

DIRECTOR OF PUBLIC PROSECUTIONS

ANNUAL REPORT 2001 - 2002

This report is prepared for submission to the Attorney-General in accordance with the requirements of Section 15 of the *Director of Public Prosecutions Act 1973*, to report on the performance of my functions during the 12 months ending on 30 June in each year.

During the year staff in my Office have undertaken the prosecution of all criminal trials, pleas of guilty and breaches of suspended sentences or conditional discharges in the Supreme Court, the conduct of appeals in the Court of Criminal Appeal and Lower Court Appeals, and all civil litigation on behalf of the State of Tasmania. The Office has also provided representation and advice to Agencies and Departments involved in prosecutions and proceedings in Courts of Petty Sessions and Tribunals and representation, where appropriate, for officers of Courts or Tribunals who become the subject of applications for prerogative relief or review.

The formation of the Victims Assistance Unit and changes to the legislation have reduced the Office's tasks in relation to Criminal Injuries Compensation, although several remain.

As I noted last year, many counsel in the Office from both the criminal and civil sides generously give their time and expertise to a variety of community organisations (particularly those concerned with victims' support) and in the provision of legal education and contributions to law reform.

Criminal Cases in the Supreme Court

During the year a total of 462 persons (445 last year) were presented for trial or plea in the Supreme Court (see Table 1). A higher number than in previous years

were discharged. I believe this largely reflects a greater willingness to return matters for summary disposal (particularly assaults) than any significant change in the nature or application of the discretion to prosecute. However, I publish with this report my guidelines concerning that discretion. These have been slightly updated since last published by my predecessor, however they remain those as generally subscribed to by Directors of Public Prosecutions throughout Australia.

Table 2 shows major crime grouping by type with reference to persons convicted. Table 3 shows disposals.

There were 264 criminal cases awaiting disposal as at 30 June 2002, an increase of 103 from the same period last year. The increase has been over all centres.

Criminal Cases Awaiting Disposal

	30/6/98	30/6/99	30/6/00	30/6/01	30/6/02
Hobart	99	82	63	78	137
Launceston	35	63	74	42	75
Burnie	58	51	39	41	52

Undoubtedly this largely reflects that several larger trials were held or completed in the reporting year. My Office can have little control eventually over the backlog of cases. All we can do is effectively use the judicial time allocated to crime, but priority will continue to be given to the trials of persons in custody awaiting trial, and to sex crimes, particularly those involving children for whom delay is far more significant and arduous. I have instituted a new statistical check this year to monitor the use of allocated judicial time, and the (broad) reasons why such time might not have been productively used.

Reference to the statistics published by the Australian Bureau of Statistics in relation to Higher Criminal Courts for the period 1/7/2000 to 30/6/2001 confirms

the trend I expected in my last report, that is that several larger trials and legislative change particularly to aggravated burglary resulted in a substantial decrease in the proportion of defendants finalised. Nevertheless this State's median elapsed time to finalisation is, with Western Australia, the fastest in Australia. Our active finalisation proportion was the highest in the jurisdictions. Our conviction and discharge rates were also highly satisfactory on a comparative basis.

These figures are published a year behind mine, and I would expect similar trends next year with the exception of proportion of defendants finalised which I would expect to stay around the same, or decrease only slightly.

Summary Prosecutions and Lower Court Appeals

This varied and important work continued under the direction of Mr F M Neasey, Principal Crown Counsel. There appears to have been fewer summary prosecutions in the reporting year than previously. This might reflect a greater observance of the regulatory systems and statutes, but it is considered more likely that it unfortunately reflects that Agencies have curtailed investigatory activities with the result of less detection of offences.

Civil Litigation

The Civil Litigation section, under the supervision of Mr P Turner, provides legal representation to the State and its Agencies in the litigation in which it is involved. This year I can publish fuller statistics than previously about civil litigation and those are shown in Tables 4 and 5.

Conclusion

This has been a most satisfying year for my Office. Several complex and difficult criminal trials were prosecuted with great diligence and effect. Regrettably some

may have been made more lengthy than they ought to have been by the involvement of mainland counsel, whose trial culture seems more disposed to obfuscation than efficient presentation of the real issues to a jury. The same approach was evident in a Commonwealth prosecution this year which ate up significant judicial time allocated to crime.

One would not expect the results of this approach to see an increase in the use of interstate counsel, as in almost every case the accused were convicted.

In civil cases, the Crown strives to be a model litigant, but this is not the same as being timorous. I have encouraged counsel to adopt a pro-active rather than reactive approach to civil litigation.

Counsel, clerks, production, secretarial and management staff have worked diligently, co-operatively and highly professionally throughout the year and I am deeply grateful for their assistance in discharging my functions under the *Director of Public Prosecutions Act 1973*.

(Timothy J Ellis)
DIRECTOR OF PUBLIC PROSECUTIONS

THE ROLE OF AN INDEPENDENT PROSECUTOR AND GUIDELINES FOR THE EXERCISE OF THE DISCRETION TO PROSECUTE

These guidelines are published to provide an indication to the community at large of the nature of the task undertaken by my Office in determining whether or not an Indictment should be filed and a prosecution undertaken in the Criminal Court.

In Tasmania almost all charges involving indictable crime are laid by Police officers who undertake the investigation and gather the evidence relevant to the prosecution. These officers are trained investigators, they are not qualified lawyers and do not undertake a formal course of training in the prosecution of indictable matters in the Supreme Court of this State. In addition the case presented to my Office for prosecution after a committal proceeding has been conducted will often have undergone an evidentiary change due to the effect of cross-examination upon witnesses, the addition of forensic evidence (some of which may not be available at the time of charging) and the response to any request from my Office for additional evidence or investigation. Police prosecutions are commenced on obtaining a prima facie case but, as the Prosecutorial Guidelines indicate, a mere prima facie case is an insufficient level of proof for my Office to be satisfied that an Indictment should be filed. The test applied by my Office and all other prosecuting agencies in Australia is one which requires the person signing the Indictment to be satisfied that there is a reasonable prospect of conviction on the available and admissible evidence. This test requires, quite obviously, the assumption that the prosecution will be conducted before a reasonable jury not subject to any bias or undue influence and one which is properly directed to assess the issue of guilt.

The decision to discontinue a prosecution will often cause anger and distress to the victim or family of the victim of a crime. Whilst, in an emotional sense, victims of crime and the families of victims of crime may wish to see the perpetrator of a wrong prosecuted for the most serious criminal offence possible there is always a need to ensure that a careful and objective assessment of the available and admissible evidence is made and a correct application of legal principle to that evidentiary material. It is unfortunate that the role of an independent prosecutor is only the subject of consideration or discussion when issues such as this arise. It is

to be hoped that the continued publication of these guidelines and, wherever necessary, public explanation will assist the community at large in understanding the careful consideration which is given to the decision to prosecute and the factors which are taken into account in exercising the discretion to prosecute or making the decision to discontinue a prosecution.

1. 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, tend to undermine the confidence of the community in the criminal justice system.
2. It follows that the objectives of fairness and consistency are of particular importance. However, fairness need not mean weakness and consistency need not mean rigidity. The criteria for the exercise of this discretion cannot be reduced to something akin to a mathematical formula; indeed it would be undesirable to attempt to do so. The breadth of the factors to be considered in exercising this discretion indicates a candid recognition of the need to tailor general principles to individual cases.
3. In deciding whether or not a matter should be prosecuted any views put forward by the Tasmania Police Force or other investigating agencies are carefully taken into account. Ultimately, however, the decision is to be made having regard to the considerations referred to below.
4. The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution (Section 310(4) of the Criminal Code). 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 an identifiable person.

5. In deciding whether the evidence is sufficient to justify the institution or continuation of a prosecution the existence of a bare prima facie case is not enough. A prima facie case is a necessary but not sufficient condition for launching a prosecution. Given the existence of a prima facie case it must be understood that a prosecution should not proceed if there is no reasonable prospect of a conviction being secured before a hypothetical reasonable jury properly instructed (i.e. an impartial jury) or Magistrate in the case of summary offences. This decision 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 alleged offender 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 the useless expenditure of public funds.
6. 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.
7. 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 many public interest factors 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, 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.

8. 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 alleged offender, a witness or victim;
 - (d) the alleged offender's antecedents and background;
 - (e) the staleness of the alleged offence;
 - (f) the degree of culpability of the alleged offender in connection with the offence;
 - (g) the obsolescence or obscurity of the law;
 - (h) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;
 - (i) the availability and efficacy of any alternatives to prosecution;
 - (j) the prevalence of the alleged offence and the need for deterrence, both personal and general;
 - (k) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
 - (l) whether the alleged offence is of considerable public concern;

- (m) any entitlement of the victim or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken;
- (n) the attitude of the victim of the alleged offence to a prosecution;
- (o) the likely length and expense of a trial;
- (p) whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
- (q) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the Court;
- (r) whether the alleged offence is triable only on Indictment.

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

9. As a matter of practical reality the proper decision in many cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. Although there may be public interest 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 Court at sentence in mitigation. Nevertheless, where the 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.
10. Special considerations apply to the prosecution of persons under the age of 16 years. Prosecution action against children should be used sparingly and in making a decision whether to prosecute particular consideration should be given to available alternatives to prosecution, such as a caution or reprimand, as well as to the sentencing alternatives available to the relevant Youth Justice Court if the matter were to be prosecuted.
11. 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 alleged offender or any other person involved;
- (b) personal feelings concerning the offender 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.

TABLE 1

Criminal Prosecutions

	Persons Presented	Persons Convicted	Persons Acquitted	Persons Discharged
1992-93	330	250	28	52
1993-94	316	237	20	59
1994-95	327	249	9	69
1995-96	324	255	14	55
1996-97	309	240	20	39
1997-98	335	262	24	49
1998-99	505	401	23(1) ¹	80
1999-00	711	562	45 ²	103
2000-01	445	333	68 ³	79 ⁴
2001-02	462	319	32	111

¹ 1 person found unfit to plead

² 1 person found not guilty by reason of insanity & 1 person whose jury failed to reach a verdict

³ 1 person found not guilty by reason of insanity & 3 persons to be retried

⁴ 1 person deceased before trial

TABLE 2

Crime (Type) Major Groupings by Persons Convicted

	2000/01 %	2001/02 %
Dishonesty (aggravated/armed robbery, stealing, burglary, receiving, fraud, etc.)	39.32	44.20
Personal violence (murder, manslaughter, assault, wounding, grievous bodily harm)	26.83	30.09
Arson & injury to property	8.53	5.32
Sex crimes (rape, unlawful sexual intercourse/relationship, indecency)	7.92	5.64
Other ungrouped (includes causing death by dangerous driving, conspiracy, escape)	7.65	5.35
Perjury & perverting the course of justice	5.48	4.70
Drugs	4.27	4.70

TABLE 3**Comparative Table Relating to the Disposal of Criminal Matters**

Year	Number of Persons Presented	Pleas of Guilty	Dealt with other than as Plea	Number of Persons Tried
1992-93	330	199	52	79
1993-94	316	186	59	71
1994-95	327	218	69	40
1995-96	324	222	55	47
1996-97	309	214	39	56
1997-98	335	234	49	52
1998-99	505	368	80	56
1999-00	711	488	104	119
2000-01	445	260	79	106
2001-02	462	244	111	107

Of those persons tried -

Year	Convictions	Acquittals	Found Insane	Retrials
1992-93	51	28	...	3
1993-94	51	20	...	2
1994-95	31	9	...	3
1995-96	33	14	...	4
1996-97	36	20	...	1
1997-98	28	24
1998-99	33	23	...	1
1999-00	74	43	1	1
2000-01	73	29	1	3
2001-02	75	32	0	0

TABLE 4

Number of Civil Matters

	New files opened	Files closed	Active files (as at 30 June)
2000-01	340	347	855
2001-02	350	340	946*

* This represents total files open as at 30 June 2002. By reason of the manner in which data is stored and retrieved it includes files which have previously been closed and re-opened.

TABLE 5

Categories of Civil Matters Opened (by %)

	30/6/2001	30/6/2002
Employment (WCC & Crown Law)	56	57
Miscellaneous *	24	24
Medical Malpractice	13	12
Debt Recovery	5	5
Housing	2	2

* includes occupier liability, industrial and anti-discrimination