDATED REVENUE FUND (CRF)		
479,048	Receipts	5,700,000	776,959
109,358	Expenditure from Special Appropriations*	nil	nil
21,267,051	Expenditure from Annual Appropriations	23,349,000	23,934,469
21,376,409	Expenditure	23,349,000	23,934,469

* This item is now included in running costs item with effect from 1 July 1988.

LOAN FUND	NIL
TRUST FUND	NIL

The attached notes form an integral part of these statements.

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

DETAILED STATEMENT OF TRANSACTIONS BY FUND
FOR THE YEAR ENDED 30 JUNE 1989

CONSOLIDATED REVENUE FUND (CRF)

RECEIPTS TO CRF

The CRF is the main working fund of the Commonwealth and consists of all current moneys received by the Commonwealth (excluding loan raisings and moneys received by the Trust Fund).
The DPP is responsible for the following receipt items :

1987-88 ACTUAL $		SUB-PROGRAM*	1988-89 BUDGET $	1988-89 ACTUAL $
453,705	Fines and Costs	1.	1,000,000	737,344
25,343	Proceeds of Crime	2.	4,700,000	39,615#
479,048	TOTAL RECEIPTS CRF		5,700,000	776,959

Proceeds of Crime monies were also received by the Bankruptcy sub-program of the Attorney-General's portfolio.

EXPENDITURE FROM CRF

The constitution requires that an appropriation of moneys by the Parliament is required before any expenditure can be made from the CRF. Appropriations follow two forms :
- . special (or standing) appropriations; and
- . annual appropriations.

The DPP is responsible for the following expenditure items :

1987-88 ACTUAL $		SUB-PROGRAM*	1988-89 BUDGET $	1988-89 ACTUAL $
	Special Appropriations			
109,358	Remuneration Tribunals Act 1973 - Director**	3.	nil	nil
109,358	Total Expenditure from Special Appropriations		nil	nil

* Refer to Program Statement.

** This item is now included in running costs with effect from 1 July 1988.

The attached notes form an integral part of these statements.

EXPENDITURE FROM CRF

1987-88 ACTUAL $		1988-89 APPROPRIATION $	1988-89 ACTUAL $
	Annual Appropriations		
	(Appropriation Act No.1	23,034,000)	
	(Appropriation Act No.3	432,000)	
	(Advance to the	)	
21,143,052	(Minister for Finance	200,000)	23,619,478
123,999	Appropriation Act No.2	315,000	314,991
21,267,051	Total Expenditure from Annual Appropriations	23,981,000	23,934,469
21,376,409	TOTAL EXPENDITURE FROM CRF	23,981,000	23,934,469

DETAILS OF EXPENDITURE FROM ANNUAL APPROPRIATIONS

1987-88 ACTUAL $		SUB-PROGRAM*	1988-89 APPROPRIATION $	1988-89 ACTUAL $
	APPROPRIATION ACTS NOS 1 AND 3 **			
	Division 181 - Director of Public Prosecutions			
17,395,042	1. Running Costs	#	19,737,000	19,695,160
	2. Other Services			
3,748,010	01. Compensation&Legal	#	3,853,000	3,848,686
	02. Payments under			
NIL	s.34A(1) Audit Act	3.	76,000	75,632
21,143,052			23,666,000	23,619,478

* Refer to Program Statement.

** Includes Advance to the Minister for Finance.

\# Allocated to various sub-programs.

The attached notes form an integral part of these statements.

1987-88 ACTUAL $		SUB-PROGRAM*	1988-89 BUDGET $	1988-89 ACTUAL $
	APPROPRIATION ACT NO 2			
	Division 818 - Capital Works and Services			
	1. Plant and Equipment			
123,999	04. DPP	#	315,000	314,991
123,999			315,000	314,991

LOAN FUND NIL

TRUST FUND NIL

* Refer to Program Statement.

Allocated to various sub-programs.

The attached notes form an integral part of these statements.

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

PROGRAM SUMMARY
FOR THE YEAR ENDED 30 JUNE 1989

This statement shows the outlays for each program administered by the DPP and reconciles the DPP's total outlays to total expenditure from appropriations. 'Expenditure' refers to the actual amount of resources consumed by a program whereas 'outlays' refers to the 'net' amount of resources consumed, after offsetting associated receipt and other items.

This Statement also reconciles the total receipts classified as revenue for each program, with 'receipts to CRF'.

This Statement has not been subject to audit.

1987-88 ACTUAL $'000		1988-89 BUDGET $'000	1988-89 ACTUAL $'000
	EXPENDITURE		
	Outlays		
13,611	1. Prosecutions	14,800	15,011
2,263	2. Criminal Assets	3,919	3,915
5,502	3. Executive and Support	4,630	5,008
21,376	Total Outlays	23,349	23,934
21,376	TOTAL EXPENDITURE FROM APPROPRIATIONS	23,349	23,934
	REVENUE		
454	1. Prosecutions	1,000	737
25	2. Criminal assets	4,700	40
479	TOTAL REVENUE	5,700	777

The attached notes form an integral part of these statements.

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

PROGRAM STATEMENT
FOR THE YEAR ENDED 30 JUNE 1989

This statement shows details of expenditure from annual and special appropriations for each sub-program administered by the DPP. Each 'annual' appropriation item contributing to a sub-program is identified by its description followed by an appropriation code in brackets. 'Special' appropriations are identified by reference to the legislation containing the special appropriation. Partial allocations of appropriation items to sub-programs are indicated by ('p') following the item. With respect to those sub-programs for which 'expenditure from appropriations' and 'outlays' differ, the Statement discloses information reconciling the amounts concerned.

A detailed explanation of each sub-program is provided elsewhere in this Report.

This Statement has not been subject to audit.

1987-88 ACTUAL $'000		1988-89 BUDGET $'000	1988-89 ACTUAL $'000
	1. PROSECUTIONS		
	Running Costs (181.1)(p)		
7,200	Salaries	7,913	8,241
2,846	Administrative Expenses	3,188	2,918
3,565	Compensation & Legal (181.2)(p)	3,447	3,606
NIL	Plant & Equipment (818.1.4)(p)	252	246
13,611	Expenditure from Appropriations	14,800	15,011
13,611	Outlays	14,800	15,011
	Revenue		
454	Fines and Costs	1,000	737
454		1,000	737

The attached notes form an integral part of these statements.

1987-88 ACTUAL $'000		1988-89 BUDGET $'000	1988-89 ACTUAL $'000
	2. CRIMINAL ASSETS		
	Running Costs (181.1)(p)		
1,541	Salaries	2,798	2,685
551	Administrative Expenses	872	942
171	Compensation & Legal (181.2)(p)	202	242
nil	Plant & Equipment (818.1.4)(p)	47	46
	Expenditure from		
2,263	Appropriations	3,919	3,915
2,263	Outlays	3,919	3,915
	Revenue		
25	Proceeds of Crime	4,700	40
25		4,700	40
	3. EXECUTIVE AND SUPPORT		
	Remuneration Tribunals		
109	Act 1973 - Director*	nil	nil
	Running Costs (181.1)(p)		
3,663	Salaries	3,117	3,293
1,594	Administrative Expenses	1,493	1,616
12	Compensation & Legal (181.2)(p)	4	nil
	Payments pursuant to s.34A(1)		
Nil	of Audit Act (181.2)	-	76
124	Plant & Equipment (818.1.4)(p)	16	23
	Expenditure from		
5,502	Appropriations	4,630	5,008
5,502	Outlays	4,630	5,008

* This item is now included in running costs with effect from 1 July 1988.

The attached notes form an integral part of these statements.

NOTE 8

AMOUNTS WRITTEN OFF

The following details are furnished in relation to amounts written off during the financial year 1988-89 under sub-section 70C(1) of the Audit Act 1901.

	Up to $1000		OVER $1,000	
	No.	$	NO.	$
(i) Losses or deficiencies of public moneys	-	-	-	-
(ii) Irrecoverable amounts of revenue	7	510	-	-
(iii) Irrecoverable debts and overpayments	-	-	-	-
(iv) Amounts of revenue, or debts or overpayments, the recovery of which would, in the opinion of the Minister, be uneconomical	-	-	-	-
(v) Lost, deficient, condemned, unserviceable or obsolete stores *	-	-	-	-

* stocktakes conducted during 1988-89 identified various asset items totalling $17,186 to be written-off under category (v). Formal write-off processes had not been finalised by 30 June, 1989.

NOTE 9

LOSSES AND DEFICIENCIES ETC IN PUBLIC MONEYS AND OTHER PROPERTY

One case involving loss of moneys was recorded during the financial year 1988-89 under Part XII of the Audit Act 1901. The amount of the loss was $70 and deliberations as to whether the officer is to be held liable are in progress.

NOTE 10

CONTINGENT LIABILITIES

If a matter being prosecuted by the DPP is defended succesfully, the Court may order that the DPP meet certain costs incurred by the defence. Similarly, if assets are frozen under the Proceeds of Crime Act and the related prosecution is unsuccessful, costs/damages may be awarded against the DPP. Costs so awarded are met from DPP or client organisations annual appropriations for Legal Expenses.
Although costs have been awarded against the DPP and will continue to be awarded from time to time, the DPP is unable to declare an estimate of contingent liabilities due to the uncertainty of the outcome of matters, but more particularly to the sensitivity of the information related to matters still before the Courts.
The DPP has no other contingent liabilities.

NOTE 11

RESOURCES RECEIVED FREE OF CHARGE

During the 1988-89 financial year, a number of Commonwealth departments and agencies provided services to the DPP without charge. Expenditure for those services were met from those Department's appropriations. The major services received include :

Department of Administrative Services

. The lease of and payment for rented premises occupied by the DPP in Canberra and the States.

. The arrangement and payment of cleaning contracts for premises occupied by the DPP.

Australian Audit Office

. Auditing services as required by the Audit Act 1901 with a notional value of $15,300 for the audit year ended 31/03/89.

Attorney-General's Department

. Prosecution and related services in states in which the DPP does not have offices;
. Payroll support;
. Accounting support until December 1988;
. Internal audit services.

Department of Finance

. Payroll and accounting support

NOTE 12

FINES and COSTS BANK ACCOUNTS

During 1988-89 Fines and Costs awarded in matters prosecuted by the DPP were processed through Fines and Costs Bank Accounts operating in each state. Moneys collected are initially banked to these accounts and then disbursed to either DPP revenue accounts (see Statement of Transactions by Fund) for matters for which the DPP has administrative responsibility, mainly Crimes Act matters, or to other Departments or Agencies for Acts administered by them (eg Taxation, Social Security, etc).

The Fines and Costs function was taken over from the Australian Government Solicitors Office progressively during 1988 and an in-house produced Fines and Costs ADP system is in the final stages of implementation. Therefore, comprehensive financial data is not available for 1988-89, but will be reported in 1989-90.

A total of $162,536 remained undisbursed in Fines and Costs bank accounts around Australia at 30 June 1989. This was represented by (see also Note 2):

Cash at bank	160,771
Cash on hand	1,765
	162,536

APPENDIX: GLOSSARY OF TERMS

ACT OF GRACE PAYMENTS: Section 34A of the Audit Act 1901 provides that, in special circumstances, the Commonwealth may pay an amount to a person notwithstanding that the Commonwealth is not under any legal liability to do so.

ADMINISTRATIVE EXPENSES: Includes not just expenditure on office based activities but all operational expenditure (excepting salaries). The item includes both direct costs and overhead expenditure: it includes, inter alia, minor capital expenditure which is considered part of ordinary annual services; it does not include, inter alia, major capital expenditure, grants, loans or subsidies.

ADVANCE TO THE MINISTER FOR FINANCE (AMF): The contingency provisions appropriated in the two Supply Acts and the two annual Appropriation Acts to enable funding of urgent expenditures not foreseen at the time of preparation of the relevant Bills. These funds may also be used in the case of changes in expenditure priorities to enable 'transfers' of moneys from the purpose for which they were originally appropriated to another purpose pending specific appropriation.

ANNUAL APPROPRIATIONS: Acts which appropriate moneys for expenditure in relation to the Government's activities during the financial year. Such appropriations lapse on 30 June.

APPROPRIATION: Authorisation by Parliament to expend public moneys from the Consolidated Revenue Fund or Loan Fund for a particular purpose, or the amounts so authorised. All expenditure (ie outflows of moneys) from the Commonwealth Public Account must be appropriated ie authorised by the Parliament. The authority for expenditure from individual trust accounts is provided under the Audit Act 1901 or an Act establishing the trust account and specifying its purposes. See also 'Annual Appropriations' and 'Special Appropriations'.

APPROPRIATION ACT (No 1): An act to appropriate moneys from the Consolidated Revenue Fund for the ordinary annual services of Government.

APPROPRIATION ACT (No 2): An act to appropriate moneys from the Consolidated Revenue Fund for other than ordinary annual services. Under existing arrangements between the two Houses of Parliament this Act includes appropriations in respect of new policies (apart from those funded under Special Appropriations), capital works and services, plant and equipment and payments to the states and the Northern Territory.

APPROPRIATION ACTS (Nos 3 and 4): Where an amount provided in an Appropriation Act (No 1 or 2) is insufficient to meet approved obligations falling due in a financial year, additional appropriation may be provided in a further Appropriation Act (No 3 or 4). Appropriations may also be provided in these Acts for new expenditure proposals.

AUDIT ACT 1901: The principal legislation governing the collection, payment and reporting of public moneys, the audit of the Public Accounts and the protection and recovery of public property. Finance Regulations and Directions are made pursuant to the Act.

COMMONWEALTH PUBLIC ACCOUNT (CPA): The main bank account of the Commonwealth, maintained at the Reserve Bank in which are held the moneys of the Consolidated Revenue Fund, Loan Fund and Trust Fund (other than the National Debt Sinking Fund).

CONSOLIDATED REVENUE FUND (CRF); LOAN FUND; TRUST FUND: The three Funds comprise the Commonwealth Public Account (CPA).

CRF - The principal working fund of the Commonwealth mainly financed by taxation, fees and other current receipts. The constitution requires an appropriation of moneys by the Parliament before any expenditure can be made from the CRF. These follow two forms:

(1) annual appropriations consisting of Supply Acts (Nos 1 and 2), the Supply (Parliamentary Departments) Act , the Appropriations Acts (Nos 1-4) and the Appropriation (Parliamentary Departments) Acts (Nos 1 and 2) (the Supply Acts relate to the first five months of the financial year and are subsumed by the corresponding Appropriation Acts); and

(ii) special or standing appropriations.

Loan Fund - Authority for its establishment comes from the the Audit Act. All moneys raised by loan on the public credit of the Commonwealth are credited to the Loan Fund. Expenditures from the Loan Fund require an appropriation by Parliament and are limited to the purpose(s) for which moneys were originally raised as specified.

Trust Fund - Essentially comprises trustee funds (termed 'Heads of Trust') established under s.60 of the Audit Act (ie moneys held in trust for benefit of persons or bodies other than the Commonwealth); trust accounts established under s.62A of the Audit Act (ie working accounts covering certain government agencies and certain other accounts in the nature of 'suspense accounts'); and trust accounts established under other Acts to meet future expenditure.

EXPENDITURE: The total or gross amount of money spent by the Government on any or all of its activities (ie the total outflow of moneys from the Commonwealth Public Account) (c.f. 'Outlays'). All expenditure must be appropriated ie authorised by the Parliament, (see also 'Appropriations'). Every expenditure item is classified to one of the economic concepts of outlays, revenue (ie offset within revenue) or financing transactions.

FORWARD OBLIGATIONS: Obligations existing at 30 June which create or are intended to create a legal liability on the Commonwealth to provide funds in future years and which have not been exempted from the forward obligations system. In special circumstances, arrangements which do not create a legal liability, but which require forward obligations cover for effective program management, may also be included in the forward obligations system eg memoranda of understanding with other Governments and foreign aid arrangements. The following items are exempted from the forward obligations system:

- all items classified in Appropriation Acts as Running Costs (ie salaries, administrative and operating expenses);
- those items for which payment is authorised by special legislation where the amount and timing of payments are specified or clearly dictated by eligibility criteria (ie most, but not all, Special Appropriations); and
- those items which have been exempted by the Minister for Finance as a result of specific case-by-case requests from departments.

LOAN FUND: See 'Consolidated Revenue Fund'.

OUTLAYS: An economic concept which shows the net extent to which resources are directed through the Budget to other sectors of the economy after offsetting recoveries and repayments against relevant expenditure items ie outlays consist of expenditure net of associated receipt items. The difference between outlays and revenue determines the Budget balance (ie surplus or defecit). See also 'Appropriations'; and 'Receipts offset within outlays'.

RECEIPTS: The total or gross amount of moneys received by the Commonwealth (ie the Commonwealth Public Account). Every receipt item is classified to one of the economic concepts of revenue, outlays (ie offset within outlays) or financing transactions.

RECEIPTS NOT OFFSET WITHIN OUTLAYS: Receipts classified as 'revenue'. See also 'Revenue'.

RECEIPTS OFFSET WITHIN OUTLAYS: Refers to receipts which are netted against certain expenditure items because they are considered to be closely or functionally related to those items eg receipts from computer hire charges are offset against the running costs of the department's accounting and management information systems.

REVENUE: Items classified as revenue are receipts which have not been offset within outlays or classified as financing transactions. The term 'revenue' is an economic concept which comprises the net amounts received from taxation, interest, regulatory functions, investment holdings and government business undertakings. It excludes amounts received from the sale of government services or assets (these are offset within outlays) and amounts received from loan raisings (these are classified as financing transactions). Some expenditure is offset within revenue eg refunds of PAYE tax instalments and the operating expenditure of budget sector business undertakings. See also 'Receipts'.

SPECIAL (STANDING) APPROPRIATION: Moneys appropriated by a specific Act of Parliament for a specific purpose (eg unemployment benefits, grants to States for schools). They may or may not be for a specific amount of money or particular period of time. Special Appropriations do not require annual spending authorisation by the Parliament as they do not lapse at the end of each financial year. A distinction is sometimes made between Standing and Special Appropriations. Standing Appropriations refer to an open-ended appropriation of the Consolidated Revenue Fund by the enabling Act of a legislatively-based program: the amount appropriated will depend on the demand for payments by claimants satisfying program eligibility criteria specified in the legislation. Special Appropriations can be regarded as somewhere between Standing and Annual Appropriations: while a specified amount is provided, it is included in a separate Bill authorising the particular program and can be specified for any number of years.

TRUST FUND: See 'Consolidated Revenue Fund'.

Index