



SOUTH AUSTRALIA

DIRECTOR OF  
PUBLIC PROSECUTIONS

Annual Report

2003-2004

Office of the Director of Public Prosecutions  
Level 7, 45 Pirie Street (GPO Box 464)  
ADELAIDE 5000

Phone: (08) 8207 1529  
Fax: (08) 8207 1799  
Email: [dpp@agd.sa.gov.au](mailto:dpp@agd.sa.gov.au)



If calling please ask for:

Telephone:  
(08) 8207 1529

Email:  
dpp@agd.s.gov.au

**DIRECTOR OF PUBLIC  
PROSECUTIONS**

Level 7  
45 Pirie Street  
ADELAIDE 5000

BOX 464 GPO  
ADELAIDE 5001

DX 336

Telephone:  
(08) 8207 1529

Facsimile:  
(08) 8207 1799

23 September 2004

Hon Michael J Atkinson, MP  
Attorney-General  
GPO Box 464  
ADELAIDE 5001

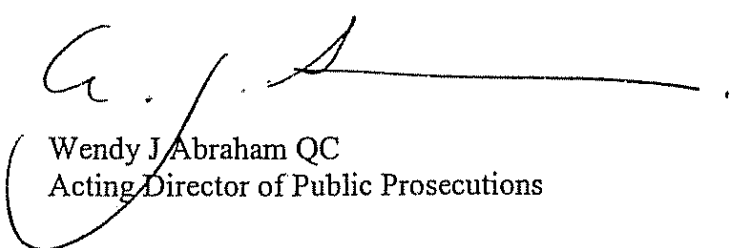
Dear Attorney

**Re: 2003-04 Annual Report**

I have pleasure in presenting you with the Annual Report of the Office of the Director of Public Prosecutions for the year ending 30 June 2004.

The report has been prepared pursuant to section 12 of the *Director of Public Prosecutions Act 1991* for laying before both Houses of Parliament.

Yours sincerely



Wendy J Abraham QC  
Acting Director of Public Prosecutions

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## ACTING DIRECTOR'S OVERVIEW

### YEAR IN REVIEW

When South Australia enacted legislation to create the Office of the Director of Public Prosecutions in July 1992, it was the last State or Territory in Australia to adopt an independent statutory prosecuting authority. The proclaimed statutory independence of the Director was made subject to the ability of the Attorney-General to give directions, albeit after consultation. Most other Australian jurisdictions have legislation enabling the Attorney-General to issue directions to the Director of Public Prosecutions after consultation but this power is generally restricted to general matters rather than in respect of individual cases. The power to issue a direction in an individual case has never been exercised in any Australian jurisdiction other than South Australia.

With the decision by the then Acting Attorney-General to issue a direction in a specific case (Nemer), it became necessary for the Office and the community to re-examine the notion of an independent statutory prosecuting authority. The resultant debate brought sharply into focus the difficulty of balancing the need to be properly accountable to the community for prosecution decisions made by the Office, with the need to ensure that those decisions are free from any perception of political influence.

I am confident that the appropriate balance can be struck by my continued commitment to give reasons for decisions unless publication would be injurious to the public interest, and, by my annual report to Parliament, to satisfy the need for accountability, and by the Attorney-General maintaining his position that such a direction should only be given in exceptional circumstances to ensure that there is no perception of political interference.

The challenges in the aftermath of the decision to issue the direction have been considerable. This is despite the fact that the direction related to a specific case and Mr Kourakis QC in his report regarding charge negotiations finding that in relation to the Office:

*“The work of its prosecutors has been of the highest standard and they enjoy and deserve the respect of the legal profession, the judiciary and the wider community. The South Australian public can be confident that the general principles and practices by which the office selects charges and prosecutes guilty pleas properly serve the public interest.”*

The first challenge was to restore the Office's standing with victims and police to its previous high level. Considerable effort went into reassuring victims and police that their views were heard by the Office and given appropriate weight in the decision making process. It is true to say that for a period both the police and victims were less accepting of decisions made by experienced practitioners in the handling of prosecution files. It is a testimony to the competence and professionalism of staff that the initial reaction has largely dissipated.

The second challenge was to ensure that public confidence in the working of the Office was maintained. To this end staff continued to perform to a high standard in all aspects of the prosecution process. A brief examination of the trials and appeals conducted by the Office during the relevant period demonstrates the ability of the highly talented and dedicated professionals employed by the Office to perform under pressure and in the public spotlight.

In addition to the challenges created by the Nemer decision, the Office was required to perform with considerably less than optimum funding levels. Staff worked long hours and six day weeks to manage the heavy workloads. The Attorney-General was very alive to the

problems being experienced by the Office as a result of the level of funding and during the year increased the appropriation to the Office by \$500,000. In addition a further \$1 million has been secured from the 2004-05 financial year bringing the increase to \$1.5 million in additional recurrent funds. This has enabled the Office to employ additional staff and over time workloads will reduce. The impact of the additional resources will not be immediate, however, as it takes considerable time to train new staff to be able to handle the sensitive and complex work of this Office. My thanks must go to the Attorney-General in providing this much needed additional funding.

The position of Crown Counsel became vacant during the course of the financial year, however the Office has been unable to fill this position. This position was created in 1990 to enable the Office to attract and retain a counsel with significant experience who would otherwise go to the private profession. The role of Crown Counsel has always been a highly regarded appointment and the talents of the two incumbents, Barry Jennings QC and Steven Millsted QC have ensured a high quality of professionalism and expertise.

The position of Crown Counsel is now under review following the report of the Solicitor General to Government in relation to charge negotiations between the Office of the Director of Public Prosecutions and the defence. That report made recommendations relating to the position and to changing essential elements of the role within the Office so as to establish something of an ombudsman position.

The Office requires Crown Counsel to conduct complex and lengthy criminal trials in this State. These trials require extensive preparation of materials and witnesses by someone with the skill and expertise of senior counsel to conduct the matters in the Supreme Court. The experience essential to the position requires many years of training and practice. South Australia deserves and expects that its most important trials are handled by talented and experienced counsel. Crown Counsel should not be distracted from this critical role by performing an oversight function. To expect the incumbent to be an ombudsman is to undermine and misunderstand the critical role that has previously been provided to this State by a person in this position. Such a position cuts across the very basis for the creation of the Director of Public Prosecutions.

During the year, the Office provided a submission to the Legislative Review Committee Inquiry on Sexual Assault Conviction Results. I gave evidence before the Committee with Pauline Barnett, Managing Solicitor and Adam Kimber, Senior Solicitor. It is important that the criminal justice system continues to look at ways to make it easier for victims of sexual assault to give evidence. Closed circuit TV has already been successful in enabling some victims to give evidence where previously they would not have been able to. There are other procedures used interstate and overseas which ought to be examined with a view to adopting them in this State. For example, for child witnesses of sexual offences using a video tape of their interview with the police as their examination in chief at trial, or having specific procedures which enable the entire evidence of a child to be given well before the trial date and recorded on video to enable that recording to be played to the jury.

#### THE FUTURE

As Acting Director I have committed myself to ensuring that the Office consolidates on its good performance and moves forward in a constructive manner. A review of the Office's structure and function is being conducted to ensure that the additional funding granted to the Office is spent to achieve the highest possible standard of legal knowledge and competence.

For the criminal justice system to be effective, the community must have confidence in it. I will take steps to enhance the credibility of the criminal justice system by increasing accessibility of the Office of the Director of Public Prosecutions to the public and assisting them to understand the processes involved. To this end I will rewrite and expand the ODPP Prosecution Policy and Guidelines, create an ODPP website, establish a Victims' Liaison Committee and contribute to community education through all available resources and opportunities.

#### ACKNOWLEDGEMENTS

The Office has continued to maintain the high standard of performance that it and the community expects. The dedication and professionalism of all the staff has been outstanding. What we have achieved is due to the efforts of all staff employed in the Office. I wish to publicly acknowledge their efforts and thank them for their work and support. I thank the Executive of the Office - Pauline Barnett, Managing Solicitor; Geraldine Davison, Managing Prosecutor and Ted Clark, General Manager. They have worked tirelessly throughout the year to ensure that the demands upon the Office have been met.

Finally, I take this opportunity to acknowledge the splendid contribution to the criminal justice system made by the first South Australian Director of Public Prosecutions, Mr Paul Rofe QC. Paul was a fearless prosecutor who regularly sparked public interest in difficult and complex policy issues. He was an excellent trial lawyer and a man of great compassion and integrity. South Australia was well served by his thirty-year career in the public service of the State.



## ACHIEVEMENTS 2003–04

In the year under review the Office delivered its vision of providing the people of South Australia with an independent and effective criminal prosecution service that was timely, efficient and just. The exceptional work of each of the dedicated teams within the Office culminated in the following outcomes.

Some of the major achievements were:

### PLEAS

*R v Hender* - In February 2004, Kevin Hender pleaded guilty to the murder of a 15 year old schoolgirl. The victim went missing from the vicinity of the Munno Para Shopping Centre on 3 January 2003. Her partly clad body was found later that evening beside the driveway to a property at One Tree Hill. She had been strangled, and forensic material recovered from her body suggested she had been sexually interfered with.

Despite widespread publicity, this crime went unsolved until July 2003. On 16 July 2003, police took a voluntary buccal swab from Mr Hender, who was sampled because he was associated with the victim's family through school football. Later that day, realising that he would be apprehended once his buccal swab was tested, Mr Hender drove to a country location where he made a clumsy suicide attempt. When this was unsuccessful, he rang police and confessed to the murder. The DNA extracted from Mr Hender's buccal swab matched the DNA found on the victim's body. Flecks of paint recovered from the victim's body were also matched to paint from Mr Hender's driveway.

During sentencing submissions, there were several areas of factual dispute between the prosecution and defence. The sentencing judge resolved those disputes in favour of the prosecution. Mr Hender was sentenced on the basis that after an act of attempted unlawful sexual intercourse with a 15 year old girl, he strangled her, intending to kill her so that she could not tell anyone about the sexual incident.

Mr Hender was sentenced to life imprisonment with a non parole period of 23 years.

*R v Brooks and Birmingham* - In October 2003, Mr Trevor Brooks pleaded guilty to multiple offences which included the rape and attempted rape of four women in separate incidents spanning the years from 1995 to 2000. In August 2003, Mr James Birmingham pleaded guilty to the rape of one of those women, committed jointly with Mr Brooks. Mr Brooks and Mr Birmingham were strangers to their victims. In each case, the offences were committed after the offender(s) broke into the victim's home or motel room when the victim was there alone.

The offending went unsolved until December 2000 when Mr Brooks was caught for an offence at a house where he had left behind his DNA on a knife. That DNA profile was run through the forensic database of unsolved crimes, resulting in a match to samples of DNA stored in relation to the offences upon the four women. Given that the victims were unable to identify their attacker(s) in any way, the prosecution cases rested almost exclusively upon the DNA evidence.

In December 2003 the sentencing judge described the offending as "horrific, despicable and cowardly" going on to say that "no words of mine could adequately

paint the picture of the degradation and terror to which you subjected your respective victims”.

Mr Brooks was sentenced to a term of imprisonment of 29 years, 4 months and 10 days with a non parole period of 23 years. Mr Birmingham was sentenced to a term of 11½ years with a non parole period of 9½ years.

*R v Perkins* - In August 2003, Mr Perkins pleaded guilty to sexual offences involving three intellectually disabled boys, one of those boys being under the age of 12 years. The offences were committed over a period of time from 1987 to 1991.

Mr Perkins obtained access to the three boys as a result of volunteering to drive the school bus and teach woodwork at an Adelaide school. The offending occurred at Mr Perkins’ home and in the school woodwork shed. Two of the victims were so intellectually disabled that they were unable to give statements or speak for themselves.

The prosecution case relied upon the evidence of one intellectually disabled victim who was himself sexually abused and who had witnessed sexual abuse upon the other boys. The police found naked photos of the boys taken by Mr Perkins and a video showing the abuse of one of the boys. The offending was aggravated by the fact that Mr Perkins arranged for other adults to have access to the boys for their own joint sexual gratification.

In September 2003 Mr Perkins was sentenced to imprisonment for 10½ years with a non parole period of 6 years. Mr Perkins applied for Leave to Appeal against his sentence. Leave to Appeal was refused.

*R v Rust* - Mark Rust pleaded guilty to the murder of Maya Jakic on 12 April 1999 at Payneham and the murder of Megumi Suzuki at Cumberland Park on 3 August 2001. He also pleaded guilty to a series of sexual offences; common assault and gross indecency on 16 August 2001 at Rose Park and indecent behaviour at Norwood on 16 August 2001.

He was sentenced to life imprisonment with no non parole period for the murders and a term of 12 years imprisonment with no non parole period for the sexual offences. Justice Nyland declined to set a non parole period on the basis of the gravity of the offending and the circumstances of each of the offences, the prior criminal record of Mr Rust and the fact that he was on parole at the time of some of the offending.

In addition to the sentences Mr Rust was declared incapable of controlling his sexual instincts and an order was made detaining him in custody until further order.

## TRIALS

*R v Burgess and Matthews* - in August/September 2001 David Key, Michelle Burgess and Kevin Matthews were arrested and charged with the murder of Carolyn Matthews, a mother of three, who was murdered in her West Lakes home in July 2001. This Office became involved with the matter from the very inception of court proceedings working closely with major crime investigators and preparing the prosecution case and suggesting further avenues of police investigation and enquiries.

After an oral committal held in December 2002 the accused were committed for trial to the Supreme Court. On the eve of the trial which commenced at the end of July 2003, David Key pleaded guilty and undertook to give evidence for the Crown. The trial involved the calling of numerous witnesses, civilian, police and experts, along with the presentation of voluminous quantities of financial materials, intercepted telephone calls and telecommunication data, all of which was made possible as a result of cooperation and collaboration of members of this Office and SAPoL.

Burgess and Matthews were convicted after a trial that ran for just over two months. Since their conviction, Burgess and Matthews have filed appeal notices and it is expected that their appeal hearings will be heard later this year.

*R v Bunting and Wagner (Bodies in the Barrels)* - This trial commenced in March 2002 with legal argument. The jury empanelled in October 2002 returned their verdicts in relation to John Bunting and Robert Wagner on 8 September 2003. Bunting was found guilty of 11 counts of murder and Wagner was found guilty of seven counts, having already pleaded to three counts of murder. This concluded a trial by the jury that had lasted for approximately 12 months and during which 230 witnesses were called to give evidence. The new technological court had been utilised and was of great assistance in dealing with the 1716 exhibits that were tendered.

This trial was the culmination of four years of exhaustive and meticulous preparation by the dedicated group of lawyers, social workers and administrative staff. As at the time of publication, Leave to Appeal by Bunting and Wagner has been refused by a single judge. Both accused have filed a Form 7 application requesting the Court of Criminal Appeal grant leave. That application is pending.

*R v Collie and Collie* - Garry and Samantha Collie were charged with the double execution style murder of Leila Hoppo and John Powers in the deceased's home at Parafield Gardens in January 2002. The relationship between Mr Collie and the deceased involved drug and gun transactions. The trials of Mr and Mrs Collie were severed by the trial judge who ruled that it would be unfair to Mr Collie to have his trial held at the same time as the trial of his wife. Mr Collie's trial involved the calling of numerous witnesses and telephone records to show his whereabouts at critical times.

The jury convicted Mr Collie. Mr Collie was sentenced to life imprisonment with a non parole period of 30 years. The trial for his wife will be listed after his appeal has been finalised.

*R v Encheff* - Dragni Encheff was charged with the murder of his sister-in-law at Virginia in October 2002. The motive for the shooting was an ongoing family dispute about the accused's mother-in-law's will. The case was circumstantial and included telephone records and ballistics evidence.

As the accused's wife was very ill her evidence was taken pursuant to Section 34J of the *Evidence Act 1929* by video prior to the trial and played to the jury. Mr Encheff was convicted and is currently awaiting sentence.

*R v Evans* - Stephen Evans was charged with murdering his defacto, Lynn Luxton, in March 2003. Ms Luxton had sustained a brain injury as a child and was very dependant on the accused. Ms Luxton had been awarded \$1.3 million as compensation which was administered by the Public Trustee. The motive for the murder was greed and the desire to obtain a substantial financial benefit.

The six week trial was conducted in Port Augusta (circuit) and during the trial nearly one hundred witnesses gave evidence.

Mr Evans was convicted of murder. Mr Evans was sentenced to life imprisonment and received a non parole period of 25 years.

#### COURT OF CRIMINAL APPEAL

*R v Payne* - Jarrod Payne was convicted of causing the death by dangerous driving of Abigail Ralph, a nine year old girl. He was sentenced in February 2004 to a term of imprisonment of three years with a non parole period of 18 months.

The Director applied to the court to use the sentencing guidelines provisions under section 29A *Criminal Law (Sentencing) Act 1988*. The provisions allow the Court of Criminal Appeal to provide assistance to judges who must sentence offenders for these offences. This was the first application under the legislation that came into effect in 2003. The other parties who appeared included the Attorney-General, Victim Support Services, Offenders Aid and Rehabilitation Services, Legal Services Commission and Aboriginal Legal Rights Movement.

A Full Bench of five judges sat to determine the application for guidelines and the Leave to Appeal. The court declined to establish a sentencing guideline and to increase the penalties to be imposed. The court did however make some general remarks by way of guidance and explanation for sentencing judges.

Despite the fact that the court found that the sentence imposed on Mr Payne was moderate, it found that this was not a case that warranted interference. In July 2004 the court in accordance with principles governing Crown Appeals, refused application for Leave to Appeal.

*R v McKelliff (Conviction)* - Terry McKelliff was convicted of possessing methylamphetamine and LSD for sale. The appellant sought an order excluding evidence at his trial. He challenged a ruling made by the trial judge during the course of his trial, that a general search warrant used by police officers who searched his premises was validly issued.

This challenge was a wide ranging assault on the general search warrants issued to police in South Australia. The court rejected all the criticism made in respect of the nature of the warrant and the issuing procedures adopted by the Deputy Commissioner of Police.

*R v Blayney and Blayney (No 2) (Conviction)* - The appellants were brothers who were convicted of raping a severely intoxicated 18 year old woman. The victim was so intoxicated as to be in a stupor and in that condition they had sexual intercourse with her. The main issue on appeal was consent or lack thereof.

Gray J with whom Sulan J agreed, found that the Trial Judge had properly directed the jury on this issue. The court rejected the other criticisms of the summing up.

*R v Loader (Conviction)* - Michael Loader was convicted of the murder of two men whose bodies were discovered on the side of a dirt road near Wistow in December 2000.

Mr Loader denied killing them and claimed to have no knowledge of the circumstances in which they died.

The main ground of appeal centred on Mr Loader's behaviour after the killings, namely the disposal of the victims' bodies and creating an impression that the victims were still alive and the lies told by him. The argument centred on the use the jury could make of this conduct. The court were of the view that the directions given by the learned Trial Judge were appropriate.

#### HIGH COURT

*R v A and M (Conviction)* - This was an appeal to the High Court by two youths convicted of murder. The offence arose out of a failed attempt to rob two men of a mobile phone near the Maid & Magpie Hotel.

The appeal involved the interpretation of the recently created offence of statutory murder, and clarification of the law of causation as it is applied to that offence. By a 5:1 majority the court dismissed the appeal.

This decision provides clarification of the elements of the offence, and will be useful in determining when the charge may be appropriately used in the future.

*R v Kamleh (Conviction)* - In April 2003, Leave to Appeal to the High Court was granted to Kamleh. Kamleh was convicted of a double murder committed in North Adelaide in April 2000. Since the end of the financial year (August 2004) this appeal was heard by the Full Court of the High Court. The decision has been reserved.

#### RESOURCES

The year commenced with the Office being under considerable pressure because of inadequate resourcing. The Office was able to successfully negotiate for an increase in revenue to enable it to properly discharge its functions. With the assistance of the Attorney-General the Office was able to secure an additional \$1.5 million in recurrent funding. The increase in resources has enabled additional staff to be employed and has provided an opportunity to conduct a review of the Office's functions and procedures. This review will ensure that the operational efficiency of the Office is maximised.

#### RECRUITMENT

Since 1 July 2003 the Office has employed 16 additional staff including new legal, witness assistance and administrative staff.

For the new legal staff their experience ranges from 15 years to 2 years post admission. Given the number of new staff, most of whom are inexperienced in criminal prosecution work, it was considered essential to review the solicitor induction program. The Senior Solicitors developed a program whereby new solicitors are given an opportunity to deal with a small number of files including committal files, general files, bail reviews, occasionally junior in a short trial and do some court appearance work, attend introductory continuing legal education seminars on office methods and procedures etc, before being placed into a

general practice with a large number of files. This induction program has been successful in more effectively orienting new staff to the prosecution process.

#### IMPROVED CASE MANAGEMENT SYSTEMS - IJP PROSECUTIONS CASE TRACKING

During 2003-04 the Office continued with the development of an improved information technology system - IJP Prosecutions Case Tracking. The project is the first of a number of projects to be developed under the framework of the Integrated Justice Program (IJP).

The Integrated Justice Program provides the vehicle for business process reform and improvement that will provide a strategic and cost effective approach to modernise the computerised and manual components of the criminal justice system. IJP is a program of continuous improvement which seeks to deliver and support improvements in the efficiency and effectiveness of the criminal justice system on an ongoing basis. Of particular interest to the Office is the linking of processes and systems across police, prosecutions and courts.

The development of IJP Prosecutions Case Tracking was commissioned by Office in 2003. IBM Global Services and Justice Technology Services undertook the development work, with the assistance of a small project team from the Office. The system was implemented to a group of pilot users in Office in June 2004, and will be extended across the office in 2004-05.

IJP Prosecutions Case Tracking has built links with systems within SA Police, and the Court Outcomes systems available to the Justice Information System (JIS). It enables the recording of information about prosecution cases handled by the Office, eliminating duplicate data recording and standardising the recording of offences across agencies.

The second phase of IJP Prosecutions, Case Management, has commenced building on IJP Prosecutions Case Tracking. This new project will see better management of cases and information through management reporting, scheduling and notification of events. Links with Courts will be strengthened and the links with SAPol systems enhanced. Improvements in business processes throughout Office are expected to follow as a result of the introduction of the new system.

#### SUMMARY

While the past twelve months have been challenging and the Office has at times received adverse publicity, the above list of achievements clearly demonstrate the inherent strength of the Office and the skills possessed by its staff. Above all else the staff have continued to provide the people of South Australia with an efficient and effective prosecution process.

In retrospect, the last twelve months will be seen as the commencement of a new chapter in the Office's history.

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## ORGANISATIONAL PROFILE

### MISSION

To provide the people of South Australia with an independent and effective criminal prosecution service which is timely, efficient and just.

### VISION

The Director and staff are committed to providing a criminal prosecution service which:

- ※ applies the highest ethical and professional standards instituting, and where necessary terminating proceedings, without fear or favour in order to provide public confidence in the administration of justice within South Australia;
- ※ is recognized for its independence, professionalism and standards of excellence;
- ※ endeavors to deal with victims of crime with sensitivity and respects their special needs; and
- ※ strives for excellence, efficiency and effective communication in its work with police, the courts and other entities within the criminal justice system.

### CORPORATE VALUES

The values which provide a framework for the functions within the Office are:

- ※ the highest standard of ethical and professional conduct, objectivity, honesty and sensitivity;
- ※ full public accountability for the quality of service provided by the Office and for the administration of public funds;
- ※ a commitment to excellence by regular review and continuous improvement of its performance;
- ※ a commitment to the promotion of competence and professionalism in staff through training and continuous staff development, recognising that staff are our most important resource; and
- ※ sensitivity to and understanding of the needs of victims and witnesses.

### FUNCTIONS OF THE DIRECTOR

The functions of the Director are specified in the *Director of Public Prosecutions Act 1991*. They are to:

- ※ lay charges of indictable or summary offences against the law of the State;
- ※ prosecute indictable or summary offences against the law of the State;
- ※ claim and enforce, either on behalf of the Crown or other persons, civil remedies that arise out of, or are related to, prosecutions commenced by the Director;
- ※ take proceedings for or in relation to the confiscation of profits of crime;
- ※ institute civil proceedings for contempt of court;
- ※ enter a *nolle prosequi* or otherwise terminate a prosecution in appropriate cases;
- ※ grant immunity from prosecution in appropriate cases;
- ※ exercise appellate rights arising from proceedings of the kind referred to above;

- \* carry out any other function assigned to the Director by any other Act or by regulation under this Act;
- \* do anything incidental to the foregoing.

## STAKEHOLDERS

The key stakeholders for the Office are the South Australian Parliament, the judiciary, victims, witnesses, SA Police, the Courts Administration Authority, Department for Correctional Services, accused persons and others in the criminal justice system. The Office continues its support to the key stakeholders and the criminal justice system by representation on various committees, steering groups and working parties. A list of representatives on external committees and steering groups is reported in Appendix B (p 47).

## STRATEGIC FOCUS

During the financial year the Executive, Management Committee and nominated experienced legal and administrative staff were co-opted to undertake a review of the Office's strategic plan (2004-06). This process was commenced in late 2003 and will be completed by the end of 2004. As a result of this process the Office determined that the following were the key result areas for 2004. Draft goals and strategies to achieve those key results were also developed.

The determination of performance measures/indicators for the key result areas will be completed by early 2005. Following this phase business plans and relevant outcome measures will be developed for each of the sections within the Office.

The key result areas were:

### I Ensure an independent and effective criminal prosecution service.

#### *Goals:*

- a) *Provide structures and systems that ensure a timely and efficient prosecution service.*

#### *Strategies:*

- \* *Continuously evaluate and improve the standards for criminal prosecutions.*
- \* *Ensure that relevant time measures are achieved.*
- \* *Improve the timeliness and quality of briefs.*
- \* *Develop solutions in partnership with key stakeholders to improve efficiencies.*
- \* *Ensure existing performance measures are appropriate.*
- \* *Continue to build greater integration of electronic information systems with key stakeholders.*

- b) *Uphold professional and legal ethical standards.*

#### *Strategies:*

- \* *Develop and implement benchmarks for standards of practice within the Office.*
- \* *Recognise and deliver relevant services to victims and witnesses.*



- \* *Develop and promote accountability and efficiency in the use of resources.*
- \* *Review and improve systems, policies and procedures within the Office.*
- \* *Ensure the highest professional standards for the Office by exhibiting the highest levels of integrity, fairness and objectivity.*

2 Work co-operatively with Government and other key stakeholders to improve the criminal justice system.

*Goals:*

- a) *Contribute to the improvement and reform of the criminal justice system.*

*Strategies:*

- \* *Actively participate in interagency and external committees to improve the criminal justice system.*
- \* *Develop solutions in partnership with other stakeholders to ensure improved efficiency in the criminal court listing system.*
- \* *Initiate and contribute to law reform.*
- \* *Implement appropriate recommendations of reviews and reports into the criminal justice system.*

- b) *Contribute to education and the development of community awareness of the Office and the criminal justice system.*

*Strategies:*

- \* *Deliver effective services to the community and victims and witnesses in accordance with the Witness Assistance Service mission and objectives.*
- \* *Deal with all stakeholders promptly, professionally, efficiently and courteously.*

3 Ensure the most efficient use of the resources (human, physical, financial and technological) provided for the prosecution of criminal matters.

*Goals*

- a) *Ensure that appropriate resources are provided to the Office to continue to adequately provide an effective criminal prosecution service.*

*Strategies:*

- \* *Implement appropriate strategies to ensure that the Office is appropriately funded in line with its strategic direction.*

- b) *Review and implement office systems and structures to ensure the most efficient use of the resources provided.*

*Strategies:*

- \* *Anticipate and respond to the legitimate needs of those involved in the prosecution process.*
- \* *Improve systems for analysing outcomes and evaluating the effectiveness of services.*
- \* *Ensure appropriate risk management strategies are developed and implemented.*
- \* *Integrate Occupational Health, Safety, Welfare and Injury Management practices into the business processes of the Office.*

c) *To recruit, retain and develop quality staff.*

*Strategies:*

- \* *Attract, retain and develop skilled staff in order to meet the present and future needs of the Office.*
- \* *Empower employees to commit to the strategic direction of the Office.*
- \* *Undertake a review of and implement adequate performance management processes.*
- \* *Develop an integrated plan for performance management and professional development activities.*
- \* *Acknowledge the quality and capability of staff in determining the Office's reputation and credibility.*
- \* *Place high value on excellence, innovation, efficiency and effectiveness of staff.*

d) *Ensure that the performance indicators adequately measure the appropriate use of financial resources of the Office.*

*Strategies:*

- \* *Improve the method of planning, budgeting and reporting on performance.*
- \* *Continually review, evaluate and improve systems, policies and procedures.*
- \* *Allocate resources according to priorities.*
- \* *Increase efficiency through improved technology and information systems.*

#### LEGISLATIVE FRAMEWORK

The following legislation was relevant to the legislative, professional, administrative and industrial requirements and obligations for the operation of the Office during the year.

These Acts may be accessed via the South Australian Government's SA Central web site ([www.sacentral.sa.gov.au/government/parliament](http://www.sacentral.sa.gov.au/government/parliament)).

*Bail Act 1985*  
*Controlled Substances Act 1984*  
*Criminal Assets Confiscation 1996*  
*Criminal Law (Forensic Procedures) Act 1998*  
*Criminal Law (Sentencing) Act 1988*  
*Criminal Law (Undercover Operations) Act 1995*  
*Criminal Law Consolidation Act 1935*  
*Director of Public Prosecutions Act 1991*  
*District Court Act 1991*  
*Equal Opportunity Act 1984*  
*Evidence Act 1929*  
*Freedom of Information Act 1991*  
*Legal Practitioners Act 1981*  
*Listening and Surveillance Devices Act 1972*  
*Magistrates Court Act 1991*  
*Occupational Health, Safety and Welfare Act 1986*

*Public Finance and Audit Act 1987*  
*Public Sector Management Act 1995*  
*State Records Act 1997*  
*Summary Offences Act 1953*  
*Summary Procedures Act 1921*  
*Supreme Court Act 1935*  
*Telecommunications (Interception) Act 1975 (Commonwealth Act)*  
*Victims of Crime Act 2001*

#### ORGANISATIONAL STRUCTURE

The Director has responsibility for the overall management of the Office. The Director is assisted in this by the Associate Director. The Office structure represents the functional areas of solicitors, prosecutors, Witness Assistance Officers and administrative support staff.

The Solicitor Section provides all solicitor services on the files conducted by the Office. These services include legal advice, committals, arraignments, all matters in the pre-trial stage and after sentencing submissions. The Office has three teams of solicitors who report directly through the senior solicitors to the Managing Solicitor.

The Prosecution Section provides counsel services to the Office in trials, appeals and complex legal arguments. The prosecutors appear in the Magistrates Court and the District and Supreme Courts for trial and the Full Court of the Supreme Court and High Court for appeals. Magistrates appeals are also conducted before single judges of the Supreme Court. The Office has two teams of prosecutors who report directly through the senior prosecutors to the Managing Prosecutor.

The Witness Assistance Service provides services to victims and witnesses. The Witness Assistance Officers report through the Manager Witness Assistance to the General Manager.

The Administrative Support Team provide all administrative services to the Office including secretarial, law clerk, paralegal, reception and rounds. The administrative staff report through the Administrative Manager to the General Manager.

#### MANAGEMENT STRUCTURE

There are two internal committees established to augment the strategic and operational management of the Office.

The *Executive Committee* consists of the Director, Associate Director, Managing Solicitor, Managing Prosecutor and the General Manager. The Executive meets fortnightly and has overall responsibility for the establishment, implementation and evaluation of the strategic direction of the Office. It has final responsibility for policy and will also determine the appropriate response to the important legal issues affecting the Office generally.

The *Management Committee* consists of the Managing Solicitor, Managing Prosecutor, General Manager, Senior Solicitors, Senior Prosecutors, Manager Witness Assistance, Administrative Manager and the Project Manager, IJP Prosecutions.

The Management Committee is chaired by the General Manager and meets monthly. It has responsibility for operational issues including accommodation, information technology, staffing movements, finance proposals, co-ordination of business planning, performance

management and enterprise bargaining issues. On a number of issues, the Management Committee are required to forward proposals to Executive for final approval.

#### EXECUTIVE PROFILES

The profiles of the Executive staff of the Office are:

#### **Wendy Abraham QC** (ACTING) DIRECTOR OF PUBLIC PROSECUTIONS

Graduated from the University of Adelaide 1982 with a Bachelor of Laws (Hons). Admitted as a legal practitioner in December 1982. After a term in private practice she was offered employment in the Crown Prosecutor's Office in 1983 where she continued until July 1992 when she transferred to the newly formed Office of the Director of Public Prosecutions. Appointed as MLS-1 Prosecutor in 1991, and has held the position of Associate Director since 1995. In December 1998 she was appointed Queen's Counsel. Has been acting as Director since May 2004.

*Paul Rafe QC, the Office's first Director, resigned in May 2004.*

#### **Pauline Barnett LLM** MANAGING SOLICITOR

Admitted as a legal practitioner in 1986. A member of the Crown Solicitor's Office from 1985 to 1994 in the Advising Section. For 18 months she was seconded to the Attorney-General's Office as Principal Private Secretary to the Hon C J Sumner MLC from November 1988 until April 1990. In 1994 she joined the Office as an MLS-1 Solicitor and in 1997 she was appointed as Managing Solicitor.

*Acts as solicitor and counsel in the conduct of prosecutions and appeals on behalf of the Director. Manages the Solicitor Section of the Office which includes Adjudications, Opinions, Committals, General Solicitor Section, Fraud Unit, Criminal Assets Confiscations and Drug Court.*

#### **Geraldine Davison LLB, GDLP** MANAGING PROSECUTOR

Graduated from University of Adelaide in 1984 and worked in private practice until 1989. Joined the Crown Prosecutor's Office in 1989 and prosecuted in the District and Supreme Courts until 1996 when commenced managing the Committal Unit. From 1999 to 2003 managed a group of solicitors and concentrated on appellate counsel work. Became Managing Prosecutor in 2003. Extensive trial and appellate experience in the District and Supreme Court.

*Prosecutes major trials in the District and Supreme Courts. Conducts appellate work in the Court of Criminal Appeal and High Court. Responsible for management of the Prosecutor Section and allocation of trial work including briefing to the private profession.*

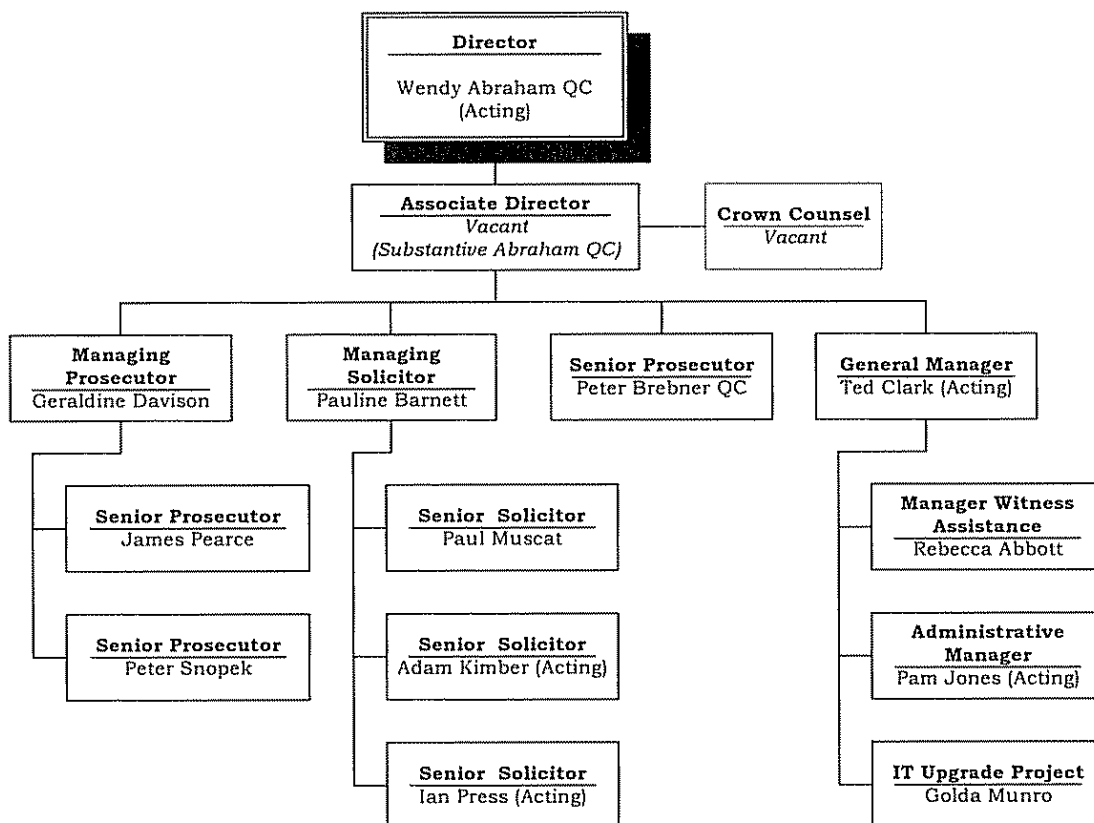
#### **Ted Clark MBA, MPPM** (ACTING) GENERAL MANAGER

Acted in the position of General Manager during the absence of Rosemary Markotic. Came to the Office via five years in a similar position in the Crown Solicitor's Office. During a

25 year career in the public service has been responsible for financial, administration, human resource and business systems management.

*Provides high level management services including strategic and business planning, risk management, financial management, and the provision of comprehensive corporate services to the Office. Also responsible for the executive level oversight of the Witness Assistance Service. Plays a key role in policy development and training and development within the Office.*

### ODPP Organisational Chart as at 30 June 2004



#### CORPORATE GOVERNANCE

Although the Director of Public Prosecutions has statutory independence the Office is a business unit within the Attorney-General's Department of the Justice Portfolio. For administrative purposes the Director, reports to the Chief Executive of the Justice Portfolio. In practical terms this is more of a liaison rather a strict reporting relationship.

The Office's budget is isolated from that of the Department generally, even though it is still formally included within the Department's expenditure, and the Department remains responsible for preparing accounts for audit purposes.

As an associated office of the Justice Department the Office draws on a range of corporate services provided by the Department. The services provided during the past year have included:

- \* payroll functions;
- \* human resource consulting, advice and assistance (also occupational health, safety and welfare and equal employment opportunities);
- \* information technology support;
- \* financial services;
- \* library services.

The Office has a small internal administrative component and therefore relies heavily on the advice and support from the Justice Portfolio Services Division. The Office would like to take this opportunity to acknowledge the Department's role and in particular the Acting Chief Executive, Mr Bill Cossey, and extend our thanks for the ongoing support that he and his staff have provided.

During the year the previous Chief Executive, Kate Lennon left the Department for a position within the newly formed Department for Families and Communities. Again this Office is indebted to Kate for her ongoing support over the years.

#### DIRECTIONS FROM THE ATTORNEY-GENERAL

Pursuant to Section 9 of the *Director of Public Prosecutions Act 1991* there was one direction or guideline given by the Attorney-General to the Director of Public Prosecutions during the financial year.

On 12 August 2003 the then acting Attorney-General issued a direction to the Director of Public Prosecutions pursuant to section 9(2) of the *Director of Public Prosecutions Act, 1991*.

*"I Paul Holloway, Attorney-General, having consulted with the Director of Public Prosecutions, pursuant to section 9(2) of the Director of Public Prosecutions Act 1991, direct the Director of Public Prosecutions to appeal, pursuant to section 352(1)(a)(iii) of the Criminal Law Consolidation Act 1935, to the Full Court against the sentence imposed upon Paul Habib Nemer by Justice Sulan on 25 July 2003, upon the following grounds which have been settled by the Solicitor General, and I further direct that the Director of Public Prosecutions brief the Solicitor General as counsel on the hearing of any proceedings relating to the appeal."*

#### DIRECTIONS TO THE COMMISSIONER OF POLICE

In 2003-04 there were no directions or guidelines given to the Commissioner of Police by the Director of Public Prosecutions.

Since the end of the financial year however one direction has been issued, pursuant to section 11, to the Commissioner of Police. Whenever such a direction is issued, section 11(2) requires that the direction be published in the Director's annual report.

Despite the fact that this direction was issued after the conclusion of the financial year to which this report relates, given the nature of the direction, the requirement of section 11(2) and the obvious intent that the direction be made public, it is appropriate to report the issue of the direction in this annual report.

The terms of the direction were as follows:

*"To the Commissioner of Police:*

*I direct you that when members of the South Australian Police prosecute they are required to do so in accordance with DPP Prosecution Policy and Guidelines. This policy is set out in the document entitled 'Statement of Prosecution Policy and Guidelines' reprint September 2003 (copy attached)."*

A similar direction was issued in 1992 by the then Director of Public Prosecutions, Paul Rofe QC. However, given the recent public discussion relating to prosecutions conducted in courts of summary jurisdiction, it was necessary to re-issue the direction.

The basis upon which decisions are made to prosecute criminal offences and the manner in which those prosecutions are conducted, must be consistent throughout South Australia, regardless of which jurisdiction the offence is to be tried, and regardless of whether the prosecution is conducted by an officer of the Director of Public Prosecutions or a police prosecutor.

#### PERFORMANCE INDICATORS

During 2003-04 the Office received additional funding of \$610 000 (\$110 000 as one-off emergency funding and \$500 000 in recurrent funding). This funding was received part way through the financial year and was used to recruit additional legal and administrative support staff. The Office returned a small surplus which was due to salary savings from vacant positions. This was the result of late notification of the additional funding and the departure of two senior staff (Crown Counsel and Director) during the year.

As a result of successful submissions to Government to accommodate the increased demands on the Office, additional recurrent funding of \$1 000 000 has been secured from the 2004-05 financial year. These funds have been directed to the recruitment of legal staff, a policy and training officer, a witness assistance officer and support staff.

#### ACTIVITY LEVELS

The Office's key performance indicators reflect only the quantity of files finalised by this Office at committal and in the District and Supreme Courts. The number of matters finalised does not reflect the true level of activity as they fail to show the entirety of the work conducted by the Office (eg opinions, adjudications). This quantitative measure also does not reflect the complexity of individual files nor that the work involved in prosecuting individual files varies greatly. In the Bodies in the Barrels murder trial, for example, there were four accused and this has been counted as four files. For the first trial these four files involved extensive preparation over the last four years and required a team of six full time staff. In contrast there are files where there is only one accused and few witnesses and these trials may last for only two or three days. The detail and nature of the other work conducted by this Office is outlined in the reports from the Managing Solicitor and the Managing Prosecutor.

Further, the number of matters handled by this Office is, to a large degree, outside of our control. The number of files received during the year depends on the number of accused charged with offences, and the number of matters referred to this Office.

During 2004-05 the Office will undertake a review of its key performance indicators and outcome measures to ensure the ongoing relevance of these measures to the effectiveness and efficiency of performance in the Office.

#### YEAR IN REVIEW

The overall number of matters finalised by the Committal Unit<sup>1</sup> and the total number of defendant files finalised by the Office<sup>2</sup> were slightly less than anticipated.

A factor relevant to the number of defendant files finalised is that throughout the year, there has been a significant impact on the Office of the unavailability of either judges or courtrooms for trials.<sup>2</sup> During the year a total of 107 trials were deferred, which is more than double the number in the previous year. The notification that a trial has been removed from the list is often only received by the Office the day before the trial was scheduled to commence. There is a significant impact on the Office when late notification is received of matters not proceeding on the listed date. When a matter is deferred and re-listed for trial it is usually some months later, thereby delaying the finalisation of the files.

<b>OUTPUT:</b>	<b>5.3 PROSECUTION SERVICES</b>			
	<b>5.5 PENALTY AND CONFISCATION MANAGEMENT</b>			
<b>Description:</b>	ODPP contributes to these outputs through providing advice to Police, assistance for victims and witnesses, solicitor and counsel services on all matters ultimately heard in the District and Supreme Courts and all matters finalised in the Magistrates Court, as well as administration of confiscation orders issued by the Courts			
<b>Performance Indicators:</b>	<i>Descriptions</i>	<i>Expected activity 2003-04</i>	<i>Actual for 2003-04</i>	<i>Expected activity level for 2004-05</i>
<b>Quantity</b>	Number of matters finalised by the Committal Unit <sup>1</sup>	1400	1347	1400
	Number of defendant files finalised by the ODPP <sup>2</sup>	950	941	950
	Number of clients seen by the Witness Assistance Service <sup>3</sup>	450	700	700
<b>Quality</b>	Percentage of matters committed through the Committal Unit in which the DPP enters a nolle prosequi after committal	<10%	8%	<10%
	Percentage of committed matters which are finalised by a guilty verdict or guilty plea	>70%	75%	>70%
	Percentage of referring agencies who rate the standard of service by the Witness Assistance Service as high	85%	85%	85%
<b>Timeliness</b>	Percentage of trials where the ODPP meets the court timetable requirements for the trial list	95%	93%	95%
<b>Cost</b>	Total Cost	\$8.8m	\$8.6m	\$10.1m

There has been a significant increase in the number of new clients seen by the Witness Assistance Service during the year.<sup>3</sup> The increase of 250 clients (55%) this financial year reflects a 62% increase in clients over the last two years. The additional funding provided by the Victims of Crime Co-ordinator to provide additional support to child witnesses, and the



ongoing focus by the Office on victims and witnesses of crime are reflected in this increase. It is expected that this level of activity will continue in the near future.

## FUTURE DEVELOPMENTS AND CHALLENGES

### ORGANISATIONAL REVIEW

The additional recurrent funding (\$1.5m) is the biggest increase in funding that this Office has received since its formation. It is imperative that this funding be used to maximise its benefit to the Office. Therefore during 2004-05 an organisational review is to be undertaken of the structure, practices, procedures and business systems in the Office. This review will provide the opportunity to revisit the foundation of the Office to ensure that it meets its obligations and responsibilities in the most efficient and effective manner.

An experienced consultant will be engaged to undertake the process of the review and to assist in the implementation of any appropriate recommendations.

## BUSINESS OPERATIONS

The Office provides statistical information on the number of completed matters during the year. The data below on quantity of files completed, does not reflect the substantial variation in complexity of files nor the resource implications on the Office of any particular matter.

During the year there was a decrease in the number of matters finalised through the District and Supreme Courts. This decline in the number of matters completed is attributable in part to matters being pulled from the trial list due to the unavailability of court rooms and judges.

### STATISTICAL INFORMATION

The following tables should be read in conjunction with the Glossary (Appendix F - p 54).

#### District and Supreme Court Prosecutions (Adelaide & Circuit) 2003-04

	2003-04		2002-03	2001-02	2000-01
Convicted	701	74.5%	791	810	654
Nolle Prosequi*	99	10.5%*	118	101	93
Not Guilty	62	6.6%	56	48	59
White Paper	46	4.9%	65	114	68
Other	33	3.5%	16	15	24
<b>TOTAL FINALISED MATTERS</b>	<b>941</b>	<b>100%</b>	<b>1046</b>	<b>1088</b>	<b>898</b>

#### Of Total Nolle Prosequi\*

Committal Unit Involved*	72	72.7%	7.7%	94	80	70
No Committal Unit Involvement*	27	27.3%	2.9%	24	21	23

### GENERAL COUNTING RULES

#### Matter

An accused charged with an offence or series of offences upon the same Information.

- Note:*
- 1 Where a single Information contains charges against several accused, each accused counted
  - 2 Where an accused is charged upon separate unrelated Informations, each Information counted (subject to note 3)
  - 3 Where an accused charged or committed on separate Informations, that are subsequently joined upon a single Information, counted as one only (subject to note 4)
  - 4 Where an accused charged or committed on one Information and subsequently charged on separate Informations, or separate trials ordered, each trial is counted separately
  - 5 Where trial proceeds to conviction, but retrial ordered on appeal:
    - a) from time that Director elects to proceed with retrial, counted as a new matter
    - b) if a Nolle Prosequi is entered immediately, not counted as a new matter  
[NB: where appeal is instituted, original prosecution is not altered, irrespective of appeal outcome]
  - 6 A single matter will sometimes include multiple trials/proceedings. For example, where a trial results in a mistrial, hung jury or is otherwise inconclusive and relisted. These are counted as one matter in accordance with the ultimate outcome. But, each trial is included in trial outcomes. Hence total trial and other outcomes may exceed total matters finalised

## TREND DATA FOR MATTERS LISTED FOR TRIAL IN ADELAIDE

**Outcomes of Adelaide matters that were Listed for Trial**

	2003-04	2002-03	2001-02	2000-01
<i>Proceeded to Trial</i> #	238 34.7%	230	204	260
Plea of Guilty	112 16.4%	155	144	104
Nolle Prosequi	49 7.2%	51	54	29
Bench Warrant	10 1.5%	9	7	10
Removed from List	249 36.4%	184	161	164
Other	27 3.9%	27	25	26
<b>Total Finalised</b>	<b>685 100%</b>	<b>656</b>	<b>595</b>	<b>593</b>

**Outcomes of matters that were listed and proceeded to trial#**

<i>Guilty</i>	154 64.7%	119	119	146
<i>Not Guilty</i>	43 18.1%	43	35	43
<i>Nolle Prosequi</i>	6 2.5%	7	4	14
<i>Not Guilty (mentally incompetent)</i>	3 1.3%	3	3	10
<i>Hung Jury</i>	6 2.5%	7	9	7
<i>Mistrial</i>	11 4.6%	15	8	12
<i>Other</i>	15 6%	36	26	28
<b>Total #</b>	<b>238 100%</b>	<b>230</b>	<b>204</b>	<b>260</b>

## TREND DATA FOR MATTERS LISTED FOR TRIAL FOR CIRCUIT

**Outcomes of Circuit Matters that were Listed for Trial**

	2003-04	2002-03	2001-02	2000-01
<i>Proceeded to Trial</i> #	38 48.1%	29	35	25
Plea of Guilty	23 29.1%	23	33	30
Nolle Prosequi	5 6.3%	8	4	7
Bench Warrant	2 2.5%	0	1	1
Removed from List	6 7.6%	8	18	24
Other	5 6.3%	3	5	9
<b>Total Finalised</b>	<b>79 100%</b>	<b>71</b>	<b>96</b>	<b>96</b>

**Outcomes of matters that were listed and proceeded to trial**

<i>Guilty</i>	16 42.1%	17	19	12
<i>Not Guilty</i>	19 50.0%	11	11	8
<i>Nolle Prosequi</i>	1 2.6%	1	0	0
<i>Not Guilty - mentally incompetent</i>	0 0.0%	0	0	1
<i>Hung Jury</i>	0 0.0%	0	1	2
<i>Mistrial</i>	2 5.3%	0	2	2
<i>Other</i>	0 0%	0	2	0
<b>Total#</b>	<b>38 100%</b>	<b>29</b>	<b>35</b>	<b>25</b>

## TREND DATA FOR OUTCOMES OF THE COMMITTAL UNIT

	2003-04		2002-03	2001-02	2000-01
<b>Adjudications Finalised</b>	1364		1521	1315	1207
Charge Major Indictable	1165	85.4%	1174	1027	950
Charge Minor Indictable	151	11.1%	255	228	159
Charge Summary Offence	30	2.2%	62	40	47
Do not lay charges	8	0.6%	27	17	32
Other	10	0.7%	3	3	19
<b>Total</b>	<b>1364</b>	<b>100%</b>	<b>1521</b>	<b>1315</b>	<b>1207</b>

	2003-04		2002-03	2001-02	2000-01
<b>Opinions Finalised</b>	329		334	372	439
Charge Major Indictable	108	32.8%	104	134	100
Charge Minor Indictable	35	10.6%	37	48	56
Charge Summary Offence	23	7.0%	39	45	52
Do not lay charges	73	22.2%	84	77	117
Other	90	27.4%	70	68	114
<b>Total</b>	<b>329</b>	<b>100%</b>	<b>334</b>	<b>372</b>	<b>439</b>

**Summary of Committal Unit Outcomes 2003-04**

	2003-04		2002-03	2001-02	2000-01
Committed for Sentence	115	8.5%	113	116	108
Committed for trial as charged	617	45.8%	663	659	566
Resolved Summarily	331	24.6%	380	434	321
Tender No Evidence (TNE)	215	15.9%	207	234	205
TNE - to Drug Assessment Aid Panel	13	1.0%	16	16	11
Other	56	4.2%	132	127	109
<b>Total</b>	<b>1347</b>	<b>100%</b>	<b>1511</b>	<b>1586</b>	<b>1320</b>

## TREND DATA FOR NEW REFERRALS TO THE WITNESS ASSISTANCE SERVICE

Offence Type	2003-04		2002-03	2001-02	2000-01
Abduction	3	0.4%	1	0	0
Assault	22	3.1%	20	21	16
Assist Offender	1	0.1%	0	0	0
Attempted Murder	20	2.9%	21	11	9
Criminal Trespass (Burglary)	111	15.9%	104	76	55
Dissuade Witness	4	0.6%	3	0	0
Drug Related Offences	7	1.0%	0	0	0
Endanger Life	11	1.6%	5	14	14
Fraud	2	0.3%	2	0	8
Grievous Bodily Harm	14	2.0%	10	13	6
Larceny	4	0.6%	3	6	1
Major Crash	48	6.9%	50	51	59
Murder	33	4.7%	42	43	45
Other/Miscellaneous	5	0.7%	1	2	8
Robbery	97	13.9%	50	45	42
Sex	99	14.1%	134	89	87
Sex (Child)	133	19.0%	197	169	125
Sex (Criminal Trespass)	20	2.9%	8	15	7
Sex (pre 1982 offences)	32	4.6%	0	0	0
Threaten Life/Threaten Harm	34	4.9%	32	28	15
<b>Total</b>	<b>700</b>	<b>100%</b>	<b>683</b>	<b>583</b>	<b>497</b>

## REPORT FROM THE MANAGING SOLICITOR

The Solicitor Section provides all solicitor services on the files conducted by the Office. These services include giving legal advice to police on their practices and procedures, legal advice as to the sufficiency of evidence for trials, committals, bail reviews, arraignments, all matters in the pre-trial stage and after sentencing submissions. In addition the section performs a substantial amount of counsel work for the Office including Magistrate Appeals, Leave to Appeal applications in the Supreme Court, disputed facts hearings prior to sentence, junioring in trials, appearing as counsel in trials and judicial review proceedings. The Section is also responsible for preparing responses to the Attorney-General in relation to queries from members of the public, victims and convicted persons as well as responding to Parliamentary questions. Finally the section has a significant role to play in training of external stakeholders. Staff regularly attend training courses for SAPoL both Detective Training Courses and more informal gatherings at Local Service Areas in relation to specific problems. In addition they lecture at Yarrow Place and at TAFE. The section is also responsible for work experience for law graduates during their PLT training.

The challenges facing the Office have arisen from a variety of factors but in particular from inadequate resourcing and from an unprecedented level of public scrutiny arising from the controversy surrounding the Nemer decision. Solicitors have regularly carried file loads approximately 30-50% higher than their interstate counterparts. The additional funding made available by government should substantially alleviate the pressures placed on the Section by providing more solicitors to assist with the workload.

The level of supervision necessary for new and inexperienced staff is very high. As a consequence of the inexperience within the Solicitor Section and the increase in staff given the additional funding, the Office piloted a third line manager position for a six month period. The value of the structure was recognised as being essential to the effectiveness of the Office and a permanent position was created at the end of the pilot. The increased staff numbers and level of management within the Solicitor Section should serve to address the immediate needs of the Section and assist the overworked solicitors to regain the necessary life/work balance needed for a healthy lifestyle.

The Section introduced two very popular initiatives with staff in the year under review. Two locum positions were created; a trial locum and a leave locum. These two positions are used to cover the practices of solicitors who are on annual leave or who are prosecuting trials to enhance their professional development. These two positions ensure that busy practices are not left unattended for the relevant period, as two skilled practitioners monitor these practices to ensure that the incumbent is free to concentrate on trial work or to take recreation leave.

I would like to take this opportunity to thank the three MLS1 solicitors (Paul Muscat, Adam Kimber and Ian Press) for the excellent management of their teams of solicitors and their outstanding legal skills in this difficult year.

The Solicitor Section is confident it can build on all the hard work of the last twelve months and is optimistic about the challenges ahead. A summary of the individual areas within the Solicitor Section follows.

### ADJUDICATION SERVICES

Adjudication services are provided by the Committal Unit of the Office. The Committal Unit has continued the formal arrangement with SAPoL Criminal Justice Sections in the metropolitan area, to adjudicate charges to be laid in court after police have arrested a person on a major indictable offence. In such cases, arresting police formulate draft charges and

forward a brief to the local Criminal Justice Section (Adelaide, Sturt, South Coast, Port Adelaide, Holden Hill, Elizabeth) where a police prosecutor checks the brief to ensure there is evidence to provide the consideration of major indictable charges. The file is then referred to the Committal Unit who consider the appropriateness of the draft charges. If necessary, the charges will be redrafted. The Criminal Justice Section is then advised what charges, if any, should be laid in court. This process is undertaken before the defendant's first appearance in the Magistrates Court which will occur if bail has been refused, on the morning after arrest. Thus the decision as to the appropriate charges must be made on the basis of the limited information which is available at that stage. Charges may be reviewed at a later stage once all the evidence has been received.

During the year there were 1364 adjudications finalised. At this formative stage of the prosecution process 181 of these matters were diverted from the superior courts by the laying of minor indictable or summary charges which are then finalised in the Magistrates Court.

#### LEGAL ADVICE/OPINION

During the year the Office provided advice as to the appropriate charges, if any, to be laid in 329 cases. This represents a small decrease in the number from last year. Of the 329 cases, 108 were determined to be major indictable offences. It was determined that in the balance of cases (221) that the appropriate charges could be laid in the Magistrates Court or that no charges at all should be laid.

The Office receives a large number of requests from SAPoL for legal advice, predominantly as to the appropriate charges, if any, to be laid in cases investigated by police. Advice is provided after an examination of the complete police brief, containing all statements and an account of any interview with the alleged offender. If an examination of the brief reveals that further investigation is required, the brief will ordinarily be returned to police. A solicitor then evaluates the available evidence to determine, in accordance with the ODPP Prosecution Policy and Guidelines, whether and which charges should be laid. Advice is then provided to SAPoL in writing.

SAPoL's Prosecution Policy Number 7 prescribes the nature of matters which should be referred to the Office for advice:

*Proceedings which are of unusual importance, significance or sensitivity or involve a witness the subject of the Witness Protection Act or involve serious crime or complex issues of law or fact are to be referred to the DPP, through the Officer in Charge, Prosecution Services Branch, for information, assistance and/or advice. All such matters are to be accompanied by a covering report outlining the reasons for referral to the DPP*

This Policy further provides a general discretion about such referrals but requires certain categories of cases to be referred. These include in particular:

- 1 Cases involving a potential conflict of interest for SAPoL to prosecute, such as offences allegedly committed by close friends or relatives of a SAPoL employee and also where offences have allegedly been committed by persons with a high public profile, such as Members of Parliament;
- 2 Major and/or complex drug offences;
- 3 Any case where a Court has invited/suggested such a referral;
- 4 Sexual offences where a Court conducting a committal has ordered that a complainant be called to give evidence during a committal. (Referrals of this nature will only come from SAPoL Prosecution Units in the country, as the DPP conducts such proceedings in the suburban courts in any event);

- 5 *Sexual offences involving child victims where:*
  - a) *it is uncertain whether criminal charges should be laid,*
  - b) *admissibility of evidence is in question,*
  - c) *pressure to prosecute is being applied by parents, guardians, other interested parties, or government departments, and it is believed by SAPoL prosecutors that there is insufficient evidence to proceed,*
  - d) *SAPoL prosecutors believe that there is little or no reasonable prospect of securing a conviction despite the statements showing a prima facie case;*
  - e) *leave has been granted during a committal hearing to call the child to give evidence. (Again, this will only be required in country areas as in the suburban courts the DPP Committal Unit would be conducting the committal in any event.)*
- 6 *Any case in which significant difficulties are experienced during committal hearing, including abuse of process allegations (Again, this is relevant only to committals in country courts.)*
- 7 *Any case involving a witness for the prosecution who is subject to the Witness Protection Act 1996.*
- 8 *Any other matter deemed proper for referral by the Officer in Charge of the SAPoL Prosecution Services Branch including, in particular where there is an actual or possible conflict of interest, or where an inappropriate approach has been made, or unwelcome pressure applied, to compromise a SAPoL adjudicator, prosecutor, other police officer, or a lawful process.*

In practice many other cases are also referred by SAPoL for advice including where an alleged offender has not been arrested but instead has been reported on a charge of a major indictable offence. In the case of persons arrested and charged with major indictable offences, the file goes through the adjudication process outlined above in this Report under "Adjudication Services". This ensures at the outset that appropriate charges are laid and that cases are identified which can be appropriately dealt with by less serious charges in the Magistrates Court or which ought not to proceed at all.

In cases where it is likely to depend on the assessment by a jury of the credibility of a witness, the ODPP solicitor preparing the advice will meet with the witness to assess his or her ability to give evidence. This is particularly important in sex cases where it is usually critical to the outcome that the jury unreservedly accepts the truthfulness and accuracy of the victim's account. An early meeting with the complainant allows the prospects of conviction of a case to be properly assessed by an experienced prosecutor. This is also an opportunity for victims in sex cases to be introduced to the prosecuting authority, to be informed about the legal process and to meet with an ODPP Witness Assistance Officer, who can help the witness deal with the prosecution process. The Witness Assistance Officer can also assist the victim to understand the reasons if the decision is made not to proceed. In some cases, information and documentation provided to victims in sex cases during such meetings assists them to decide that they do not wish to take part in the prosecution process. Whilst in recent years there have been developments in the criminal justice system which improve the position of victims of sex offences, it remains an unfortunate fact that such cases have a lower rate of conviction, both Australia wide and in South Australia, than cases of non-sex offences. The provision of advice to police, prior to the charging of alleged offenders with sex offences, assists victims of these offences to know at an early stage whether a case will proceed and to understand the reasons for these decisions.

The Office also provides legal advice in relation to major fraud cases through the Fraud Unit of the Solicitor Section. Advice is given at an early stage in some matters to assist SAPoL in determining how the matter should proceed, what further investigations are necessary to ensure that the matter is adequately prepared and the appropriate charges are laid. A close liaison is then maintained throughout the conduct of the matter and reviewed as necessary.

There is an arrangement with the Major Crash Investigation Section of SAPoL that most vehicular collision cases, in which death or serious injury occur, will be referred to this



Office for advice, prior to the laying of charges. The process ensures that these sensitive matters are adequately examined by experienced staff within the Office to determine the appropriateness of the draft charges. The early referral to the Office allows the victim's family to be referred to the Witness Assistance Service.

#### *IMPACT OF LEGISLATIVE CHANGES*

As a result of the abolition of the time limit for the prosecution of certain sexual offences, a significant number of files involving historical sexual offences have been referred for advice. These files involve complex issues in that they often involve multiple victims and consideration needs to be given to legal issues such as joinder of charges and abuse of process arguments. Careful consideration of the law as it existed at the time the alleged offences were committed is required when determining whether there is a reasonable prospect of conviction, and if so, the appropriate charges to be laid.

The Office has been placed under some pressure by the increased incidence of the use of arrest rather than report for alleged offenders. Once an offender has been arrested court timelines begin to operate which require a considerable amount of work to be accomplished in a short period of time. Given the complexities of these files, the difficulties of proofing the number of victims involved etc, it is considered highly desirable for the prosecution to proceed after most of the preliminary steps are completed. This process is better assisted when a report is made rather than an arrest. The Office's concerns in this matter have been communicated to SAPoL.

#### *COMMITTAL SECTION*

The Office conducts committal proceedings where major indictable offences have been charged in the Magistrates Courts at Adelaide, Holden Hill, Elizabeth, Port Adelaide and Christies Beach. Committal proceedings will also be held where a person charged with a minor indictable offence has elected for a trial by jury. Major fraud case committals are conducted by the Fraud Unit within the Solicitor Section.

During the committal proceedings, the prosecution case is disclosed to the person charged by filing in the Magistrates Court, the statements of witnesses and other materials upon which the prosecution is founded. A copy of the material is provided to the person charged or to his or her legal representatives. Prosecution witnesses will not ordinarily be called to give evidence during committal proceedings but this may occur where a magistrate finds that special reasons exist. If a magistrate finds, on consideration of the statements filed in the Court and any evidence taken, that there is sufficient evidence to put a defendant on trial, the defendant is then committed for trial to the District Court or the Supreme Court. Alternatively, if the defendant pleads guilty to the charge during committal proceedings the magistrate will commit that person to be sentenced in the District Court or the Supreme Court.

During committal proceedings the Office continues to consider the appropriateness of the charges laid upon review of the declarations and other evidence supplied, then identifies and negotiates at this stage to resolve appropriate cases by way of pleas of guilty to appropriate lesser charges which can be finalised in the Magistrates Court. Early intervention by the Committal Unit also identifies matters which, although not finalised by guilty pleas, may proceed on appropriate lesser charges in the Magistrates Court or which should not proceed at all. This ensures that the superior courts are not called upon to deal with criminal cases which may be appropriately dealt with in the Magistrates Courts.

There are still concerns about the time taken for SAPoL to deliver all statements of witnesses in sufficient time to be filed and served in the Magistrates Court in compliance with the court

imposed timeframes. The Office has met with SAPoL to attempt to address ongoing problems with Declaration Officers and this aspect will be monitored in the coming year.

During the year the Committal Unit dealt with the committals of 1347 defendants, a decrease on the previous year. Of these matters, 617 were committed for trial as charged and 115 were committed for sentence to the superior courts. The balance of 615 did not proceed to the superior courts due to the intervention of the Committal Unit (resolved summarily, Tender No Evidence, or referred to Drug Assessment Aid Panel). In addition to the committals handled directly by the Committal Unit, the Fraud Unit and General Solicitor Section of the Office conducted a further 77 committals (major fraud, murders and complicated matters).

During the year a total of 1424 committals were conducted by the Office.

#### GENERAL SOLICITOR SECTION

The General Solicitor Section has responsibility for all files once they are committed for trial in the superior courts. Whilst the Committal Unit assesses the matters prior to committal in the metropolitan area, there are also a significant number of matters that come from country areas where SAPoL has had the conduct of the earlier court appearances. In the absence of the screening and review functions provided by the Committal Unit these files require a more intensive initial assessment. On occasion this results in matters being referred back to the Magistrates Court and appropriate charges being resolved in that jurisdiction.

Upon assuming conduct of the files it is the responsibility of the Solicitor Section to:

- ※ assess all files;
- ※ lay charges that adequately reflect the nature and extent of the criminal behaviour;
- ※ draft an advice on evidence;
- ※ ensure that all matters that are necessary for the proper conduct of the file have been attended to by the investigating officer and if required giving directions to the police to follow up items of evidence;
- ※ attend in the District and Supreme Courts on arraignments, bail applications and directions hearings;
- ※ engage in negotiations with defence that may resolve the matter without the need to go to trial;
- ※ comply with the *Victims of Crime Act 2001* and ensure that appropriate witnesses are referred to the Witness Assistance Service;
- ※ deliver properly prepared briefs to the prosecutor.

A significant number of matters are resolved without the need to go to trial and it is critical that these matters be identified as early as possible. A number of matters are resolved by the Committal Unit (the accused pleads guilty) and committed for sentence to the superior courts. These matters then become the responsibility of the General Solicitor Section. In addition there are many matters that will resolve by way of plea upon an accused being given appropriate advice by his/her solicitor. There are also some prosecutions that are assessed as not being in the public interest or having no reasonable prospect of conviction. A *nolle prosequi* is then entered in these matters as it would be inappropriate to continue the prosecution (see Glossary Appendix F and also Appendix G - p 58).

The carriage of the files through the courts requires that the solicitor attend on all interlocutory hearings such as bail applications, arguments on the law prior to trial, filing of prosecution applications for trial such as vulnerable witness applications and setting of matters for trial. A significant number of matters are the subject of applications by the defence pursuant to s269A of the *Criminal Law Consolidation Act 1935* for a finding that

they were mentally incompetent at the time of the offence or are unfit to stand trial. The calling of medical evidence and a finding of fact by a judge or jury resolves most of these matters. The General Solicitor Section attends on a number of these matters without the need for them to be briefed to the Prosecution Section.

#### CRIMINAL ASSETS CONFISCATION SECTION

The *Criminal Assets Confiscation Act 1996*, provides for forfeiture of tainted property upon the conviction of a person for a prescribed offence under the Act, including a serious drug offence. Tainted property may be the subject of a restraining order which, in the case of some serious drug offences, converts into an automatic forfeiture order after conviction, or, the tainted property is forfeited at the discretion of the Court. This Act also provides for forfeiture of tainted property by way of an oral application before the Court in which the person is convicted of the relevant offence. It is not necessary for the property to be the subject of a restraining order for an oral forfeiture application to be made but the property must be tainted according to the provisions of this Act. Funds received from the sale of forfeited property are deposited into the Victims of Crime Fund under section 19 of this Act.

A dedicated Confiscations Section was created within the Office in 1999 due to the increase in workload and changes to the relevant legislation. The Office works closely with the Police Confiscation Section in SAPoL to undertake the procedures necessary to restrain and confiscate tainted property, including proceeds of crime, in South Australia. There is often a significant delay between the restraint of property under the Act and the conviction of a defendant and subsequent forfeiture of the tainted property.

During the year it was pleasing to note that revenue deposited into the Victims of Crime Fund amounted to \$1 502 615, which represents an increase of 125% on the revenue collected in the previous year. This amount included one matter alone where \$349 400 in cash was forfeited to the State.

	2003-04
Revenue	\$1 502 615
Restraining Orders	25 defendants
Undertakings	17 defendants
Converted Undertakings	3 defendants
Forfeiture Orders	68 defendants

Applications for restraining orders under section 15 of the *Criminal Assets Confiscation Act* were issued against only 25 defendants this financial year, reflecting the result of the decision in *DPP v Alexander*. This represents a substantial decrease on the previous financial year. There were however a further 17 undertakings to the court, entered into by defendants. A further three restraining orders issued in the previous financial years were converted in to undertakings.

During the year forfeiture orders were granted against 68 defendants. This represents an increase of 32% on the previous financial year. The majority (92.6%) of these forfeiture orders related to serious drug offences. There were 33 automatic forfeiture orders made and 33 oral forfeiture orders.

A two day national Criminal Assets Confiscation Forum was held in Melbourne in October 2003. All states and territories were represented by their respective police departments and asset confiscation enforcement agencies, including representatives from the majority of

Directors of Public Prosecutions' offices. The forum provided a valuable opportunity to share information and developments.

Under section 37 of the *Criminal Assets Confiscation Act* assistance was provided to one interstate agency. As most Australian states are now operating confiscation of criminal assets under civil based forfeiture statutes, this Office is unable to provide assistance to corresponding interstate agencies. South Australia's Act remains conviction based and is inconsistent with interstate civil legislation. The Government's policy is to legislate for civil forfeiture legislation and a civil forfeiture Draft Bill is likely in the near future.

#### SIGNIFICANT JUDICIAL DECISION

The result of *DPP v Alexander* (serious drug offence) handed down by the Full Court of the South Australian Supreme Court on 9 October 2003 has had a negative impact on the number of restraining orders during the year. The Court held that:

- \* *Magistrates Court Act* orders (under ss 25 & 26) are not available to restrain property of persons charged with criminal offences when a Magistrate does not grant a s15 *Criminal Assets Confiscation Act* restraining order which would automatically convert into a forfeiture order if a person is convicted of a serious drug offence;
- \* if a court decides that a restraining order under the *Criminal Assets Confiscation Act* should not be issued, then the only other appropriate method of preventing the disposal of property is by way of an undertaking by the defendant;
- \* a court should be cautious in issuing a restraining order under the *Criminal Assets Confiscation Act* in relation to persons charged with a drug offence because of the draconian consequences of automatic forfeiture of all property listed in the restraining order if the person is convicted. This means that fewer section 15(5) restraining orders which result in automatic forfeiture, are likely to be granted in the future under this particular Act, which relies upon a conviction for forfeiture to occur. Revenue is also likely to decrease in future years under this Act.

#### FRAUD UNIT

The Office acknowledges the specialist skills in this area and has for some years maintained a dedicated Fraud Unit. The Fraud Unit within the Office consists of 2.5 FTE legal practitioners and a law clerk. During the year an additional half time fraud solicitor has been allocated to the Unit to reflect the increase in files over the previous two years. The additional resources to the Unit also recognises the complexity of fraud matters which are typically larger and more time consuming than many of the general prosecution briefs.

The Fraud Unit primarily prosecutes matters investigated by SAPoL's Commercial and Electronic Crime Branch (CECB). A close working relationship is maintained with CECB, with the Office providing advice as early as possible during the investigation stage. This practice assists in providing a focus, where possible, to investigations which are often both legally and factually complex.

In addition the Fraud Unit prosecutes matters referred by the Anti-Corruption Branch of SAPoL. The past twelve months has seen some increase in this area of the Unit's activities. The Unit also prosecutes significant fraud matters investigated by Local Service Areas of SAPoL.

The pattern of fraudulent offending has changed over recent years. There has been a rise in referrals of what is often referred to as 'identity fraud'. The victims are typically banks and credit providers. The Office has been advised by police that the trend towards identity fraud is likely to increase. Similarly, CECB has advised that the Office can expect an increase in

referrals in the area of electronic crime involving fraudulent internet schemes and internet banking.

#### *IMPACT OF LEGISLATIVE CHANGES*

The Fraud Unit has experienced the gradual impact of the new offences of dishonesty which came into operation in July 2003. These replace a series of offences under the *Criminal Law Consolidation Act 1935 (CLCA)* which were in many cases antiquated and failed to reflect modern banking practices and methods of offending. In particular, the new offences of deception (section 139 CLCA) and theft (section 134 CLCA) have made simpler the charging of conduct previously dealt with by false pretences, fraudulent conversion and falsification of accounts.

#### *POLICY UNIT*

In the last financial year the Office has not been able to maintain a dedicated policy position (even at a half time level) because of the pressure on the Office to process prosecutions in a timely manner. It remains the firm view of the Executive that a full time policy position is critical within the Office. This position is essential to allow the Office to provide timely advice to government and to enable the Office to make an effective contribution to the development of the criminal justice system. The new funding will allow the Office the opportunity to recruit a full time training and policy officer. This lawyer will provide a primary focus for the ongoing training and development of staff as well as allowing the Office to provide timely and well considered advice to Government and other key stakeholders.

The Office has continued with its Policy Committee which has representatives from all levels within the Office. This Committee has attempted during the year to address all of the legislative changes made by government, however its effectiveness has been less than optimal because of the lack of a dedicated resource.

## REPORT FROM THE MANAGING PROSECUTOR

The Prosecution Section has 16 prosecutors whose experience as counsel ranges from over 20 years to less than 5 years. In addition to these staff Wendy Abraham QC also undertook counsel work. Three of these prosecutors are directly responsible for management functions within the Office, in addition to counsel work in the courts. With several senior members of the section leaving the Office to pursue other opportunities, the level of experience has significantly reduced. In the last 18 months the Office has lost the benefit of three senior counsel, being Paul Rofe QC, Steven Millstead QC and Patricia Kelly QC. The Section has been fortunate in being able to attract junior prosecutors with a lot of potential as counsel who are committed to their role in the Office and will continue to develop their skills over the coming years.

The Prosecution Section conducts prosecutions for a range of offences including drug offences, offences of sexual assault, other offences of violence, armed robberies, cause death by dangerous driving, fraud, offences of a public nature and murder. Trials last from two or three days with relatively straightforward issues factually and legally, through to complex murder trials that may last several months.

In the past few years the complexity of most trials has increased due to the nature of the legal argument prior to trial, the requirements of disclosure and the nature of the evidence now available to the prosecution. For example, technology now plays a significant role in prosecutions with SAPoL commonly using intercepts to monitor conversations such as telephone intercepts, listening and tracking devices. Further forensic science methods (eg DNA testing) are commonly employed. In addition, prosecutors are commonly confronted with defences such as mental illness, self-defence and duress, without any notice as the system that currently exists does not require disclosure by defence. The prosecutors therefore need to have complete understanding and training in all of these areas to assist them to properly present the evidence to the court and deal with any issues that arise in the conduct of trials.

Many prosecutors begin their career in this Office in the Solicitor Section. It is common for prosecutors to be drawn from the Solicitor Section as there are very few suitable external applicants for prosecutor positions who possess the necessary experience to enable them to prosecute to the required standard. New prosecutors are allocated the work that is appropriate for their level of experience and are closely supervised by two senior prosecutors.

The nature of prosecuting requires that new prosecutors must develop the skills quickly to enable them to prosecute skilfully and fearlessly while maintaining at all times a proper sense of balance and fairness. These qualities must be taught, monitored and encouraged. The nature of the work is at times very stressful and it is important that an appropriate balance of work and outside commitments is achieved and fostered in the organisation.

### PROSECUTION SECTION

In 2003-2004, 685 accused had matters listed for trial in the Adelaide District and Supreme Courts. Of these, 238 matters proceeded to trial. The remainder pleaded guilty or the matters were withdrawn. The Prosecution Section also provides services to the Port Augusta and Mount Gambier Circuit Courts of the District and Supreme Courts. There were 79 matters listed for trial in these Courts and of those 38 proceeded to trial. This equates to 1350 trial days (including legal argument) (1273 days in 2002-03) during the year.

It is clear that with an average trial length of just under six days, the Prosecution Section is unable to provide prosecutors for the 764 accused listed for trial in the financial year. To

supplement the 16 prosecutors within the Office some trials are briefed to the private profession. It is quite common for few members of the independent bar to be available to accept these briefs. This is especially so when there are criminal trials with multiple accused running in the courts. Allocating of the resources to conduct trials requires very close monitoring and management of the availability of prosecutors. Allocation of these matters presents difficulty at times with resources being stretched in an effort to provide the best service to the Courts, police and community.

There are ten criminal court rooms in the District and Supreme Courts. To illustrate the practical effect of the requirements imposed on this Office, from the last week of April and into early May 2004 the Office provided counsel to argue six applications for Special Leave before the High Court and in May 2004 there were significant matters argued before the Court of Criminal Appeal. During this period the Office also had five lengthy murder trials in progress. This workload was in addition to a number of other major trials commenced or concluded at that time, including offences of rape, aggravated serious criminal trespass and sexual offences.

The financial impact on the Office during the year of the cost of briefing out of trials to the private profession was \$306 085.

#### FUTURE DEVELOPMENTS AND CHALLENGES

During this very difficult year the Prosecution Section has continued to present and conduct prosecutions at all levels of complexity. All prosecutions have involved hard work and a strong level of commitment. The specialist expertise that exists in the Prosecution Section needs to be retained and expanded upon. To allow for the development of the specialist skills by the more inexperienced staff within the Section, increased opportunities will be provided to junior the more experienced prosecutors in complex trials. In addition the knowledge and skill base of the staff will be enhanced by professional development in areas such as child abuse, sexual assault, drugs and their manufacture, and cultural and social issues.

I take this opportunity to thank Peter Snopek and James Pearce as the Senior Prosecutors in our Section who have provided mentoring and legal skills to their team members, and management skills to the Office in this very turbulent year. I also congratulate Peter Brebner who was appointed Queen's Counsel in 2003.

#### TRIALS

*R v Burgess and Matthews* - reported on previously under Achievements 2003-04 - Trials on page 5.

*R v Bunting and Wagner* (Bodies in the Barrels) - reported on previously under Achievements 2003-04 - Trials on page 6.

*R v Collie and Collie* - reported on previously under Achievements 2003-04 - Trials on page 6.

*R v Encheff* - reported on previously under Achievements 2003-04 - Trials on page 6.

*R v Evans* - reported on previously under Achievements 2003-04 - Trials on page 7.

*R v Kurtulus and Kurtulus* - The two accused were charged with armed robbery and wounding with intent to cause grievous bodily harm. The offences were committed

outside the Women's and Children's Hospital where both the accused's and the victim's babies were being treated for heroin dependence.

It is alleged that there was a joint enterprise between Mr and Mrs Kurtulus to rob the victim of heroin. The events were captured on the hospital's video surveillance footage.

Mr Kurtulus was convicted of both counts and his wife of the first count and acquitted of the second. The verdict was consistent with the jury being satisfied that there was a joint enterprise to commit armed robbery between the two accused but that Mrs Kurtulus did not foresee the possibility that following the commission of the robbery that her husband would wound the victim with the intention of doing him grievous bodily harm.

*R v Singh (Retrial)* - Dharmander Singh was charged with the murder of his wife in Berri in June 2001. The killing occurred at a meeting place where the accused was to have contact with his daughter. In 2002 Mr Singh was convicted by a jury and subsequently appealed his conviction.

The Court of Criminal Appeal allowed the appeal on the basis that the trial judge had not properly directed the jury as to the law and a retrial was ordered.

In the retrial Mr Singh was acquitted of murder and released.

#### COURT OF CRIMINAL APPEAL

Section 352 of the *Criminal Law Consolidation Act* provides jurisdiction for appeals against conviction and sentence in the Supreme Court and the District Court. A convicted person may appeal against the conviction and/or against the sentence.

#### CROWN APPEALS

The prosecution only has a right to appeal against sentence. The principles that apply to a consideration of Crown appeals are different from those that apply to appeals filed by a convicted person. In considering prosecution appeals against sentence it is acknowledged that the sentence for a specific offence will vary according to its nature, the circumstances of its commission, the antecedents of the prisoner, and the effect on the victim. Consequently, for any given offence there exists a range of legitimate penalty options. In *R v Osenkowski* (1982) 30 SASR 212, the Court held:

*"...The proper role for prosecution appeals, in my view, is to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected and occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience."*

#### CASE STATED ON A QUESTION OF LAW

There is no right of appeal against a verdict of acquittal in the District or Supreme Court. However the prosecution can apply to the court during the trial or sentencing process, or after an acquittal, for the court to refer a question of law for consideration to the Full Court. This power is exercised sparingly. The Director of Public Prosecutions should not seek to have a question of law referred to the Full Court unless it can be asserted with some confidence that the Court will answer the question in the manner sought by the prosecution. The question of law must be of sufficient importance to require the attention of the Full Court.



## MAGISTRATES APPEALS

The Office conducts appeals from the Magistrates Court to the Supreme Court on indictable offences. The prosecution has a right to appeal against acquittal where there has been an error of law or fact by the Magistrate. These appeals are only instituted on rare occasions. The same considerations apply to appeals against sentence brought by the prosecution for a sentence imposed by a magistrate or a judge.

## FOR APPLICATIONS FOR LEAVE TO APPEAL FILED PRIOR TO 1/7/03

	Appeals initiated by Defendant	Appeals initiated by ODPP
<i>Applications for Leave to Appeal heard in 2003-04</i>		
Leave to Appeal granted previously <sup>1</sup>	20	1
Leave to Appeal granted in 2003-04 <sup>1</sup>	7	
Leave to Appeal refused and subsequently Form 7 lodged for further consideration <sup>2</sup>	7	
Leave to Appeal refused	2	
Other (Civil Appeal)	1	
TOTAL	37	1
<i>Of those Applications where Leave to Appeal was granted<sup>1</sup> (including three where Leave refused and Form 7 lodged<sup>2</sup>)</i>		
Appeal against conviction upheld	5	
Appeal against sentence upheld	8	
Appeal against conviction dismissed	7	
Appeal against sentence dismissed	8	
Other dismissed		1
CCA decision pending	2	
TOTAL	30	1

## FOR APPLICATIONS FOR LEAVE TO APPEAL FILED DURING 2003-04

	Appeals initiated by Defendant	Appeals initiated by ODPP
Leave to Appeal Application by the ODPP		11
Leave to Appeal granted in 2003-04 <sup>1</sup>	71	
Leave to Appeal refused and subsequently Form 7 lodged for further consideration <sup>2</sup>	10	
Leave to Appeal refused	8	
Leave to Appeal abandoned	9	
Application for Leave to Appeal pending as at 30/6/04	28	
Other (Judicial Review, Case Stated, Questions of Law)	9	1
TOTAL	135	12
<i>Of those Applications where Leave to Appeal was granted<sup>1</sup> (including four where Leave refused and Form 7 lodged<sup>2</sup>)</i>		
Appeal against conviction upheld	7	
Appeal against sentence upheld	15	6
Appeal against conviction dismissed	13	
Appeal against sentence dismissed	13	
Appeal abandoned	3	
CCA hearing or decision still pending as at 30/6/04	24	5
TOTAL	75	11

*YEAR IN REVIEW*

During the year the Director instituted appeals against 11 sentences imposed that were arguably inadequate for the offending involved. Of these, six appeals against sentence were heard and determined and the appeal was allowed and the sentences were increased. The outcome of the remaining five appeals were pending as at 30 June 2004.

One of the purposes of these appeals is to try to achieve consistency in sentencing standards and on occasions to raise the standards if they are no longer appropriate in the current climate.

*SIGNIFICANT CROWN APPEALS*

*R v Nemer* - This was a matter that is well known in the community, and was conducted by the Solicitor-General following a direction to appeal by the Acting Attorney-General to the Director of Public Prosecutions. (see Direction on page 17)

The sentence imposed on Mr Nemer had originally been suspended. The court found that the sentence was manifestly inadequate in all the circumstances and an actual term of imprisonment was imposed.

The effect and substance of this judgment is discussed elsewhere in this report.

*R v Robinson* - The respondent pleaded guilty to a series of offences arising out of a break into a home. During the course of the incident the respondent used a young 17 year old man in a house in which he had taken refuge following a police chase, as a human shield. He made a number of threats with a knife and an axe during the ensuing siege which lasted almost four hours. The siege was brought to an end by police firing a shot that passed through the young man's shoulder and struck Mr Robinson.

The sentencing judge imposed a single sentence of 57 months and 6 days with a non parole period of 26 months. On appeal the court held that the original sentence was manifestly inadequate and Mr Robinson was re-sentenced to 6 years, 1 month and 6 days with a non parole period of 4 years to reflect the serious nature of the offending.

*R v Payne* - reported on previously under Achievements 2003-04 - Court of Criminal Appeal on page 7.

*R v Lennon* - The respondent had pleaded guilty to wounding with intent to cause grievous bodily harm to the victim (his defacto wife). He was initially sentenced to 18 months imprisonment with a non parole period of 10 months.

On appeal the seriousness of the circumstances of the offence, of the injuries, and Mr Lennon's previous record were taken into consideration. In cases like this the community expects, and protection of women requires, that the court should impose a sentence that is likely to deter the individual offender and to deter other potential offenders.

In handing down his decision the Chief Justice commented that although the public interest calls for a longer non parole period, it would be particularly hard on Mr Lennon at this late stage, to increase his non parole period by more than two years given the closeness of his release date. The sentence was increased to 4 years with a non parole period of 20 months.

*R v Stamos, Stanton, Kapovic and Williams* - The respondents were involved in cannabis dealing and Stamos and Williams were also dealing in ecstasy. Large quantities of

drugs and money were involved in an interstate trading operation. The initial sentences were all determined by the Court of Criminal Appeal to be inadequate and the serious nature of the drug offences and the need to deter the offenders and others required that significantly higher terms of imprisonment should be imposed.

Mr Kapovic had received a suspended term of imprisonment. For this an actual term of imprisonment was substituted.

The judgement recognises the need to impose sentences that will deter others from engaging in crimes that have a significant effect on our society.

*SIGNIFICANT APPEALS TO THE CCA BY CONVICTED PERSONS*

*R v McKelliff (Conviction)* - reported on previously under Achievements 2003-04 - Court of Criminal Appeal on page 7.

*R v Blayney and Blayney (No 2) (Conviction)* - reported on previously under Achievements 2003-04 - Court of Criminal Appeal on page 7.

*R v Kostaras (No 2) (Conviction)* - The appellant a school teacher, was convicted of a series of sexual assaults against a 15 year old male student. A previous conviction for the same offences had been quashed in the Court of Criminal Appeal and a retrial ordered.

The main issues on appeal related to aspects of the prosecution closing address and the trial judge's directions to the jury on the use they could make of uncharged acts of indecency. The language used by a prosecutor addressing a jury must not be intemperate, inflammatory or overzealous in nature. In this case certain matters put in issue by the appellant who did not give evidence in his trial, raised issues that made it permissible for the prosecutor to address on areas that he may not otherwise have been able to.

The appeal was dismissed. Mr Kostaras also sought Special Leave to Appeal to the High Court. That leave was refused.

Mr Kostaras has recently been sentenced to a term of imprisonment of 5 years and 3 months with a non parole period of 2 years and 1 month.

*R v Loader (Conviction)* - reported on previously under Achievements 2003-04 - Court of Criminal Appeal on page 8.

*R v Perdikiyiannis (Conviction)* - The appellant was convicted of false imprisonment, armed robbery and causing grievous bodily harm with intent to cause grievous bodily harm in 2002. The offences related to a joint enterprise with unknown others to abduct the victim and extortion.

Under consideration in this appeal were the circumstances in which alternative verdicts have to be left to a jury. At trial, no alternative verdicts which were open on the law were asked to be left to the jury. This appeal was dismissed.

*R v Bennett, Mahoney, Mumme, Bennett and Glover (Conviction)* - Bennett and three co-accused appealed against their convictions for aggravated serious criminal trespass and assault. The offences were the result of Bennett, Glover, Mumme, Mahoney and at least two others attending the home of the victims for the purposes of committing assault following an altercation in the street. Once inside the home all three adult victims were assaulted by different co-accused.

Under consideration in this appeal were the directions necessary when the prosecution case is based upon a joint enterprise, the intention required to be proved for an accused to be a trespasser, inconsistent verdicts and the application of the proviso.

#### HIGH COURT

Special Leave to Appeal to the High Court must be granted before there is jurisdiction to entertain an appeal. The power of appeal is not unlimited and is constrained by well defined legal limits.

During the financial year Special Leave to Appeal was refused for Kostaras, Smith, Karger, Caplikas and Tazroo. In April 2004 Special Leave to Appeal to the High Court was granted for Kamleh. In August 2004 the appeal was heard by the Full Court of the High Court. The decision was reserved.

	2003-04
Special Leave to Appeal applications pending as at 1/7/03	4
Special Leave to Appeal applications filed 2003/04	11
Full Court matters pending as at 1/7/03 <sup>1</sup>	3
TOTAL	18
Special Leave to Appeal refused	5
Special Leave to Appeal granted	0
Special Leave to Appeal abandoned	4
Special Leave to Appeal pending as at 1/7/04	6
Full Court appeal granted <sup>1</sup>	1
Full Court appeal dismissed <sup>1</sup>	2
TOTAL	18

During the previous year Leave to Appeal to the High Court was granted for two matters, *NJA v R and CMM v R (co-accused)* (reported on previously under Achievements 2003-04 - High Court on page 8) and *R v Gillard*. Each of these matters were heard before the Full Court of the High Court during this financial year.

*R v Gillard (Conviction)* - The appellant was convicted in 1998 of two counts of murder and one of attempted murder. In part, the appellant's role in the shooting was that of a getaway driver and he claimed to the police that he had understood that it was to be a robbery, not a killing. His co-accused was convicted of firing the fatal shots.

In summing up the judge did not leave the alternative verdict of manslaughter to the jury. The prosecution argued at trial that the alternative verdicts should be left, however this was opposed by the appellant's counsel at trial.

The appellant appealed against his conviction to the High Court on the basis that the alternative verdict of manslaughter should have been left to the jury. The High Court considered the extent of an accused's criminal liability for murder and manslaughter based upon what he/she foresaw as a possible consequence of a joint plan to commit an unlawful act, when the unlawful act contemplated by the accused fell short of murder.

The High Court concluded that the alternative verdict of manslaughter should have been left to the jury, notwithstanding the opposition of the appellant's counsel at trial. A retrial was ordered and this is scheduled to occur in early 2005.

## REPORT FROM THE GENERAL MANAGER

With the significant injection of recurrent funding, the challenge for the future is to ensure the most effective and appropriate use of these financial resources. This will be addressed as part of the organisational review to be undertaken in the new financial year.

Not only has the Office been successful in gaining recurrent funding it has also been able to negotiate with the Victims of Crime Co-ordinator for additional staffing to specifically target child victims and witnesses of crime.

The staff of the Witness Assistance Service and the Administrative Section have continued to provide a dedicated and professional service to complement the legal staff in ensuring that the Office provides a timely and efficient prosecution service.

The Attorney-General's Department continues to provide the Office with an effective library support service. The Office extends to Ms Judie Cox and her staff their gratitude for this valuable service.

### WITNESS ASSISTANCE SERVICE

The Witness Assistance Service was established in 1995 as a sole Witness Assistance Officer who was employed to provide information and support services to victims of crime and prosecution witnesses. Since that time the number of Witness Assistance Officers has increased and currently is a team of nine experienced social work practitioners.

The Review of the South Australian Witness Assistance Service in 2002 highlighted the strengths of the Service which included its high level of credibility inside the ODPP and with external stakeholders. This review reported that stakeholders acknowledged that the Witness Assistance Service provides quality services to adult and child victims, witnesses and family members.

The Service has undergone a considerable change in personnel during the year. This change was due to the departure of the long-standing manager, a worker returning to her substantive position in another organization, a worker taking long service leave and the creation of additional Witness Assistance Officer positions. As a consequence a total of six new Witness Assistance Officers were recruited and inducted during the year. These new staff bring to the Office a range of relevant experience, including specialist skills in the areas of trauma, and working with children and young people. These skills are valuable to the work of the Office and the Witness Assistance Service.

Special funding was granted in 2003 by the Victims of Crime Co-ordinator within the Attorney-General's Department to support 3.5 FTE Witness Assistance Officers to work exclusively with children. In addition, funding has been secured for 2004-05 to employ a Witness Assistance Officer to work with adult victims and witnesses.

### ROLE AND FUNCTIONS OF WAS

The diverse range of services provided by Witness Assistance Officers to victims of crime and vulnerable witnesses includes:

- ※ Providing information about the legal process, updates on progress of a matter, support services available, victim's rights and responsibilities;
- ※ Liaison with solicitors and prosecutors;
- ※ Court preparation and familiarisation tours;

- ※ Assessment and planning for special needs and support in preparation for the court process;
- ※ Attendance and support during meetings with solicitors and prosecutors;
- ※ Co-ordination and provision of court companion support for victims/witnesses;
- ※ Assistance with the preparation and presentation of victim impact statements for the sentencing court;
- ※ Crisis counselling, intervention and debriefing in relation to the legal process;
- ※ Interagency liaison;
- ※ Community education and training and contribution to policy about victim's issues.

The ODPP Prosecution Policy and Guidelines (see Appendix G - p58) stipulates that all children and young people under the age of 18, will be referred to the Witness Assistance Service. Ideally this referral should occur as early as possible in the legal process to ensure an adequate exchange of information and sufficient time to develop rapport and trust with the young person. The majority of referrals to the Witness Assistance Service are made by ODPP solicitors and prosecutors. Referrals may also come from victims and witnesses themselves or external agencies such as SA Police, and victim services including Victim Support Service, and Yarrow Place Rape and Sexual Assault Service.

Due to the lengthy process of some matters through the criminal justice system there is the potential for files to remain active with the Witness Assistance Officer for many months and in some instances several years. Many of the files referred to the Witnesses Assistance Service represent a number of victims and witnesses, and where the victim is deceased multiple family members.

#### *YEAR IN REVIEW*

During the year there were 700 new referrals to the Service, of which 543 were adults and 157 were children. The particular needs of each victim and/or witness are recognised and the resources allocated reflect the uniqueness of each matter in the legal process.

The Witness Assistance Service has continued to provide support and information to family members of victims and prosecution witnesses involved in what is termed the "Bodies in the Barrel" trial. Three of the four accused have now been sentenced.

#### *CHILD WITNESS ASSISTANCE OFFICERS*

The provision of funding during the year by the Victims of Crime Co-ordinator (Attorney-General's Department) has allowed 3.5 FTE positions to be dedicated to child victims/witnesses and their parents or caregivers. Whilst the focus is largely on supporting the child victim/witness, in many cases a high proportion of time is also spent working with parents, siblings, extended family and support people from external organizations.

The specialised Child Witness Assistance Officers regularly attend interagency meetings and working parties to represent the views and advocate for the interests of child victims of crime and witnesses. These include the Whole of Government Response to Child Protection, Project Magellan (Pilot project for managing Family Court contact disputes when allegations of child abuse have been made) and Closed Circuit TV facilities for Vulnerable Witnesses Working Party. Due to their close working relationship with young victims and witnesses, Child Witness Assistance Officers are in a unique position to observe and report on their needs and identify areas for improvement in the criminal justice system.

#### *COMMUNITY LIAISON, EDUCATION AND TRAINING*

The Witness Assistance Service has continued to provide education and training to SAPoL, TAFE, Flinders University and Victim Support Service (see Appendix D - p50).

In conjunction with staff from Victim Support Service and Yarrow Place Rape and Sexual Assault Service, Witness Assistance Officers continue to work collaboratively to design and present full day seminars about the criminal justice system. These seminars target those in the community who work with victims of crime. During this year seminars have been conducted in Berri (December 2003) and the Adelaide metropolitan area (May 2004). These continue to be successful in raising awareness about the issues relevant to victims, legal processes and the support services available.

The Witness Assistance Service has initiated training sessions for new legal practitioners and administrative staff as part of their induction, to increase awareness of issues for victims of crime and working with Witness Assistance Officers. Orientation sessions with law students on placement, including court familiarisation tours, have been valuable in raising awareness and understanding of issues for witnesses giving evidence for the prosecution.

During the year the team supported a final year social work student on placement. The focus of this placement has been on the issue of restorative justice and the benefits to the Office of the consultation with external agencies undertaken by this student will be ongoing.

#### *FUTURE DEVELOPMENTS AND CHALLENGES*

The staff of the Witness Assistance Service have positively responded to the challenge of a significant increase in the team size. In adapting to this challenge the team have continued to maintain focus and direction in providing quality services to victims and witnesses. The team continues to develop and improve its communication channels and relationships with both its internal and external stakeholders.

The team identified several issues for focus in the coming year including an internal review of procedures, policies and strategic planning structure as a priority. In addition the team also looks forward to strengthening links with community organisations to ensure a co-ordinated and responsive service to victims of crime.

#### *ADMINISTRATIVE SECTION*

The Administrative Section have continued to provide an effective support function to the Office during the year. The 31 administrative staff provide a range of services which include secretarial, law clerk, reception, rounds and an executive assistant function.

The administrative staff have continued to meet the challenge of maintaining focus and direction in providing quality services to the professional staff within the Office, even though there have been significant impacts from the high workloads and several major trials.

As the Office continues in the development of its new case management system several administrative staff have been assigned to the development and pilot teams to ensure that the formation of this new information system will provide ongoing improvements in business processes within the Office.

In addition the Administrative Manager provides a service to the Office on human resource and financial matters and considerable resources have been diverted during the year to the induction of the many new staff to the Office.

## TECHNOLOGY

### *ODPP INTRANET*

The ODPP Intranet is used to provide a valuable online information service for staff on human and physical resources, and operational issues. The resource material available includes links to the CHRIS payroll system, rosters, job manuals and policies. The operational material available includes the ODPP's Prosecution Policy and Guidelines, hyperlinks to library resources, legislation, Court's cause list, sentencing remarks, technical information and internal and external phone lists.

The Intranet site will be revamped during 2004-05 financial year to ensure that all resources are relevant and current.

## THE FUTURE

During the 2004-05 financial year the Office will develop a web site. This internet presence will allow the Office to meet its organisational needs and statutory obligations, while providing the stakeholders and members of the community with an opportunity to access relevant information about the Office. The work on this project will be undertaken as a priority in the first half of the 2004-05 financial year.

Office accommodation remains an ongoing issue. The Office was last refurbished during early 2001 and since that time two separate interim arrangements have been required to accommodate additional staff. During 2004-5 additional space will be made available to have staff located on part of another floor within the Pirie Street building. The effectiveness of locating staff on four levels (three part floors and one whole floor) will be tested during this time.

The issue of appropriate long term accommodation for the increasing number of staff remains a major concern and will be addressed during the year.



## CORPORATE OVERVIEW

### FINANCIAL BUDGET

The recurrent funding for the Office for the 2003-04 financial year was increased by \$500 000 by special allocation in November 2003. In addition to this, emergency one off funding of \$110 000 was provided in July 2003. The total funding allocation for the Office for 2003-04 financial year was \$8.8 million.

In addition to the \$500,000 in recurrent funds negotiated this financial year a further \$1 million has been allocated to the Office's recurrent budget for the coming year. The total funding allocation for 2004-05 financial year will be \$10.1 million.

The Office has also been funded for two separate projects this year. The ODPP Infrastructure Project (IJP Prosecutions Case Tracking) to improve the case management system in the Office, and the Bodies in the Barrels trial.

The Office has been separately funded by Government for direct costs associated with the Bodies in the Barrels murder trial, while the indirect costs associated with this trial have continued to be met from within the Office's recurrent funding. There continues to be a significant impact on the staffing in the Office as experienced staff have been focused on this trial for several years. It is anticipated that the trial for the remaining accused will be completed by the end of 2004.

### STAFFING LEVELS

The allocation of emergency funding in July 2003 and the significant cash injection in November 2003 has allowed the Office to increase its staffing numbers. The full time equivalent positions for categories of staff are noted below. The 2003-04 figure represents staffing establishment before the additional funding was received. The additional funding will allow the Office to continue the employment of the now experienced legal staff, who have been on contract backfilling those staff diverted to work on the Bodies in the Barrels trials.

	<i>Actual 2003-04</i>	<i>Projected 2004-05</i>
Executive	5.0	5.0
Legal (including Managers)	42.8	53.9
Witness Assistance Officers	4.2	8.5
Administrative staff	29.12	34.9
<b>Total</b>	<b>81.12</b>	<b>102.3</b>

Includes staff who are working on separately funded projects within the Office

### TRAINING AND DEVELOPMENT

The Office has continued its commitment to the development and enhancement of the skills of staff. Staff have benefited from the courses and seminars they have attended throughout the year. Conferences attended by staff are reported in Appendix B - p47).

The Leadership Training Program for the 13 legal staff was completed during the financial year. This formal leadership program which commenced in early 2003, was specifically for the experienced (non-management) legal staff (LEC4/5) within the Office. The objectives of the program were to develop a pool of potential leaders for future succession planning; to enhance their skills and knowledge to allow them to contribute more effectively to existing management discussions and planning; to support and encourage them to more effectively manage existing relationships where they are expected to lead, coach or supervise staff.

Access to professional development through formal tertiary studies is encouraged by the Office. Several staff are completing post graduate study in Management, Masters of Social Work, and the Masters in Counselling. The Office has also provided support for several staff to undertake the Certificate in Justice Studies and Bachelor of Laws.

A range of internal and external training and development courses were undertaken by staff during the year. These included courses in management, leadership, communication, stress management, defensive driving, ergonomics and media skills training.

#### CONTINUING LEGAL EDUCATION

The Office continued its commitment to the ongoing development of the legal staff through its continuing legal education program. During the year the monthly sessions have focused on the development of relevant skills to ensure the ongoing effectiveness of the work of the Office. The wide range in experience of the staff of the Office was accommodated for the first time by dividing the CLE sessions to match the different needs levels of staff. The more junior staff received development in proofing witnesses (including those of sex offences), protected communications under the *Evidence Act*, and interviewing of suspects under section 74D of the *Summary Offences Act*. While the more experienced staff received development sessions covering leading crash reconstruction evidence, leading DNA evidence, leading medical evidence in sex cases, cross examination and closing addresses.

In addition to the normal CLE program 25 staff attended a session conducted by SAPoL's Drug and Organised Crime Task Force on the manufacture of drugs and clandestine drug laboratories.

The Office is indebted to the senior staff within the Office who provided these informative sessions and to the experts in their fields who provided their assistance to ensure the ongoing development of staff.

#### THE FUTURE

The Office is creating a position with duties responsible for policy and staff development. The creation of this full time position will provide the Office with a dedicated resource to co-ordinate and oversee policy and research activities and to provide high level policy advice to the Director. The role will develop and co-ordinate an extensive professional development program for both new and experienced staff. The position will also be the contact person for external agencies seeking speakers for training and public information events.

## APPENDIX A

## PUBLICATIONS/INFORMATION

The Office provides the community with publications about its services and acts as a channel for information to victims and witnesses of the services provided by support agencies.

The following publications are available from this Office at no cost.

- ※ ODPP Annual Reports
- ※ ODPP Prosecution Policy and Guidelines
- ※ Information for Victims of Crime
- ※ Homicide Maze (*SA Government Publication produced by the ODPP in conjunction with the Homicide Victims Support Group*)
- ※ An Important Job - Going to Court (suitable for child victims/witnesses)
- ※ What Choice Do I Have - Information for people who have experienced a rape or sexual assault (*ODPP and Yarrow Place Rape and Sexual Assault Service*)

The following pamphlets are available from this Office at no cost.

- ※ Witness Assistance Service

The following internet links provide further information in support of the work of the Office.

<i>Victims of Crime</i>	<a href="http://voc.sa.gov.au">voc.sa.gov.au</a>
<i>SA Police</i>	<a href="http://sapolice.sa.gov.au">sapolice.sa.gov.au</a>
<i>Yarrow Place</i>	<a href="http://yarrowplace.sa.gov.au">yarrowplace.sa.gov.au</a>
<i>Courts Administration Authority</i>	<a href="http://courts.sa.gov.au">courts.sa.gov.au</a>
<i>Department for Correctional Services</i>	<a href="http://corrections.sa.gov.au">corrections.sa.gov.au</a>

## PAPERS PUBLISHED BY STAFF

"And the riot act was read" <i>Adelaide Law Reports</i> , (2003) 24(1) Adel LR 79	Martin Hinton
"The prosecutor's duty with respect to witnesses: pro Domina Veritate" <i>Criminal Law Journal</i> , (2003) Vol 27 CLJ 260	Martin Hinton
Case and Comment, R v Scobie, <i>Criminal Law Journal</i> , (2004) Vol 28 CLJ 179	Martin Hinton
Reporter - South Australian State Reports	Martin Hinton, Zoe Thomas

## APPENDIX B

## ODPP REPRESENTATIVES ON COMMITTEES/STEERING GROUPS

## INTERNAL

Name	Representative
Case Tracking Management Committee	Golda Munro, Ted Clark
Case Tracking Steering Group	Golda Munro, Ted Clark, Wendy Abraham QC, Paul Rofe QC
Executive	Wendy Abraham QC, Pauline Barnett, Geraldine Davison, Ted Clark
Management Committee	Ted Clark, Pauline Barnett, Geraldine Davison, Jim Pearce, Peter Snopek, Paul Muscat, Ian Press, Adam Kimber, Rebecca Abbott, Pam Jones, Golda Munro
Policy Committee	Pauline Barnett, Sophie Downey, Adele Andrews, Martin Hinton, Caroline Mealor, Anna Whittam, Geraldine Davison, Wendy Abraham QC, Briony Kennewell, Rebecca Abbott <i>(including from the Crown - Matthew Goode and Helen Wighton)</i>

## EXTERNAL

Name	ODPP Representative
Australian Association of Crown Prosecutors	Martin Anders
Australian and New Zealand Psychiatrists, Psychologists and Lawyers	Geraldine Davison
CCTV Facilities for Vulnerable Witnesses Working Party	Anna Whittam, Heidi Ehrat
Committee to discussion implications of the Layton Report	Adam Kimber
Conference of Australian Directors of Public Prosecutions	Paul Rofe QC
Criminal Courts Committee	Paul Rofe QC, Wendy Abraham QC
Criminal Justice Leadership Group	Paul Rofe QC, Wendy Abraham QC
Criminal Justice Portfolio Policy Meeting	Rebecca Abbott
Data Quality Committee	Golda Munro
Drug Court Steering Committee	Pauline Barnett
Duggan Working Party into Criminal Law Reform	Wendy Abraham QC
Forensic Science Advisory Committee	Paul Rofe QC, Wendy Abraham QC
Heads of Prosecuting Agencies Conference	Paul Rofe QC
Information Domain Board	Golda Munro
International Association of Prosecutors: Executive Committee	Wendy Abraham QC
Justice Data Warehouse Steering Committee	Golda Munro
Justice Information System: Business Operations Committee	Golda Munro
Justice Information System: Business Operations Committee - Finance	Golda Munro
Justice Information System: Senior Developer's Forum	Golda Munro
Justice Information System: Technical Reference Group	Golda Munro
Justice Portfolio Leadership Council	Paul Rofe QC, Wendy Abraham QC
Law Society of South Australia: Council	Martin Hinton
Law Society of South Australia: Criminal Law Committee	Geraldine Davison, Martin Hinton, Paul Muscat

Law Society of South Australia: Professional Standards - Legal Professional Conduct Board	Tim Heffernan
Law Society of South Australia: Advocacy Committee	Wendy Abraham QC, Geraldine Davison
Mental Impairment Review Committee	Pauline Barnett
National Child Sexual Assault Reform Committee	Paul Rofe QC
Police Liaison Committee	Geraldine Davison, Pauline Barnett, Ted Clark
Project Magellan	Anna Whittam
Review of the Controlled Substances Act	Adam Kimber
Whole of Government Response to Child Protection	Heidi Ehrat

#### PROFESSIONAL ASSOCIATION/ORGANISATIONAL MEMBERSHIPS

Name/title

Australian Association of Prosecutors  
 Australian Institute of Judicial Administration  
 International Society for the Reform of the Criminal Law  
 International Association of Prosecutors  
 Law Society of South Australia  
 Australian and New Zealand Psychiatrists, Psychologists and  
 Lawyers

## APPENDIX C

## TRAINING AND DEVELOPMENT

## CONFERENCES ATTENDANCE

Name/title	Representative
Australian Association of Crown Prosecutors Conference 2003	Adam Kimber, Martin Anders
Australian Psychological Society: the use of exposure in working through trauma	Jacqui Flynn
Australian Society for Traumatic Stress Studies: Workshop Tour	Heidi Ehrat
Conference of Australian Directors of Public Prosecution	Paul Rofe QC, Wendy Abraham QC
Confiscation of Criminal Assets Forum	Adele Andrews
Criminal Lawyers Association of the Northern Territory: 9th Biennial Conference	Liesl Chapman, Sophie David
Domestic Violence and Sexual Assault International Conference	Filomena Merlino
International Association of Prosecutors Executive Committee Meeting (Thailand)	Wendy Abraham QC
International Law Conference: The Challenge of Conflict	Geraldine Davison
International Symposium on the Forensic Sciences: 17th Annual - Challenges and Changes	Liesl Chapman
Leadership Development Program	Pauline Barnett
Managing Professional Services	Pauline Barnett
National DPP Executives Meeting	Ted Clark, Pauline Barnett, Geraldine Davison
Women in Management: Breakfast Forum	Golda Munro
Young Professionals Forum	Rebecca Abbott

## APPENDIX D

## PRESENTATIONS/SEMINARS/SESSIONS CONDUCTED

Name	Representative
Balanced Justice	Paul Rofe QC
Court Companion Training	Jacqui Flynn
Governor's Leadership Council	Wendy Abraham QC
Law Society of South Australia: Advocacy Workshops	Liesl Chapman, Paul Muscat, Geraldine Davison
Law Society of South Australia: Criminal Law Conference	Peter Brebner QC
Law Society of South Australia: Panel Discussion - Charge Negotiations	Wendy Abraham QC, Geraldine Davison, Paul Muscat
Law Society of South Australia: Public Sector Lawyer's Forum	Wendy Abraham QC
Law Week - Criminal Justice System	Heidi Ehrat, Paul Rofe QC
Major Crash Investigators Course	Rebecca Abbott
SA Superannuants' Meeting	Paul Rofe QC
SAPoL - Elizabeth LSA	Briony Kennewell
SAPoL Homicide Training Course	Wendy Abraham QC, Adele Andrews
SAPoL Paedophile Task Force	Briony Kennewell
SAPoL Prosecutors Conference	Golda Munro
SAPoL Sex Crime Investigators	Heidi Ehrat, Geraldine Davison
TAFE - Certificate in Child Abuse Investigations (SAPoL)	Briony Kennewell
TAFE Interagency Forum	Anna Whittam, Lucy Boord
Forensic Science Advocacy Workshop	Geraldine Davison, James Pearce, Liesl Chapman, Adam Kimber
SAPoL Organised Crime	Geraldine Davison
Yarrow Place	Lucy Boord

In addition to the above structured programs the Office continues to provide informal sessions to the stakeholder agencies as well as the Universities, TAFE and the Law Society of South Australia.

Throughout the year practical legal training placement is provided in the Office through negotiation with the Law Society and the Universities.

## APPENDIX E

## COMPLIANCE REPORTING

The following matters are required to be reported on under the Premier and Cabinet Circular PC013

*Aboriginal reconciliation statement*

All relevant matters in relation to the Aboriginal Reconciliation Statement are incorporated within the Annual Report of the Attorney-General's Department.

*Consultants*

The reporting on the use of consultants by the Office during 2003-04 is incorporated within the Annual Report of the Attorney-General's Department.

*Contractual arrangement*

The reporting on the extent of contractual arrangements in the Office during 2003-04 is incorporated within the Annual Report of the Attorney-General's Department.

*Disability Action Plan Reporting*

All relevant matters in relation to Disability Action Plan Reporting are incorporated within the Annual Report of the Attorney-General's Department.

*Energy Efficiency Action Plan Reporting*

All relevant matters in relation to Energy Efficiency Action Plan Reporting are incorporated within the Annual Report of the Attorney-General's Department.

*Equal Employment Opportunity*

All relevant matters in relation to Equal Employment Opportunity Reporting are incorporated within the Annual Report of the Attorney-General's Department.

*Executive Employment Reporting*

All relevant matters in relation to Executive Employment Reporting are incorporated within the Annual Report of the Attorney-General's Department.

*Financial Reporting*

All relevant matters in relation to financial performance and account payment performance are incorporated within the Annual Report of the Attorney-General's Department.



### *Fraud*

All relevant matters in relation to Fraud Reporting under the Public Sector Management Regulations 18 (i), are incorporated within the Annual Report of the Attorney-General's Department.

### *Freedom of Information*

The Office is an "exempt agency" for the purposes of the *Freedom of Information Act 1991*.

### *Human Resource Reporting*

All relevant matters in relation to employee numbers, gender and status, leave management, workforce diversity, indigenous employees, cultural and linguistic diversity and disability are incorporated within the Annual Report of the Attorney-General's Department.

### *Listening and Surveillance Devices Act*

Pursuant to section 12 (1) of the *Director of Public Prosecutions Act* the Office reports that it has considered and approved 40 warrants issued under the *Listening and Surveillance Devices Act 1972*.

### *Occupational Health, Safety & Injury Management*

The Office continues to be pro-active in its approach to occupational health, safety and welfare within the Office and regular hazard identification audits are carried out by both the OH&S representative and management. This year staff were again offered free influenza immunisations as a preventative measure.

Two existing ODPP policies were reviewed during the year. Nine new policies relating to a safe working environment and remote and isolated work were drafted. Consultation on these draft policies will ensure that all staff are provided with an opportunity to comment on occupational health and safety policies that affect them.

The Office has continued to maintain the highest level of health and safety, in all areas of prevention, claims and rehabilitation in accordance with WorkCover standards. During the year staff attended courses in defensive driving, fire safety training, first aid, manual handling in the Office and stress management techniques.

All relevant matters in relation to Occupational Health, Safety and Welfare Reporting are incorporated within the Annual Report of the Attorney-General's Department.

The Office would like to thank its OH&S representatives for the last 12 months, Mr Brenton Egarr and Ms Christine Bretones who have displayed a high level of commitment to this role.

### *Overseas Travel*

The Associate Director attended the Executive Committee Meeting of the International Association of Prosecutors in Chiang Mai, Thailand from the 29th of February until the 3rd of March 2004. The cost to the agency of this travel was \$3033.

*Regional Impact Assessment Statements*

All relevant matters in relation to Regional Impact Assessment Statements are incorporated within the Annual Report of the Attorney-General's Department.

*Training and development*

All relevant matters in relation to Training and Development Reporting are incorporated within the Annual Report of the Attorney-General's Department. Various details of the types of training and development undertaken in the Office is reported in this report at pages 44 and conference attendance at page 49.

*Triple Bottom Line Reporting*

All relevant matters in relation to Triple Bottom Line Reporting are incorporated within the Annual Report of the Attorney-General's Department.

*Voluntary Flexible Working Arrangements*

Voluntary flexible working arrangements are provided for staff under the provisions of the *Public Sector Management Act* (s6) and the Attorney-General's Policy HRM 11. During the 2003-04 year there were 16 staff working part time and five staff who availed themselves of the flexible arrangement to purchase leave.

In addition flexitime arrangements were in place for 40 administrative and Witness Assistance staff.

All relevant matters in relation to voluntary flexible working arrangements are incorporated fully within the Annual Report of the Attorney-General's Department.

## APPENDIX F

## GLOSSARY

<i>Accused</i>	The accused is a person who is alleged to have committed an offence.
<i>Acquit</i>	To find an accused person not guilty at a trial.
<i>Adjourn</i>	To delay a court hearing, until later that day or a specified day or indefinitely.
<i>Antecedent Report</i>	A report that lists a person's previous criminal convictions.
<i>Appeal</i>	<p>Appeals are made to and determined by a court higher than the court which made the decision appealed against. Appeals can be against sentence and/or conviction. If, on appeal, a lower court is found to have made an error, the appeal is upheld and the decision of the lower court is quashed or overturned.</p> <p>In the case of an appeal against sentence, a different sentence will be substituted. In the case of an appeal against conviction, a new trial can be ordered or a verdict of acquittal entered.</p> <p>If no error is found or, in some cases, if no substantial miscarriage of justice is perceived, the appeal is dismissed and the decision of the lower court is said to have been affirmed.</p>
<i>Appellant</i>	When an accused is convicted and/or pleads guilty, and appeals, he/she is throughout the appeal process referred to as the appellant.
<i>Arrest</i>	To apprehend or take into custody a person suspected of having committed a crime.
<i>Bail</i>	Once a person has been arrested and charged with an offence, that person must remain in gaol unless that person has legal authority to remain out of gaol. When a person receives such authority that person is said to have been granted bail. Bail may be on the accused's own undertaking to appear or with sureties and subject to conditions.
<i>Burden of Proof</i>	This refers to the level of proof required. In most criminal cases the prosecution bears the burden of proof <i>beyond reasonable doubt</i> .
<i>CLCA</i>	Criminal Law Consolidation Act 1935
<i>Committal Proceedings</i>	After a person is charged with a criminal offence they appear before a magistrate who determines if there is sufficient evidence upon which to order that an accused person stand trial before a judge and jury.
<i>Committed for Sentence</i>	If at the committal proceedings the accused admits to having committed the offence as charged, the magistrate will order the accused person to appear before a District or Supreme Court to be sentenced according to law.

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<i>Convicted</i> <i>SEE TABLES AND STATISTICS</i>	Convicted of any offence, ie committed for sentence, plea of guilty as charged or a lesser charge, or found guilty as charged or of a lesser charge.  <i>Note: Convictions recorded on Magistrate Court matters called up, not included</i>
<i>Defendant</i>	In the Magistrates Court the accused may be referred to as the defendant.
<i>Exhibit</i>	A document or physical item tendered as evidence in a court hearing or referred to in an affidavit.
<i>Forfeiture Orders</i>	Orders granted under either section 8, 9 or 15(5) of the <i>Criminal Assets Confiscations Act 1995</i> which confiscate property of a person convicted of a criminal offence:  <i>Forfeiture Orders can be made:</i> a) <i>formally where application is made by the ODPP in relation to property used in an offence,</i> b) <i>orally before the court in which an offender is convicted,</i> c) <i>automatically where drug offences are involved and a section 15(5) restraining order automatically converts to a forfeiture order six months after that person is convicted of the drug offence</i>
<i>Form 7</i>	If an accused is refused Leave to Appeal by a single Judge, an accused can file a Form 7 asking the Court of Criminal Appeal to consider the application to grant Leave to Appeal.
<i>Indictable Offence</i>	An offence with which an accused has been charged for which the accused has an initial right to be tried by a judge and jury.
<i>Information</i>	The document which sets out the offence or offences that an accused is alleged to have committed and in relation to which the accused must stand trial and be sentenced if found guilty.
<i>Major Indictable Offence</i>	Those indictable offences where the maximum term of imprisonment exceeds five years. All major indictable offences are heard and determined in the District and Supreme Courts.
<i>Mentally Incompetent</i> <i>SEE TABLES AND STATISTICS</i>	Where accused is found <i>not guilty</i> on grounds of mental competence (CLCA Part 8A) and declared liable to supervision.

*Nolle Prosequi*

SEE TABLES AND STATISTICS

All charges on the Information have been discontinued and it is formally recorded that the accused is not to be prosecuted further and the criminal proceedings against an accused are to cease.

In statistical data - All charges against the accused not proceeded with.

- Note:
- 1 *Nolle entered purely because of substitute Information filed, not counted as a Nolle*
  - 2 *"Technical Nolle Prosequi" where incorrectly committed matters are returned to Magistrates Court, or lesser charge, or alternative remedy is pursued in the Magistrates Court, not counted as a Nolle, but counted separately under "other"*
  - 3 *"White Paper" filed pursuant to CLCA s276 not counted as a Nolle, but shown separately*
  - 4 *Where multiple charges laid, then one or more (but not all) are discontinued (Nolle), not counted as a Nolle but recorded under the outcome of the charge(s) which proceed*
  - 5 *Where matter Nolled immediately after appellate court orders retrial, not counted as a Nolle*

*Non Parole Period*

When a judge imposes a sentence of imprisonment, a non parole period will also be imposed. This is the minimum period the prisoner will serve before he/she is eligible for release. If this period is greater than five years, the release of the prisoner is dependant upon the Parole Board.

*Not Guilty*

SEE TABLES AND STATISTICS

Proceeded to trial and acquitted of all charges.

*Plea*

A plea is the formal response of an accused at trial or arraignment to an Information. At the accused's trial the Information is read out to the accused (the accused is arraigned) and the accused then formally responds by saying he or she is *guilty* or *not guilty*.

*Precedent*

A judicial decision on a point of law which is binding on all courts lower in the hierarchy.

*Proceeded to trial*

SEE TABLES AND STATISTICS

All matters that have been listed for trial and the proceedings have commenced, including legal argument, jury empanelment, or commencement of trial by judge alone.

Note. *Matters listed for legal argument only, not included*

*Resolved Summarily*

SEE TABLES AND STATISTICS

Includes matters where *major indictable* charge reduced to *minor indictable* or *summary* charge only, and finalised in the Magistrates Court (by plea or trial), by the Committal Unit or police.

*Restraining Orders*

Restraining orders made by a court under section 15 *Criminal Assets Confiscation Act 1995* prevent person(s) disposing of or otherwise dealing with specified property until criminal offences and confiscations proceedings are resolved.

*Sentence*

The penalty imposed on the accused if he/she is found guilty of an offence. For murder there is a mandatory head sentence of life imprisonment. The judge will usually set a non parole period.

*Summary Offence*

A minor offence heard and decided in a Magistrates Court and not sent for trial before a judge and jury.

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<i>Superior Court - Other</i> <i>SEE TABLES AND STATISTICS</i>	Includes stay of proceedings, resolved in Magistrates Court, and incorrectly committed.
<i>Tender No Evidence (TNE)</i>	Where no evidence is tendered on <b>all</b> charges in the Magistrates Court, otherwise counted in accordance with charges that proceeded
<i>Trial Outcome - Other</i> <i>SEE TABLES AND STATISTICS</i>	Includes stay of proceedings, adjournment during trial, bench warrant during trial (issued when an accused fails to attend court), and matters which are not finalised at the time of this report
<i>Voir Dire</i>	Legal argument in the absence of the jury
<i>Undertakings</i>	Where a person charged with a criminal offence undertakes not to sell or deal with the property. Undertakings therefore cannot automatically convert into forfeiture orders. A forfeiture application must be made after conviction.
<i>White Paper</i> <i>SEE TABLES AND STATISTICS</i>	After a matter has been committed for trial and where the Director declines to prosecute any charge and files prior to arraignment, a notice pursuant to CLCA s276.
	<i>Note: Where an accused is separately committed for trial and sentence, and the Director declines to prosecute any of the charges committed for trial, but proceeds with the charges(s) committed for sentence, not counted as a White Paper</i>

## APPENDIX G

## ODPP STATEMENT OF PROSECUTION POLICY AND GUIDELINES

A prosecutor must play his or her part in securing a fair trial for persons accused of criminal offences. A fair trial is one that results in justice being done, ie conviction of the guilty as well as acquittal of the innocent. A fair trial may be described also as one where all relevant credible evidence is presented, tested and adjudicated upon according to law. The obligations of the prosecution to the various parties flow from those concepts.

## THE ROLE OF THE PROSECUTOR

In order to understand the obligations of a prosecutor in any given situation or at any particular stage of the trial process, it is necessary to define the role of the prosecutor. The exercise has been attempted on numerous occasions by various commentators. The role is usually expressed in terms such as “a minister of justice” or “an officer of the court”. It may be more easily understood in terms of what it is not. It is not about winning or losing where convictions are wins and acquittals are losses. A conviction obtained on insufficient or doubtful evidence should be regarded as a loss just as much as a failure to obtain a conviction on a strong credible prosecution case. Again it is a matter of striking a balance.

Some quotations from commentators may assist in defining the role of the prosecutor :

*“It cannot be over emphasised that the purpose [cf expectation] of a criminal prosecution is not to obtain a conviction: it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented, it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing: his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.”* (per Rand J in Boucher v R (1954) 110 CCC 263 at 270).

*“Finally there is or has been a tendency for Counsel for the prosecution not to prosecute firmly enough. The last half century has seen a welcome transition in the role of a prosecuting counsel from a persecuting advocate into a minister of justice, but in some places the pendulum has swung so far and the ministry has moved so close to the opposition that the prosecution’s case is not adequately presented and Counsel, frightened of being accused of excessive fervour tend to do little except talk of reasonable doubt and leave the final speech on the facts to the Judge. The result of the deficiency is that the duty of seeing that the prosecution’s case is effectively put to the jury is sometimes transferred to the Judge and thus the balance of the trial is upset.”* (Lord Devlin, Trial by Jury pp 122-123)

But in the end it may come back to the words of Christmas Humphreys QC:

*“It is the duty of prosecuting counsel to prosecute, and he need not rise to his feet and apologise for so doing. It is not unfair to prosecute”* (1955 Crim LR 739 at 741)

and again -

*“Always the principle holds that Crown counsel is concerned with justice first, justice second and conviction a very bad third”* (Ibid p 746)

The Office of the Director of Public Prosecutions in South Australia is committed to those ideals

## THE DECISION TO PROSECUTE

A prosecution should not proceed if there is no reasonable prospect of a conviction being secured. This basic criterion is the cornerstone of the uniform prosecution policy adopted in Australia.

The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, tends to undermine the confidence of the community in the criminal justice system.

It has never been the rule in this country that suspected criminal offences must automatically be the subject of prosecution. A significant consideration is whether the prosecution is in the public interest. The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue those cases worthy of prosecution.

The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution. A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused. There is a continuing obligation to assess the evidence as the matter proceeds.

The decision whether there is a reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the accused and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course there can never be an assurance that a prosecution will succeed. Indeed it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and pursuing a futile prosecution resulting in the unnecessary expenditure of public funds.

When evaluating the evidence regard should be had to the following matters:

- (a) Are there grounds for believing the evidence may be excluded bearing in mind the principles of admissibility at common law and under statute?
- (b) If the case depends in part on admissions by the accused, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the accused?
- (c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the accused, or may be otherwise unreliable?
- (d) Has a witness a motive for telling less than the whole truth?
- (e) Are there matters which might properly be put to a witness by the defence to attack his or her credibility?
- (f) What sort of impression is the witness likely to make? How is the witness likely to stand up to cross-examination?
- (g) If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the accused?
- (h) If there is conflict between eye witnesses, does it go beyond what one would expect and hence materially weaken the case?
- (i) Is there anything which causes suspicion that a false story may have been concocted?
- (j) Are all the necessary witnesses available and competent to give evidence, including any who may be out of the jurisdiction? Is any witness likely to obtain an exemption from giving evidence pursuant to Section 21 of the Evidence Act, 1929?
- (k) Where child witnesses are involved, are there statutory difficulties in the reception and evaluation of their evidence?



This list is not exhaustive, and of course the matters to be considered will depend upon the circumstances of each individual case.

Having satisfied himself or herself that the evidence is sufficient to justify the institution or continuation of a prosecution, the prosecutor must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued. It is not the rule that all offences brought to the attention of the authorities must be prosecuted.

The factors which can properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. While some public interest factors may militate against a decision to proceed with a prosecution, there are public interest factors which operate in favour of proceeding with a prosecution, for example the seriousness of the offence and the need for deterrence. In this regard, generally speaking the more serious the offence the less likely it will be that the public interest will not require that a prosecution be pursued.

Factors which may arise for consideration in determining whether the public interest requires a prosecution include:

- (a) the seriousness or, conversely, the triviality of the alleged offence or that it is of a “technical” nature only;
- (b) any mitigating or aggravating circumstances;
- (c) the youth, age, intelligence, physical health, mental health, or special infirmity of the accused, a witness or victim;
- (d) the accused’s antecedents and background;
- (e) the staleness of the alleged offence;
- (f) the degree of culpability of the accused in connection with the offence;
- (g) the effect on public order and morale;
- (h) the obsolescence or obscurity of the law;
- (i) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;
- (j) the availability and efficacy of any alternatives to prosecution;
- (k) the prevalence of the alleged offence and the need for deterrence, both personal and general;
- (l) whether the consequences of any resulting prosecution or conviction would be unduly harsh and oppressive;
- (m) whether the alleged offence is of considerable public concern;
- (n) any entitlement of the State or other person or body to criminal compensation, reparation or forfeiture;
- (o) the attitude of the victim of the alleged offence to a prosecution;
- (p) the likely length and expense of a trial;
- (q) whether the accused is willing to co-operate in the investigation or prosecution of others, or the extent to which the accused has done so;
- (r) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
- (s) whether the alleged offence is triable only on indictment; and
- (t) the necessity to maintain public confidence in such institutions as the Parliament and the Courts.

The weight to be given to these and other factors will depend on the particular circumstances of each case.

As a matter of practical reality the proper decision in most cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. Although there may be mitigating factors present in a particular case, often the proper decision will be to proceed with a prosecution and for those factors to be put to the sentencing court in mitigation. Nevertheless, where the alleged offence is not so serious as plainly to require prosecution the prosecutor should always apply his or her mind to whether the public interest requires a prosecution to be pursued.

A decision whether or not to prosecute must clearly not be influenced by:

- (a) the race, religion, sex, national origin or political associations, activities or beliefs of the accused or any other person involved;
- (b) personal feelings concerning the accused or the victim;
- (c) possible political advantage or disadvantage to the Government or any political group or party;  
or
- (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

Special considerations apply to the prosecution of young offenders. Prosecution of a young offender should always be regarded as a severe step, and generally speaking a much stronger case can be made for methods of disposal which fall short of prosecution unless the seriousness of the alleged offence or the circumstances of the young offender concerned dictate otherwise. In this regard, ordinarily the public interest will not require the prosecution of a young offender who is a first offender in circumstances where the alleged offence is not serious.

In deciding whether or not the public interest warrants the prosecution of a young offender regard should be had to such of the factors that apply to adults as appear to be relevant, but particularly to:

- (a) the seriousness of the alleged offence;
- (b) the age, apparent maturity and mental capacity of the young offender;
- (c) the available alternatives to prosecution, such as a caution, and their efficacy;
- (d) the sentencing options available to the relevant Youth Court if the matter were to be prosecuted;
- (e) The young offender's family circumstances, particularly whether the parents or guardians of the young offender appear able and prepared to exercise effective discipline and control over the young offender;
- (f) The young offender's antecedents, including the circumstances of any previous caution the young offender may have been given, and whether they are such as to indicate that a less formal disposal of the present matter would be inappropriate; and
- (g) whether a prosecution would be likely to be harmful to the young offender or be inappropriate, having regard to such matters as the personality of the young offender and his or her family circumstances.

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

Pursuant to Section 17 of the Young Offenders Act, 1993, all young offenders charged with homicide, or an offence consisting of an attempt to commit or assault with intent to commit homicide, are to be dealt with by an adult court. In other cases an application by the DPP or police prosecutor can be made to have a young offender dealt with as an adult if it is considered that it is warranted by the gravity of the offence or because the offence was part of a pattern of repeated offending.

#### **Guideline No 1 - Choice of Charges**

In many cases the evidence will disclose a number of possible offences. Care must therefore be taken to choose a charge or charges which adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will provide the Court with an appropriate basis for sentence.

In the ordinary course the charge or charges laid or proceeded with will be the most serious disclosed by the evidence. Nevertheless, when account is taken of such matters as the strength of the available evidence, the probable lines of defence to a particular charge and other considerations including the appropriate sentence, it may be appropriate to lay or proceed with a charge which is not the most serious revealed by the evidence.

Under no circumstances should charges be laid with the intention of providing scope for subsequent charge-bargaining.

The High Court in R v Hoar [1981] 148 CLR 32 at 38 has highlighted the need for restraint in laying conspiracy charges:

*“Generally speaking, it is undesirable that conspiracy should be charged when a substantive offence has been committed and there is a sufficient and effective charge that this offence has been committed.”*

Whenever possible substantive charges should be laid. However, there are occasions when a conspiracy charge is the only one which is adequate and appropriate on the available evidence. Where it is proposed to lay or proceed with conspiracy charges against a number of accused jointly, those responsible for making the necessary decision must guard against the risk of the joint trial being unduly complex or lengthy.

It will never be appropriate to overcharge on an information to gain a benefit in relation to charge-bargaining or for some other perceived benefit to the prosecution. In cases where there have been numerous offences committed, the prosecutor should strive to charge counts, that sufficiently reflect the gravity of the incidents or the course of conduct.

### **Guideline No 2 - Charge-Bargaining**

Charge-bargaining involves negotiations between the defence and the prosecution in relation to the charges to be proceeded with. Such negotiations may result in the accused pleading guilty to fewer than all of the charges he or she is facing, or to a lesser charge or charges, with the remaining charges either not being proceeded with or taken into account without proceeding to conviction.

These guidelines have earlier referred to the care that must be taken in choosing the charge or charges to be laid. Nevertheless, circumstances can change and new facts can come to light. Agreements as to charge or charges and plea must be consistent with the requirements of justice.

A proposal should not be entertained by the prosecution unless:

- (a) the charges to be proceeded with bear a reasonable relationship to the nature of the criminal conduct of the accused;
- (b) those charges provide an adequate basis for an appropriate sentence in all the circumstances of the case; and
- (c) there is evidence to support the charges.

Any decision whether or not to agree to a proposal advanced by the defence, or to put a counter-proposal to the defence, must take into account all the circumstances of the case and other relevant considerations including:

- (a) whether the accused is willing to co-operate in the investigation or prosecution of others, or the extent to which the accused has done so;
- (b) whether the sentence that is likely to be imposed if the charges are varied as proposed (taking into account such matters as whether the accused is already serving a term of imprisonment) would be appropriate for the criminal conduct involved;
- (c) the desirability of prompt and certain resolution of the case;
- (d) the accused's antecedents;
- (e) the strength of the prosecution case;
- (f) the likelihood of adverse consequences to witnesses;
- (g) in cases where there has been a financial loss to the State or any person, whether the accused has made restitution or arrangements for restitution;
- (h) the need to avoid delay in the resolution of other pending cases;
- (i) the time and expense involved in a trial and any appeal proceedings;
- (j) the views of the investigating police officers; and
- (k) the views of the victim or others significantly affected.

In no circumstances should the prosecution entertain a charge-bargaining proposal if the accused maintains his or her innocence with respect to a charge or charges to which the accused has offered to plead guilty.

**Guideline 3 - Giving Advice to Investigators**

All requests for advice by police investigators should be made in writing to the Office of the Director of Public Prosecutions. This includes advice in relation to:

- (a) the availability of criminal charges, involving -
  - (i) the sufficiency of evidence;
  - (ii) the admissibility of evidence;
  - (iii) the most appropriate charge in the circumstances
- (b) the present state of the law with respect to a certain subject matter (where this requires detailed evaluation);
- (c) whether a matter should be disposed of summarily rather than on information;
- (d) the availability of an ex officio information; and appeal to the Supreme Court on sentence; a case stated or judicial review.

In the ordinary course these requests are to be answered in writing within a month. It should be the exception that the request is not made in writing.

There is no distinction to be drawn between “formal” and “informal” advice and “provisional” advice should not be given.

Should the person seeking advice be unable, due to the urgency of the matter, to seek advice by way of a written request, this should not preclude advice being provided. In such instances the written advice should recite the particular request made of this Office and the information provided upon which the advice is given.

In the ordinary course a letter confirming the oral advice should be dispatched within twenty four hours.

Where the request for advice relates to whether or not there is a basis for charging, any advice must only be provided after an examination of the complete police brief. Ordinarily such advice will only be given after the alleged offender has been provided with an opportunity to answer or comment upon the substance of the allegations (by interview or otherwise).

Advice will not be given on any individual exercise of police powers or on operational matters generally.

Requests for advice relating to matters of law which require a detailed evaluation or involve police or other investigative powers are to be referred to the Senior Solicitor or the manager of the Committal Unit.

The following requests for advice must be referred to the Director unless such matters have been specifically delegated to other officers:

- (a) whether or not a prosecution should proceed following a proposed extradition;
- (b) whether or not an immunity (indemnity or undertaking) should be granted;
- (c) whether or not an appeal should be lodged (including an application for judicial review);
- (d) whether or not a police officer should be prosecuted;
- (e) whether or not an ex officio information should be filed;
- (f) where the Director’s or the Attorney-General’s sanction or approval is required for the commencement of proceedings;
- (g) matters of particular sensitivity, including allegations of corruption or serious misconduct by any public official.

Where the charge is one of murder, manslaughter, assisted suicide or dangerous driving causing death, the prosecutor’s advice is to be referred to the relevant manager for final consideration before it is communicated to the investigating officer.

#### **Guideline No 4 - Ex Officio Information**

To present an information in the absence of prior committal proceedings must be regarded as constituting a significant departure from accepted practice. Given that a purpose of committal proceedings is to filter out those cases where there is an insufficient basis for the accused being placed on trial, to indict in the absence of committal proceedings will deny the accused the opportunity of securing a discharge before the Magistrate.

A decision to indict in the absence of prior committal proceedings will only be justified if any disadvantage to the accused that may thereby ensue will nevertheless not be such as to deny the accused a fair trial. Further, such a decision will only be justified if there are strong and powerful grounds for so doing. An ex-officio information should not be presented in the absence of committal proceedings unless the evidentiary and public interest considerations outlined in the prosecution policy are satisfied.

Where an ex-officio information is presented in the absence of committal proceedings the accused will be provided with all relevant witness statements and full details of the case that the prosecution will present at the trial and any other material in accordance with disclosure principles.

On the other hand, a decision to indict notwithstanding the accused was discharged at the committal proceedings will not constitute as great a departure from accepted practice. The result of committal proceedings has never been regarded as binding on those who have the authority to indict. An error may have resulted in the Magistrate discharging the accused, and in such a case the filing of an ex-officio information may be the only feasible way that the error can be corrected. Nevertheless, a decision to indict following a discharge at the committal proceedings should never be taken lightly. An ex-officio information should not be presented in such cases unless it can be confidently asserted that the Magistrate erred in declining to commit, or fresh evidence has since become available and it can be confidently asserted that, if the evidence had been available at the time of the committal proceedings, the Magistrate would have committed the accused for trial. In the event that fresh evidence is received, consideration will be given to reinstating the committal proceedings.

#### **Guideline No 5 - Declining to Proceed after Committal**

After the accused has been committed for trial the question may arise whether the trial on that information should proceed. Pursuant to Section 7(1)(e) of the Act, the Director has power to enter a nolle prosequi or otherwise terminate a prosecution in appropriate cases.

Notwithstanding that a committal order has been obtained, events may have occurred after the committal that make it no longer appropriate for the prosecution to proceed. Alternatively, the strength of the prosecution case may be re-assessed having regard to the course of the committal proceedings. Where a question arises as to the exercise of the power under Section 7(1)(e), it is to be determined on the basis of the criteria governing the decision to prosecute set out earlier. In the normal course, any person or agency significantly affected will be consulted before any decision is made.

A defence application may be based on the fact that the offence charged is a relatively minor one and does not warrant the time and expense involved in a trial on information. Such an application is most unlikely to receive favourable consideration if the alleged offence is one that could have been determined summarily but the accused refused to consent to the matter being dealt with in that way.

Where a decision has been made not to proceed with a trial where an information has been laid, that decision will not be reversed unless:

- (a) significant fresh evidence has been produced that was not previously available for consideration;
- (b) the decision was obtained by fraud; or
- (c) the decision was based on a mistake of fact or law;

and in all the circumstances it is in the interests of justice that the decision be reversed.

Where a trial has ended with the disagreement of the jury, consideration should always be given to whether the circumstances require a re-trial, and whether a second jury is likely to be in a better position

to reach a verdict. The seriousness of the alleged offence and the cost to the community and the accused should be taken into account. If it is decided to proceed with a re-trial and the second jury also disagrees, it will only be in rare and exceptional circumstances that the accused will be required to stand trial a third time.

#### **Guideline No 6 - Immunity from Prosecution**

The Director is empowered by Section 7(1)(f) of the Act to grant immunity from prosecution in appropriate cases. This power will normally be exercised in order to secure an accomplice's testimony for the prosecution.

A decision whether to call an accomplice to give evidence for the prosecution frequently presents conflicting considerations calling for the exercise of careful judgment in the light of all the available evidence. Inevitably, however, there will be instances where there is a weakness in the prosecution evidence that makes it desirable, or even imperative, for the prosecution to call an accomplice.

In conjunction with the question whether to call an accomplice the question may arise whether that accomplice should also be prosecuted. In this regard, unless the accomplice has been dealt with in respect of his or her own participation in the criminal activity the subject of the charge against the accused, he or she will be in a position to claim the privilege against self-incrimination in respect of the very matter the prosecution wishes to adduce in evidence. Where, however, an accomplice has been given an immunity under Section 7(1)(f) that immunity will override what would otherwise be an allowable claim of privilege.

In principle it is desirable that the criminal justice system should operate without the need to grant any concessions to persons who participated in alleged offences in order to secure their evidence in the prosecution of others (for example, by granting them immunity from prosecution). However, it has long been recognised that in some cases this course may be appropriate in the interests of justice. Nevertheless, an immunity under Section 7(1)(f) will only be given as a last resort. In this regard, as a general rule an accomplice should be prosecuted irrespective of whether he or she is to be called as a witness, subject of course to the usual evidentiary and public interest considerations being satisfied. Upon pleading guilty the accomplice who is prepared to co-operate in the prosecution of another can expect to receive a substantial reduction in the sentence that would otherwise have been appropriate. However, this course may not be practicable in some cases; for example, time may not permit charges against the accomplice to proceed to conviction before the trial of the principal offender, or there may be insufficient admissible evidence to support charges against the accomplice alone.

Apart from being a course of last resort, an immunity under Section 7(1)(f) of the Act will only be given provided the following conditions are met:

- (a) the evidence that the accomplice can give is considered necessary to secure the conviction of the accused, and that evidence is not available from other sources; and
- (b) the accomplice can reasonably be regarded as significantly less culpable than the accused.

The central issue in deciding whether to give an accomplice an immunity is whether in the overall interests of justice the prosecution of the accomplice should be foregone in order to secure that person's testimony in the prosecution of another. In determining where the balance lies, the following factors will be taken into account:

- (a) the significance to a successful prosecution of the evidence which it is hoped to obtain;
- (b) the degree of involvement of the accomplice in the criminal activity in question compared with that of the accused;
- (c) whether any inducement has been offered to the person concerned;
- (d) the character, credit and previous criminal record of any accomplice concerned;
- (e) whether the accomplice concerned made, or is prepared to make, full disclosure of all facts and matters within his or her knowledge.

When an accomplice receives any concession from the prosecution in order to secure his or her evidence, whether as to choice of charge or the granting of immunity from prosecution, the terms of the

agreement or understanding between the prosecution and the accomplice should be disclosed to the court.

#### **Guideline No 7 - Unrepresented Accused**

The prosecutor must not advise an unrepresented accused on legal issues or the general conduct of the defence. In the event that there is evidence that the prosecutor intends leading that is arguably inadmissible this should be raised with the Trial Judge prior to the evidence being called.

All materials and witness statements must be provided in the usual manner and the accused should acknowledge receipt in writing.

Telephone communications should be kept to a minimum and recorded in writing immediately. All oral communications should be witnessed by a third party and noted in all cases. The notes should be kept on the file or with the brief.

In the event of a trial, the witnesses should be advised that the accused is unrepresented and advised of the procedures that will be adopted in the court.

#### **Guideline No 8 - The Court Process**

A prosecutor must not appear in a contested matter or an ex-parte action before a judicial officer where there may be an appearance of partiality.

A prosecutor must fairly assist the court to arrive at the truth, seek impartially to have the whole of the relevant and admissible evidence placed intelligibly before the court, and assist the court with submissions of law that enable the law to be properly applied to the facts.

A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

A prosecutor must not argue any proposition of fact or law that is not reasonably open on the evidence and does not accurately represent the law. If there is contrary authority to the propositions being put to the court by the prosecutor, the court must be informed of them.

A prosecutor must call, as part of the prosecution case, all apparently credible witnesses whose evidence is relevant and admissible for the presentation of the complete factual case whether it supports the prosecution case or not unless:

- (a) the defence consents to the witness not being called;
- (b) the matter has been established by the calling of other evidence and there is no prejudice to the accused in not calling the witness;
- (c) the witness is, in the opinion of the prosecutor, plainly unreliable or untrustworthy;
- (d) the witness is unavailable due to serious illness, death or any other good reason.

In the event that the prosecutor declines to call a witness the defence must be informed as soon as reasonably practicable and where possible arrangements should be made to have the witness at court if the defence so request.

The prosecutor's right to challenge a juror should only be exercised if there is reasonable cause for doing so. It should never be exercised so as to attempt to select a jury that is not representative of the community as to age, sex, ethnic origin, religious belief, marital status, economic, cultural or social background.

Cross-examination of an accused as to credit or motive must be fairly conducted. Material put to an accused must be considered on reasonable grounds to be accurate and its use justified in the circumstances of the trial.

When addressing the jury or the court a prosecutor must not use inflammatory language and must at all

times put an accurate and fair interpretation of the facts and the law. The prosecutor is expected to present the case fearlessly, vigorously and skillfully.

When appearing on sentence the prosecutor has an active role to play but must not seek to persuade the court to impose an improper sentence nor should a sentence of a particular magnitude be advocated. It is the duty of the prosecutor to adequately and fairly present the prosecution case on sentence and assist the court to avoid falling into appealable error.

To do this the prosecutor should where appropriate:

- (a) comply with Sections 7 and 7A of the Criminal Law (Sentencing) Act with respect to injury, loss or damage suffered by the victim;
- (b) tender the relevant antecedents of the accused;
- (c) correct any error of fact or law;
- (d) refer the court to any relevant authority or legislation that may assist in determining the appropriate sentence;
- (e) make submissions on the appropriate sentencing options that are available including non-custodial options;
- (f) acknowledge any co-operation of the accused with the law enforcement agencies when this has occurred and proved to be of value. This must be done in a manner that does not endanger the safety of the accused or prejudice the operations of those agencies.

#### **Guideline No 9 - Disclosure**

Disclosure to the defence, of material that is within the possession of the prosecuting authority is one aspect of the duty to ensure that the Crown case is presented with fairness to the accused. In South Australia the extent of the duty to disclose is determined by both statutory and common law principles.

Section 104 of the Summary Procedure Act 1921 requires the prosecution to file in the Magistrates Court in major indictable matters:

- (a) statements of witnesses for the prosecution on which the prosecutor relies as tending to establish the guilt of the accused;
- (b) copies of any documents on which the prosecutor relies as tending to establish the guilt of the accused;
- (c) a document describing any other evidentiary material on which the prosecutor relies as tending to establish the guilt of the accused together with a statement of the significance that the material is alleged to have;
- (d) any other material relevant to the charge that is available to the prosecution.

This section entails early disclosure and filing of all relevant admissible material irrespective of whether it assists the Crown case.

The common law requires wider disclosure than Section 104. The limits of this duty are not precisely delineated, but depend upon the circumstances of each case. Moreover, the duty to disclose is an ongoing one, and turns upon the matters that are realistically in issue at any time. It is acknowledged that material is often obtained or brought to the attention of the DPP, after the preliminary hearing. Prompt consideration will be given to the need to disclose such material. Furthermore, the DPP is committed to ensuring that the police deliver to the DPP a full brief, including sufficient information to enable this disclosure guideline to be properly implemented.

In the ordinary course on request disclosure will be made of the following in a prosecution for an indictable offence in the Supreme or District Court:

- (a) particulars of the accused's prior convictions;
- (b) copies of all written statements, and an opportunity to examine electronically recorded interviews of all witnesses to be called, together with a copy of any prior inconsistent statements of those witnesses;



- (c) copies of any written or electronically recorded statement obtained from the accused by a person in authority;
- (d) copies of any photographs, plans, documents or other representations which will be tendered by the prosecution at trial.
- (e) an opportunity to examine exhibits which will be tendered;
- (f) copies of statements of any expert witnesses to be called and the prosecution will facilitate an opportunity for a defence expert from the same or a similar discipline to speak with that expert, pre-trial;
- (g) copies of any warrant or any statutory authority used in the gathering of evidence to be adduced at trial;
- (h) an opportunity to inspect bank records, books of account or other records or documents relevant to the prosecution case which may not be introduced into evidence but be relied upon.

In any case where the prosecutor declines to call a witness, the defence should receive details of any material or statements which are or may be exculpatory. The defence should also receive details of the whereabouts of that witness and if requested, the prosecution should make that witness available for the defence to call.

However, the DPP recognises that a number of factors may be relevant to the extent of disclosure required in a particular prosecution. The prosecutor also has a number of obligations in relation to the material that comes into his or her possession. These obligations include a need to consider whether documents are within the power of the prosecution to disclose and whether there are any immunities or privilege that should be claimed by the prosecution or individuals.

In addition to the above the prosecutor should also consider the following factors in respect of any material for which disclosure is contemplated or requested:

- (a) whether the material is relevant;
- (b) whether the material may divulge the identity of an informer;
- (c) whether the material is subject to legal professional privilege;
- (d) whether the material could prejudice the investigation, or facilitate the commission, of other offences;
- (e) whether the material was supplied to the police, or other authority, upon an expectation that the material would remain confidential;
- (f) whether the material could divulge confidential police methods or the internal workings of the police, or other authorities;
- (g) whether the material relates to National or State security;
- (h) whether disclosure of the material could tend to endanger, prejudice, or embarrass any person;
- (i) whether there is any apparent, or demonstrated, legitimate forensic purpose for the defence to have access to the material.

The extent to which any of these factors will affect the decision whether or not to disclose particular material will vary. Application of these factors will always be subject to the over-riding duty to ensure that the Crown case is presented with fairness.

#### **Guideline No 10 - Media Contact**

No public comment is to be made without the Director's, or his designated representative's, approval in relation to matters that are the subject of criminal proceedings or that have been referred to the Office for an opinion in relation to potential criminal proceedings. All media contact should be referred to the Director's office.

#### **Guideline No 11 - Vulnerable Witnesses**

When dealing with witnesses under 16 years of age, a person who suffers from an intellectual disability, a victim of an alleged sexual offence or a person who is at some special disadvantage, consideration must be given to the provisions of Section 13 of the Evidence Act 1929. In cases where the section might apply, a witness should be advised of the options that are available under the Evidence Act including a screen, closed circuit television, a court companion and a closed court. If the section is

applicable to a witness the application should be made after consulting with the witness where possible prior to the commencement of the trial.

The prosecutor with the conduct of the file should make the application notwithstanding any forensic advantage that is perceived in not making the appropriate arrangements.

Consideration must be given in the early stages of contact with the victim to involvement by the Witness Assistance Service (WAS). If a witness wishes to have a court companion and is unable to obtain the services of a suitable person, the Witness Assistance Service will either make arrangements in consultation with the prosecutor or refer the witness to Victim Support Services.

#### **Guideline No 12 - Victims of Crime**

In all dealings with victims of crime due regard must be had by all members of the Office to the *Declaration of Victim's Rights* (Annexure A). This is a direction given by the Attorney-General pursuant to the Director of Public Prosecutions Act.

Consideration must be given in the early stages of contact with the victim, and/or their families, to involvement in the case by the Witness Assistance Service (WAS). In all appropriate cases they should be advised of the service provided by the WAS and where necessary referred to it. Contact will then be made by a Witness Assistance Officer (WAO) directly with the victim.

Information as to the proceedings and the victim's role must be given at an early stage and there is a continuing obligation to keep the victim informed. Where possible, information about the proceedings and the legal implications should be given by the prosecutor. An effort must be made to minimise the number of staff members with responsibility for contacting the victim and handling the file.

Parents of child victims must be given adequate information about the legal system and the impact upon children in order to make informed decisions. The views of parents or caregivers must always be given appropriate consideration by the prosecutor and where possible their views should be accorded significant weight. However, the public interest must at all times be the paramount consideration.

Prosecutors should ensure that an adequate victim impact statement has been prepared and that it contains relevant material to assist the Court in the sentencing process. They must also ensure that victims are aware of their right to present the statement orally if they wish. Victims should be advised of the procedure for giving the statement orally and appropriate arrangements made for them to do so.

Victims must be informed of the outcome of finalised court proceedings in a timely fashion.

#### **Guideline No 13 - Victim Impact Statement**

Victim impact statements (VIS) should be prepared prior to trial by the person who is eligible to submit it to the court. The statements may be in the written form or presented verbally to the court. Victims should be advised of their right to give a verbal presentation to the court. VIS should usually be prepared prior to the first arraignment. In the event of complex matters or cases in which the victims require further time they must be completed expeditiously so as not to delay the sentencing process.

A victim may prepare a statement to be read to the court. All victims must be advised of the following if they wish to prepare and submit this statement:

- (a) The statement must be prepared in writing and provided to the DPP. The statement will then be provided to the Sentencing Judge who will then appoint a time for it to be read to the court. It may be read by the victim or by a person nominated by the court;
- (b) the court will not be closed to the public (unless an order of the Court is made);
- (c) the prosecutor can apply for a closed court and/or a suppression order in appropriate cases;
- (d) the statement will not be disclosed to the defence prior to conviction unless it contains inconsistencies that go to a material matter. In the event of such inconsistencies the usual practice of disclosure should be adopted;
- (e) the victim may amend the statement at any time prior to it being read to the court;

- (f) the victim may withdraw the statement at any time in accordance with the Rules of Court.

A copy of the VIS will only be provided to defence counsel or to an unrepresented accused with an undertaking that the document is not reproduced in any way without the consent of the DPP. The document must be returned to the DPP upon request.

#### **Guideline No 14 - Prosecution Appeals**

The prosecution has a right to appeal in certain circumstances. This right will always be exercised with restraint and only where there is a reasonable prospect of success.

##### *Appeals against sentence*

In The Queen v Osenkowski (1982) 30 SASR 212 King CJ made the following observations concerning the role of prosecution appeals against sentence:

*“It is important that prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where a judge’s sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender’s life might lead to reform. The proper role for prosecution appeals in my view, is to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected, and occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience.”*

This passage is reflective of the care with which the Director of Public Prosecutions must approach the question whether to institute an appeal against sentence.

The prosecution’s right to appeal against sentence should be exercised sparingly, and it is the policy of the Director of Public Prosecutions not to institute such an appeal unless it can be asserted with some confidence that the appeal will be successful.

In considering a prosecution appeal against sentence it is to be borne in mind that the sentence for a specific offence will vary according to its nature, the circumstances of its commission, the antecedents of the prisoner, and the effect on the victim. Consequently, for any given offence there exists a range of legitimate penalty options. An appellate Court will not interfere with the exercise of a Judge’s or Magistrate’s sentencing discretion unless an error in the exercise of that discretion can be demonstrated. In practical terms the Court must be satisfied that the sentence imposed falls clearly outside the appropriate penalty range and may consequently be characterised as manifestly inadequate. Mere disagreement with the sentence passed is insufficient. The High Court decisions are clear that there must be a matter of principle to be established by the appeal in relation to the matter of the sentence Everett and Phillips v R [1994] 181 CLR 295.

##### *Magistrates Appeals*

The Office conducts appeals from the Magistrates Court to the Supreme Court on indictable offences. The prosecution has a right to appeal against acquittal where there has been an error of law or fact by the Magistrate. These appeals are only instituted on rare occasions and in accordance with the authorities. The same considerations apply to appeals against sentence brought by the prosecution for a sentence imposed by a Magistrate or a Judge. This was confirmed by the Full Court in Police v Cadd (1997) 69 SASR 150.

##### *Case Stated*

There is no right of appeal against a verdict of acquittal in the District or Supreme Court. However the prosecution can apply to the court during the trial or sentencing process, or after an acquittal, for the court to refer a question of law for consideration to the Full Court. This power should be exercised sparingly. The Director of Public Prosecutions should not seek to have a question of law referred to the Full Court unless it can be asserted with some confidence that the Court will answer the question in the

manner sought by the prosecution. The question of law must be of sufficient importance to require the attention of the Full Court.

## CONCLUSION

This statement does not attempt to cover all questions that can arise in the prosecution process and the role of the prosecutor in their determination. It is sufficient to state that throughout a prosecution the prosecutor must conduct himself or herself in a manner which will maintain, promote and defend the interests of justice, for in the final analysis the prosecutor is not a servant of government or individuals. He or she is a servant of justice. At the same time it is important not to lose sight of the fact that prosecutors discharge their responsibilities in an adversarial context. Accordingly, while the case must at all times be presented to the court fairly and justly, the community is entitled to expect that it will also be presented fearlessly, vigorously and skillfully.

This statement will be kept under review, and any changes will be made public.

## ANNEXURE A

The Declaration of Victim's Rights has been superceded by the Victims of Crime Act 2001.

### VICTIMS OF CRIME ACT 2001

A copy of this Act has not been reproduced here.

A copy of this Act may be accessed at the Government's Website SA Central.

<http://www.sacentral.sa.gov.au/government/parliament>

or

Australasian Legal Information Institute's Website.

<http://www.austlii.edu.au>

## ANNEXURE B

## DIRECTOR OF PUBLIC PROSECUTIONS ACT 1991

## SUMMARY OF PROVISIONS

1. Short title
2. Commencement
3. Interpretation
4. Director of Public Prosecutions
5. Acting Director
6. Office of the Director
- 6A. Delegation
7. Powers of Director
8. Consultation
9. Independence of Director
10. Investigation and report
11. Directions and guidelines by Director
12. Annual reports
13. Saving provision
14. Regulations

## DIRECTOR OF PUBLIC PROSECUTIONS ACT 1991 .

An Act to establish the Office of Director of Public Prosecutions; and for related purposes.

The Parliament of South Australia enacts as follows:

**Short title**

1 This Act may be cited as the *Director of Public Prosecutions Act 1991*.

**Commencement**

2 This Act will come into operation on a day to be fixed by proclamation.

**Interpretation**

3 In this Act—

"Director" means the Director of Public Prosecutions and includes a person acting in the position of Director of Public Prosecutions;

"Office" means the Office of the Director of Public Prosecutions.

**Director of Public Prosecutions**

4 (1) There will be a Director of Public Prosecutions.

(2) The Director will be appointed by the Governor.

(3) A person is not eligible for appointment as the Director unless he or she is a legal practitioner of at least seven years standing.

(4) The Director will be appointed—

(a) for a term of office of seven years; and

(b) on terms and conditions determined by the Governor.

(5) At the expiration of a term of office, the Director will be eligible for re-appointment.

(6) The Director must inform the Attorney-General in writing of—

(a) any direct or indirect pecuniary interest that the Director has or acquires in any business, or in any body corporate carrying on a business, in Australia or elsewhere; and

(b) any other direct or indirect interest that the Director has or acquires that conflicts, or may conflict, with the Director's duties.

(7) The Director must not—

(a) engage in legal practice outside the duties of his or her office; or

(b) engage, without the consent of the Attorney-General, in any other remunerated employment.

- (8) The Governor may terminate the Director's appointment if the Director-
- (a) is guilty of misbehaviour; or
  - (b) becomes physically or mentally incapable of carrying out official duties satisfactorily; or
  - (c) becomes bankrupt or applies to take the benefit of a law for the relief of bankrupt or insolvent debtors; or
  - (d) is absent, without leave of the Attorney-General, for 14 consecutive days, or for 28 days in any period of 12 months; or
  - (e) contravenes or fails to comply with subsection (6) or (7).
- (9) Except as provided in subsection (8), the Director's appointment cannot be terminated.

#### Acting Director

- 5 (1) If the Director is temporarily absent, or the Director's position is temporarily vacant, the Attorney-General may assign a suitable person to act in the Director's position during the temporary absence or vacancy.
- (2) A person is not eligible to act in the Director's position unless he or she is a legal practitioner of at least seven years standing.
- (3) The terms on which a person is assigned to act in the Director's position will be as determined by the Attorney-General.

#### Office of the Director

- 6 (1) The Office of the Director of Public Prosecutions is established.
- (2) The Office consists of-
- (a) the Director of Public Prosecutions; and
  - (b) any persons assigned under the *Government Management and Employment Act 1986* to work in the Office.
- (3) The Director has the administration and control of the Office.

\* \* \* \* \*

#### Delegation

- 6A The Director may, by instrument in writing, delegate to any suitable person any of the director's powers or functions under this Act but such a delegation-
- (a) is revocable at will; and
  - (b) does not prevent the Director from acting personally in the matter.

#### Powers of Director

- 7 (1) The Director has the following powers:

- (a) to lay charges of indictable or summary offences against the law of the State;
  - (b) to prosecute indictable or summary offences against the law of the State;
  - (c) to claim and enforce, either on behalf of the Crown or other persons, civil remedies that arise out of, or are related to, prosecutions commenced by the Director;
  - (d) to take proceedings for or in relation to the confiscation of profits of crime;
  - (da) to institute civil proceedings for contempt of court;
  - (e) to enter a *nolle prosequi* or otherwise terminate a prosecution in appropriate cases;
  - (f) to grant immunity from prosecution in appropriate cases;
  - (g) to exercise appellate rights arising from proceedings of the kind referred to above;
  - (h) to carry out any other function assigned to the Director by any other Act or by regulation under this Act;
  - (i) to do anything incidental to the foregoing.
- (2) The Attorney-General may, by notice in the *Gazette*, transfer to the Director any powers or functions of the kind referred to above, or any power to consent to a prosecution, vested in the Attorney-General by an Act passed before the commencement of this Act.
- (3) A person who has power to consent to a prosecution, or to allow an extension of the period for commencing a prosecution, for an offence of a particular kind under the law of the State may, by notice in the *Gazette*, delegate that power to the Director.
- (4) A delegation under subsection (3)—
- (a) is revocable by subsequent notice in the *Gazette*; and
  - (b) does not prevent the person from acting personally in a matter,
- but, once a decision on a particular matter has been made by the Director in pursuance of a delegation, the delegator is bound by that decision.
- (5) A document apparently signed by the Director and stating that the Director consents to a particular prosecution or that the Director allows a specified extension of the period for commencing a particular prosecution is to be accepted, in the absence of proof to the contrary, as proof of the fact so stated.
- (6) Where an information or complaint charging an offence is apparently signed by the Director or a person acting on



the Director's authorisation, the information or complaint will, in the absence of proof to the contrary, be taken to have been duly signed by or on behalf of the Director.

- (7) In any legal proceedings, the Director may appear personally or may be represented by a member of the staff of the office who is a legal practitioner or by counsel or solicitor (including the Crown Solicitor or the Solicitor-General).
- (8) Details of any notices published under this section must be included in the Director's annual report.

#### Consultation

- 8 (1) The Director must, if requested to do so by the Attorney-General, consult with the Attorney-General with respect to the exercise of the Director's powers or functions.
- (2) The Attorney-General must, if requested to do so by the Director, consult with the Director with respect to the exercise of the Director's powers or functions.

#### Independence of Director

- 9 (1) Subject to this section, the Director is entirely independent of direction or control by the Crown or any Minister or officer of the Crown.
- (2) The Attorney-General may, after consultation with the Director, give directions and furnish guidelines to the Director in relation to the carrying out of his or her functions.
  - (3) Directions or guidelines under this section-
    - (a) must, as soon as practicable after they have been given, be published in the Gazette; and
    - (b) must, within six sitting days after they have been given, be laid before each House of Parliament.
  - (4) Subsection (3) need not be complied with in relation to directions or guidelines under this section relating to individual matters if, in the opinion of the Attorney-General, disclosure may be prejudicial to an investigation or prosecution, but, in that case, the directions or guidelines must be published in the Gazette, and laid before each House of Parliament, as soon as practicable after the matter is determined or otherwise completed.
  - (5) If the Attorney-General is satisfied that disclosure under this section would place human life or safety at risk or cause some other form of severe prejudice to any person, the Attorney-General may withhold material from disclosure so far as necessary to avoid that consequence.

#### Investigation and report

- 10 The Commissioner of Police must, so far as it is practicable to do so, comply with any request from the Director to investigate, or report on the investigation of, any matter.

**Directions and guidelines by Director**

- 11 (1) The Director may give directions or furnish guidelines to the Commissioner of Police or other persons investigating, or prosecuting, offences on behalf of the Crown.
- (2) Any such directions or guidelines must be published in the Director's annual report.
- (3) If the Director is satisfied that publication of material under this section would place human life or safety at risk or cause some other form of severe prejudice to any person, the Director may withhold the material from publication so far as necessary to avoid that consequence.

**Annual reports**

- 12 (1) The Director must, before 30 September in each year, prepare and provide the Attorney-General with a report on the operations of the Office during the year that ended on the preceding 30 June, including the number of applications for warrants under the *Listening and Surveillance Devices Act 1972* considered, and the number approved, by the Director.
- (2) The Attorney-General must have a copy of the report laid before each House of Parliament within six sitting days after the date of its receipt.
- (3) The Director may at any time report to Parliament on any matter affecting the proper carrying out of the functions of the Office.
- (4) The report must be given to the Speaker of the House of Assembly and the President of the Legislative Council and they must lay copies of the report before their respective Houses as soon as practicable after its receipt.

**Saving provision**

- 13 This Act does not derogate from the right of the Attorney-General to appear personally in any proceedings on behalf of the Crown.

**Regulations**

- 14 The Governor may make such regulations as are contemplated by this Act or as are necessary or expedient for the purposes of this Act.

**Schedule 1—Transitional provisions****Retrospectivity**

- 1 (1) This Act applies in relation to proceedings commenced before the commencement of this Act.
- (2) This Act applies in relation to offences committed before the commencement of this Act.

**Director to take over from Attorney-General**

- 2 Where, before the commencement of this Act, the Attorney-General had exercised, in relation to particular proceedings, a power or function of a kind vested in the Director under this Act, the Director may assume and continue to exercise that power or function as if it had been exercised by the Director from the inception of the proceedings.

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## PROGRESS OF MAJOR INDICTABLE FILE THROUGH THE OFFICE

