

SUPREME COURT
OF THE AUSTRALIAN
CAPITAL TERRITORY



**ANNUAL
REVIEW**

2017–18

Front cover: Ceremonial sitting: Penfold J retirement [L-R] McWilliam AsJ, Penfold J, Murrell CJ

Back cover, centre: Aunty Tina Brown performing the traditional Ngunnawal sweep dance. This dance is designed to bring closure and to cleanse the spirit for new journeys. Performed at Ceremonial sitting: Penfold J retirement.

Back cover, bottom: Ceremonial sitting: Loukas-Karlsson J's swearing in: Loukas-Karlsson J

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“Research shows that women often wait longer before they go for promotion. They feel that they must be more prepared and more experienced before they raise their hand. They must be more perfect.

Reshma Saujani the founder of Girls Who Code says:

So many women...tell me that they gravitate towards... professions that they know they're going to be great in, that they know they're going to be perfect in, and it's no wonder why. Most girls are taught to avoid risk and failure...Boys, on the other hand, are taught to play rough, swing high...and by the time they're adults...they're habituated to taking risk after risk...We're raising our girls to be perfect, and we're raising our boys to be brave.”

The Hon Chief Justice Helen Murrell addressing newly admitted lawyers at the Admission Ceremony on 17 June 2016 and quoting from Reshma Saujani, 'Teach girls bravery, not perfection' (speech delivered at TED Talk annual conference, Vancouver, 17 February 2016)



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Chief Justice Helen Gay Murrell

Welcome

Chief Justice Helen Murrell

The 2017–18 year has been an exciting year for the Court, which has continued to build upon its past successes.

In March 2018, Justice Hilary Penfold retired as a resident Judge after ten years of service, although her Honour continues as an Acting Judge. The ACT legal community welcomed Justice Chrissa Loukas-Karlsson to the Court and to the jurisdiction. Justice Loukas-Karlsson has a reputation for excellence at the NSW bar and a formidable reputation at the UN International Criminal Tribunal for the former Yugoslavia. The Court will benefit from her experience and intellect. With her Honour's appointment, the Court maintains gender equality on the bench, unique among superior courts in Australia.

The Court updated the judicial priorities in its Strategic Statement and remains committed to achieve the goals and priorities in the Statement.

Justice Burns and his Drug and Alcohol Court (DAC) working party moved closer to finalising a proposal for a DAC. Further progress depends on the government's response, particularly in relation to funding health care support for DAC participants. A DAC would support the rehabilitation of serious offenders whose criminality is related to substance abuse and who would otherwise receive a sentence of full-time imprisonment at considerable personal, family and community expense. It is hoped that a final proposal will emerge within the next legal year.

With the commencement of the *Courts and Other Justice Legislation Amendment Act 2018* (ACT), the jurisdiction of the Associate Justice has been expanded. Her Honour now has jurisdiction to hear the same matters as a resident Judge, save except for criminal trials and Court of Appeal matters. This enables the Court greater flexibility in listing, with improved efficiency.

The judges and staff of the Court remain closely involved in the design of the new Supreme Court building and the new shared courts facilities. With the completion of stage one of the project in sight, we look forward to using the new building and facilities, which promises to enhance Court processes and the experience of lawyers and litigants as well as providing a structure of which the Territory can be proud.

Building on the success of the indigenous mentoring program established in February 2017, the Court facilitated the placement of several indigenous law students with the Court. We received positive feedback from the students and their universities. In May 2018, Associate Justice McWilliam and others organised a very successful careers day at the Court, which was attended by many talented indigenous high school students. The students had the opportunity to speak to Court staff and associates, allowing them to develop a closer understanding of how the law and the judicial system works. All judges participated in the event. The Court remains committed to cultural diversity, and hopes to develop a more structured program for indigenous students with an interest in the legal system.

Principal Registrar Philip Kellow



During 2017–18 the courts administration continued to focus on the new courts facility, the new case management system (ICMS), courts governance and how the organisational structures and processes best support the business of the Supreme Court.

The construction of the new courts facility, including the refurbishment of the combined courts registry, made significant progress during the reporting year. The works also included the construction of new remote witness suites and modern juror facilities. I would like to thank staff for their patience as they maintained business as usual during the often disruptive building works

Work continued on the criminal release of the ICMS that is due to be implemented in early 2019. The criminal release is the most complex of the releases and includes interfaces with a number of justice agencies and the first tranche of online services. The development of various statistical reports using data from the ICMS also progressed.

In the first half of 2018 a workflow review of the business processes of the bail office was undertaken. The review identified and mapped the time spent on hundreds of activities, and produced a range of recommendations for improving the operation of this registry area. A number of these recommendations will be implemented during 2018–19.

In June 2018 the Government allocated funds for the procurement of a new jury management system. The new system will better support the effective and efficient delivery of jury trials in the ACT and streamline processes to improve the experience of those asked to perform jury service. The procurement process will commence in the first half of 2018–19.

During the reporting year the Supreme Court updated its strategic statement which informs the ACT Courts and Tribunal's corporate plan. The strategic priorities identified in the statement help ensure the administration is focused on those matters of most importance to the Court.

Significant progress was made in the project to improve the design and content of the Court's website. A new information architecture was designed having regard to feedback from the judiciary and court users and work commenced on updating the content.

The last 12 months have again been a particularly busy and productive period for the administration as major projects and other activities have made significant progress while staff continued to provide a range of high quality registry, sheriff and corporate services to the Court. I would like to acknowledge the hard work and commitment of staff that has made this to occur.

I look forward to working with the Chief Justice, Judges, Associate Judge and staff over the next 12 months as we continue to progress a number of important projects and initiatives that will enhance the Court's operations.

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Strategic Statement

The Court's Purpose

1. To maintain and promote the rule of law.
2. To provide leadership within the justice system.

The Court achieves its purpose:

1. By delivering impartial, high quality and timely decisions;
2. By resolving each case by the process most suited to achieving a just, quick and effective outcome;
3. By ensuring transparent, easy and cost-effective access to the Court for all;
4. By communicating openly, clearly and respectfully;
5. By being accountable for the use of public resources;
6. By developing and applying best practice.

Judicial Priorities for 2018–19

1. To transition smoothly to the new Supreme Court building and to develop the best methods of integration into the new physical environment.
2. To pilot criminal case conferencing.
3. As far as practicable, to implement the National Standards for Working with Interpreters in Courts and Tribunals developed by the Judicial Council for Cultural Diversity.
4. As part of implementing the International Framework for Court Excellence, to review the key activities and projects against the Framework and undertake a user survey of the Court.
5. To develop protocols for undertaking Court processes by electronic means and to pilot eTrial technologies.
6. To review all the Court's practice directions including the Court of Appeal Practice Direction.

History

The Supreme Court of the Australian Capital Territory was established as a superior court of record on 1 January 1934 by the *Seat of Government Supreme Court Act 1933* (Cth). The principal reasons behind the establishment of the Supreme Court were to relieve the High Court of Australia of its original jurisdiction in relation to the Australian Capital Territory and to provide an intermediate court of appeal from what was then the Court of Petty Sessions.

The first sitting of the Supreme Court was held at the Acton House Courthouse on 12 February 1934 and was presided over by Justice Lionel Oscar Lukin. From January 1941 the Court sat at the then new Patents Office in Parkes. The Court has occupied its present accommodation in Knowles Place on the western side of City Hill since the Law Courts Building was opened by the then Prime Minister, Sir Robert Menzies, in 1963.

When the Law Courts Building was opened, the Australian Capital Territory had a population of less than 80,000 people and the Supreme Court had no resident judge. Instead, the Court was principally constituted by additional judges; judges whose primary commission was as a judge of another Commonwealth Court. In 2015–16, the 390,000 people of the Territory were served by four resident Judges and the Associate Judge. To deal with the Territory's growing population and the Court's growing workload, the Executive appointed the Court's first fifth resident judge, Justice Michael Elkaim, in July 2016.



Law Courts of the Australian Capital Territory

Jurisdiction

The Supreme Court of the Australian Capital Territory is a superior court of record and it is invested with the original and appellate jurisdiction necessary to administer justice in the Territory.

In 2016–17, the Court consisted of the Chief Justice, four other resident Judges, a resident Associate Judge, Additional Judges (Federal Court Judges who have an additional appointment to the ACT Supreme Court) and Acting Judges (Judges who have short term appointments of up to twelve months).

The Judiciary was supported in interlocutory case management directions by a Registrar (Ms Annie Glover) and Deputy Registrar (Mr Grant Kennealy) and by combined Registry staff who assist by maintaining records, processing orders, listing cases and performing other functions. The Sheriff's Office provides security and administers the jury system. The Russell Fox Library is the main legal reference resource for the ACT Law Courts.

The original and appellate jurisdiction of the Supreme Court is usually exercised by a single Judge. The Associate Judge manages most civil matters and hears many of the civil trials. Criminal trials are heard before a Judge and jury, or (in a limited range of cases) by a Judge alone, at the election of the accused.

In civil matters the Supreme Court has an unlimited monetary jurisdiction. Claims for less than \$250,000 are usually brought in the Magistrate Court. The Supreme Court hears appeals from the Magistrates Court, the Children's Court and the ACT Civil and Administrative Tribunal.

In most cases, an appeal from the Associate Judge or from a single Judge is heard by the Court sitting as a Court of Appeal which is constituted by three Judges, at least one of whom is a resident Judge.

Judges of the Court

Resident Judges

CHIEF JUSTICE HELEN GAY MURRELL



On 28 October 2013, Helen Murrell was sworn in as the Chief Justice of the Australia Capital Territory.

Her Honour was admitted as a solicitor of the Supreme Court of New South Wales in 1977. From 1977 to 1981 her Honour practised at the Commonwealth Crown Solicitor's Office and NSW Legal Aid Commission. From 1981 to 1996 her Honour practised as a barrister in criminal law, administrative law, environmental law, common law, and equity. In 1994 her Honour was appointed the first Environmental Counsel to the NSW Environment Protection Authority. In 1995 her Honour was appointed Senior Counsel in New South Wales.

From 1996 to 2013 her Honour was a Judge of the District Court of New South Wales. In 1996 her Honour was also an Acting Judge in the Land and Environment Court of New South Wales. From 1997 to 1999 her Honour was President of the Equal Opportunity Tribunal of New South Wales. Her Honour then became Deputy President of the Administrative Decisions Tribunal of New South Wales (Head of the Equal Opportunity Division). From 2005 to 2013 her Honour was a Deputy Chairperson of the New South Wales Medical Tribunal.

From 1998 to 2003, her Honour was the first Senior Judge of the Drug Court of New South Wales. In 1999 her Honour was a member of a United Nations Expert Working Group on Drug Courts. Her Honour maintains a continuing interest in therapeutic jurisprudence.

Her Honour has a longstanding involvement in the professional development of judges. Currently, her Honour chairs the Council of the National Judicial College of Australia (NJCA) and contributes to a number of NJCA programs.

Her Honour is an Honorary Air Commodore of No 28 (City of Canberra) Squadron, Patron of the Hellenic Australian Lawyers Association (ACT Chapter), committee member of the Australian Association of Women Judges and a Fellow of the Australian Academy of Law.

JUSTICE HILARY RUTH PENFOLD



On 1 February 2008, Hilary Penfold PSM QC was sworn in as a judge of Supreme Court of the Australian Capital Territory. Her Honour retired on 23 March 2018.

Born in 1953 in Dunedin, her Honour was educated as Ascham School and the Australian National University, from which she graduated BA in 1975 and LLB (Hons) in 1977. After completing the Legal Workshop at the Australian National University, her Honour was admitted as a barrister and solicitor of the Supreme Court of the Australian Capital Territory in 1977.

In 1977 her honour joined the Commonwealth Office of Parliamentary Counsel, where she worked as a legislative drafter, and in due course as First Parliamentary Counsel for ten years until 2004. In 2001, she was appointed a Commonwealth Queen's Counsel on the recommendation of the then Attorney-General, the Hon Daryl Williams QC MP.

During her career as a legislative drafter, her Honour drafted legislation covering many subject areas, including taxation, corporations law, defamation, industrial relations, human rights, sex discrimination, and forensic procedures, as well as the constitutional amendments proposed to create an Australian republic in 1999. Her Honour was also actively involved in the work of the Parliamentary Counsel's Committee (covering Australia and New Zealand), and was the president of the Commonwealth Association of Legislative Counsel, representing all legislative drafters in the [British] Commonwealth, from 1999 until 2003. Her Honour was a member of the Board of Taxation from 2000 until 2004, and headed the Migration Litigation Review commissioned by the then Attorney-General, the Hon Philip Ruddock MP, in 2003.

In 2004 her Honour was appointed Secretary of the newly-formed Department of Parliamentary Services.

JUSTICE JOHN DOMINIC BURNS



Justice John Burns was first admitted to practice as a solicitor of the Supreme Court of New South Wales in 1981. He practiced as a Legal Aid solicitor in the Legal Services Commission of NSW, specialising in criminal law, until January 1983 when he joined the Deputy Crown Solicitors office in Canberra as a Prosecutor.

In 1984 he joined the newly created office of the Australian Government Solicitor in Canberra as a senior solicitor. In August 1985 he resigned from the Australian Government Solicitors office to take up a position in the firm of Gallens Barristers and Solicitors. He subsequently became a partner in the firm of Gallens Barristers and Solicitors. When Gallens merged with the firm of Crowley and Chamberlain, he became a partner in the new firm of

Gallens Crowley and Chamberlain. During this period, his Honour practised predominately in the field of criminal law and civil litigation.

In April 1989 his Honour commenced practice at the bar at Blackburn Chambers. His Honour practised in criminal law and general civil litigation.

His Honour was appointed as a Magistrate and Coroner of the Australian Capital Territory in April 1990. At the same time his Honour was also appointed as a Magistrate of the Norfolk Island Territory. During his time as a Magistrate his Honour spent three years as the Children's Court Magistrate. His Honour also took over responsibility for managing the lists of the Magistrate Court as List Co-ordinating Magistrate in 2007.

In December 2009 his Honour was appointed Chief Magistrate and Chief Coroner of the Australian Capital Territory. He held those positions until he took up his appointment as a Judge of the Supreme Court on 1 August 2011. Since 2012 his Honour has been a member of the ACT Law Reform Advisory Committee. Since 2016 his Honour has been the Section Editor of the Australian Law Journal for the Australian Capital Territory.

As of 2018 his Honour continues to chair the Supreme Court's Criminal Procedure Committee. Justice Burns is also leading a working group within the Court for the purpose of developing an appropriate Drug and Alcohol Court model for the Supreme Court of the ACT. The working group includes Judges, Legal Professionals, Corrections experts, and Health experts. In the past year, his Honour participated in the CEO Sleepout with Associate Justice McWilliam on behalf of the ACT Courts.

JUSTICE MICHAEL ELKAIM



Justice Elkaim grew up in Northern Rhodesia (now Zambia) and was educated from secondary school level in Rhodesia (now Zimbabwe).

His Honour completed a Bachelor of Laws degree at the University of Rhodesia in 1974 and then moved to England, where he completed a Master of Laws degree at the University of London in 1976 specialising in international law. His Honour also obtained a Diploma in Air and Space Law from the London Institute of World Affairs.

His Honour married in 1977 with a daughter being born in London and two more daughters being born in Sydney. His Honour was admitted to the Bar of England and Wales in 1978 and began practising in London Chambers, 2 Kings Bench Walk in the Temple.

In 1980 his Honour came to Australia and was admitted to the bar in New South Wales in June 1980. During this time Justice Elkaim had a wide ranging practice, mostly dealing in Common Law.

His Honour was appointed Senior Counsel in October 2002. In May 2008 his Honour became a District Court judge and on 4 July 2016 was sworn in as the ACT Supreme Court's fifth judge.

JUSTICE DAVID MOSSOP



David Mossop was sworn in as a Judge of the Court on 13 February 2017.

At the time of his appointment he was the Associate Judge of the Court, a position which he had held since 2013, first as Master and then as Associate Judge after the title of that office was changed when the *Courts Legislation Amendment Act 2015* (ACT) came into effect on 21 April 2015.

His Honour holds a Bachelor of Science and Bachelor of Laws from the University of New South Wales and a Master of Laws (Public Law) from the Australian National University.

His Honour was admitted to practice as a solicitor in 1992. He practised as a barrister for 14 years from 1998 to 2011.

His Honour served as a Magistrate and Coroner from 2012 to 2013.

JUSTICE CHRISSA LOUKAS-KARLSSON



On 26 March 2018, Chrissa Loukas-Karlsson was sworn in as a Judge of the Supreme Court of the Australian Capital Territory.

Her Honour attended the University of Sydney, where she graduated in 1985 with a Bachelor of Laws and a Bachelor of Arts. Her Honour was admitted as a solicitor in July of the same year and worked for the Aboriginal Legal Service, the Department of Industrial Relations and the Legal Aid Commission prior to being called to the New South Wales Bar in December 1989. Her Honour was appointed Public Defender in 1995 and took silk in 2012. In addition, her Honour was appointed as Acting Crown Prosecutor in 1996.

Her Honour held part time positions as Acting District Court Judge in 1996 and as a Judicial Member of the Administrative Decisions Tribunal between 1997 and 2003. From 2003 to 2006, her Honour was counsel before the UN International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague.

Her Honour was a Bar Council Member in the New South Wales Bar Association from 1991 to 2003, 2007 to 2012, 2014 and 2016 to 2018. Her Honour was elected to the executive of the New South Wales Bar Council in 2015 and elected Junior Vice President of the New South Wales Bar in 2017. Additionally, in 2015 her Honour was appointed a Director of the Law Council of Australia. Her Honour was also a Member of the International Bar Association's Criminal Law Committee Taskforce on Extra Territorial Jurisdiction in 2007.

Her Honour was awarded the Woman Lawyer of Achievement Award in 2002 by the Women Lawyers Association of New South Wales, the Senior Barrister Award in 2013 at the Lawyers Weekly Women in Law Awards in Melbourne and Barrister of the Year in 2017 by the Women Lawyers Association of New South Wales.

ASSOCIATE JUSTICE VERITY McWILLIAM



On 26 June 2017, Verity Alexandra McWilliam was sworn in as the Associate Judge of the Supreme Court of the Australian Capital Territory.

Her Honour obtained BA (Hons I)/LLB degrees from the Australian National University in 2000, and a Masters degree in International Law from the University of Sydney in 2005.

In 2002, her Honour was admitted as a solicitor to the Supreme Court of New South Wales, working in Sydney at PwC Legal in the Commercial and Regulatory Litigation Division and later at the Crown Solicitor's Office of NSW, in the Torts (Justice) division.

Interspersed with her employment as a solicitor, McWilliam AsJ worked as an associate to the Hon. Justice Mary Finn in the Appeal Division of the Family Court of Australia, and the Hon. Justice Beaumont and the Hon. Justice Madgwick in the Federal Court of Australia.

In 2006, her Honour was called to the NSW bar, developing a general practice over 11 years across the areas of commercial/equity, criminal, employment, environment/planning, public law and torts. In addition, from 2010 until 2017, McWilliam AsJ lectured variously in public law, federal constitutional law and litigation at the University of NSW, and in public law at the University of Sydney over 2010 to 2012.

Before her appointment, her Honour was a nationally accredited mediator and is currently a member of the Board of Directors of the Commercial Law Association of Australia.

Additional Judges

During 2017–18 the following additional judges sat:

The Honourable Justice Anthony Max North
 The Honourable Justice Jayne Margaret Jagot
 The Honourable Justice Lindsay Graeme Foster
 The Honourable Justice Michael Andrew Wigney
 The Honourable Justice Berna Joan Collier
 The Honourable Justice Robert James Bromwich
 The Honourable Justice Natalie Charlesworth

Acting Judges

During 2017–18 the following acting judges sat:

The Honourable Acting Justice Linda Ashford
 The Honourable Acting Justice Stephen Walmsley
 The Honourable Acting Justice David Robinson
 The Honourable Acting Justice Murray Kellam



Ceremonial sitting: Loukas-Karlsson J's swearing in

Russell Fox Library

About the Russell Fox Library

The Russell Fox Library – named after the Territory’s first Chief Judge, the late Honourable Russell Walter Fox AC QC – primarily provides and maintains legal resources for use by judicial officers of the ACT Supreme Court, the Magistrates Court and members of the ACT Civil and Administrative Tribunal.

In addition to ensuring that legal resources remain relevant, the Library also assists judicial officers and their associates with locating reference material as well as with supplying a research service. Whenever possible, Library staff also help legal practitioners, self-represented litigants and members of the public.

The Library publishes judgments and decisions on the ACT Courts website, updates web pages and assists with the Court’s social media presence on Twitter. Judgments and decisions appear on the Court’s website at <http://courts.act.gov.au/supreme/judgment>.

Physical access to the Library’s collection in the new Supreme Court building will be restricted to Court and Tribunal employees, however, the collection will still be available to the general public for use within the main reading area. Only legal practitioners who are registered Library clients have borrowing privileges.



Librarian, Victor Rodziewicz

Activities

Broaden Your Horizons program

In May 2018 Library staff participated in the Broaden Your Horizons program, an organisation committed to the social inclusion of young and marginalised people. Indigenous students were introduced to the Library and a brief talk was presented by the Librarian about collection – who can use it – what we hold – who are our clients.

Databases

The Library moved to the new Lexis Nexis online platform, now named Lexis Advance. Training was provided to associates and staff.

Overseas Support in the Pacific

A request for future assistance was received from the Law Librarian of the Office of the Director of Public Prosecutions, Fiji. To supplement the Office's limited law collection the Russell Fox Library was approached to see whether the Library was in a position to lend support in situations whenever the DPP Library was unable to locate legal material.

Assistance provided by the Russell Fox Library has primarily been supplying UK and Australian case law via email to the Fijian DPP Library.

The Library also has a reciprocal interlibrary loan relationship with the Law Library of the Fijian Office of the Attorney-General. As with the DPP, case law is provided upon request.

A set of Commonwealth Law Reports were donated to Vanuatu.

Preliminary work to do with Library move to new facilities

The Library's key focus in 2017–18 was preparing for the move to the new Supreme Court building. There were extensive discussions with the project team regarding the Library requirements in the new Supreme Court Building to ensure the new facilities would be a comfortable and practical space for a modern law library.

The new Library facilities will contain collections from various places within the existing Court building.

Work was undertaken to identify the extent of the Library's collection in terms of physical space taken up to ensure enough linear metres are available for the entire collection in the new Supreme Court building. This preliminary work was an opportunity to identify collections and texts that were no longer needed.

Surplus material was donated to practitioners and the Aboriginal Legal Service.

Library in Film Shoot

In March the Library became a backdrop to a short fictional film about a retired barrister. The film, *Missing Time*, was locally produced and directed with the intention of entering the film in various local and overseas film competitions.

Permission was granted for scenes to be shot in the Library and during a Saturday morning the film crew visited the Supreme Court to set up and filmed a scene for a couple of hours. The scene involved an actor going to the criminal law section of the collection, taking a text from the shelf from which a letter from the past falls out.

Library Review

A review of the Library began in late 2017 with the engagement of a consultant – Janine Schmidt – who visited the Library from 9 to 13 April 2018.

The review considered:

- the functions to be performed by a modern court library, including the management of the collection, support to the Judiciary and tribunal members, educational activities, the use of social media and other functions;
- the needs of the judiciary, members, practitioners and self-represented litigants;
- usage of services now and in the future;
- management, governance and staffing structures for the Library;
- necessary capabilities, work level standards and training for the staff of the Library;
- administrative systems to prioritise activities, track workload and report on performance;
- business continuity arrangements;
- opportunities for synergies or improved collaboration with other law libraries, particularly in relation to specialisation and mutual borrowing rights for collections.

Further work will be undertaken next financial year to implement the recommendations of the review.

Statistics

The following table displays the number of judgments and sentencing remarks uploaded onto the ACT Supreme website by the Library during 2017–18:

Jurisdiction	Number of Items Published
Supreme Court of the Australian Capital Territory Court of Appeal	61
Supreme Court of the Australian Capital Territory Full Court	3
Supreme Court of the Australian Capital Territory	318
Sentencing Remarks	170

Sheriff's Office

Sheriff's Office

The Sheriff's Office is responsible for the service and execution of process, the enforcement of civil judgments, the provision of juries, the provision of court attendants and security within the Supreme Court precinct.

Along with providing services to the Supreme Court during the criminal listing periods and appeal periods, Sheriff's Officers also facilitate the Remote Witness Rooms, which allow witnesses to give evidence in an alternate location away from the Court room. These rooms have been specifically designed to assist vulnerable witnesses during the period they are required to give evidence.

The Sheriff's Office, in conjunction with the Jury Management Unit, facilitates the jury service process, which enables the timely commencement of trials and payment to members of the community for their jury service. The Sheriff's Office is preparing for the opening of the new Supreme Court which will enable the Court to conduct up to five jury trials at the same time, which will almost double the capacity previously allowed. This will require additional people for jury service, which the Sheriff's Office and Jury Management Unit manages.

Sheriff's Officers professionally manage the Courts, providing an efficient service and friendly face, which ensures the smooth operations of the Court and greatly assists the judiciary, legal profession and members of the public. Sheriff's Officers are often complimented by various people in relation to their performance and the way they manage their functions in relation to all Court proceedings.

The Sheriff's Office is currently undertaking a procurement process to acquire and configure a jury management system for the ACT. The ACT Government has funded this system and it is anticipated the system will be operational during the 2019–20 financial period.

The construction of the new Supreme Court has been an exciting time for the Sheriff's Office and the Sheriff's Office is looking forward to the opening of the dedicated jury assembly area and providing jurors with updated, modern and appropriate rooms for deliberations.

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Cultural Awareness

Improving Aboriginal and Torres Strait Islander access to the ACT Supreme Court

Following consultation with the Aboriginal and Torres Strait Islander community in May 2017, the ACT Supreme Court endorsed a Strategic Plan to facilitate better access to the Supreme Court for Aboriginal and Torres Strait Islander people in the ACT. The Plan includes a range of activities that seeks to continually engage with representatives from the community, improve the cultural competency of the judiciary and improve access to the Court for Indigenous people in the ACT. A copy of the Strategic Plan is available on the Supreme Court website. A number of activities achieved in 2017–18 are outlined below.

Encouraging Indigenous students into employment within the Justice sector

On 17 May 2018 the ACT Supreme Court, in partnership with the Education Directorate, held a Justice Careers Expo for Indigenous Year 9–12 students. Almost 50 students participated which included a tour of the Supreme Court and meetings with judges, prosecutors, lawyers, corrective services officers, sheriff assistants and a range of career advisors. A morning tea was followed by mock trials where students undertook a range of court roles. The enthusiastic participation of the students is expected to lead to the event being held every few years.

Two Indigenous law students undertook internships with the ACT Supreme Court during the financial year. The internships were part of the mentoring program with the ANU and University of Canberra.

Improved information to refer court users to services

Information on external legal and support services was developed for distribution from the court registry counters and court websites which has been well received by court users.

Improving the cultural competency of the Judiciary and understanding of the community

The Judges and Magistrates participated in a cultural competency development session on 18 October 2017 with Professor Sherwood from Sydney University.

Judicial Officers met with Julie Tong, CEO of Winnunga Nimmityjah Aboriginal Health Service and with Katrina Fanning, Chairperson and Jo Chivers, Deputy Chairperson of the ACT Aboriginal and Torres Strait Islander Elected Body to keep abreast of issues affecting the local Aboriginal and Torres Strait Islander community.



Judicial Officers with Julie Tong, CEO of Winnunga Nimmityjah Aboriginal Health Service

Cultural Diversity Justice Network

On 28 April 2018, McWilliam AsJ attended the inaugural meeting of the Cultural Diversity Justice Network in Melbourne, which includes representatives from courts and tribunals across the jurisdictions of every state and territory.

The aim of the organisation is to implement policies and agendas set by the Judicial Council of Cultural Diversity. It does this through sharing of information and practices that are being developed in each jurisdiction, with a common goal of increasing access to justice for people from minority backgrounds, including people identifying as Aboriginal or Torres Strait Islanders. An example for a current project is improving access to interpreters in courts and tribunals, how they are treated in legal hearings and the quality of the service provided during such hearings.

Involvement with the legal community

Jessup Moot

The Philip C Jessup International Law Moot Court Competition is the oldest, largest and most prestigious student mooting competition in the world. For some years the Supreme Court has hosted the Semi-finals of the competition.

Elkaim J presided over the Semi-finals of the DLA Piper Australian National Rounds of the Philip C Jessup International Law Moot Court Competition, held in Canberra on Saturday, 10 February 2018. The 2018 Jessup problem addressed issues of the validity of an inter-State arbitral award; the capture of a marine vessel; the breach of nuclear disarmament obligations; and the conduct of naval warfare. His Honour was pleased to be involved in the Jessup Moot Competition in Australia and pleased to hear of the exemplary performance of both Australian teams in the international rounds. Both the University of Sydney team, who broke 14th after the preliminary rounds, and the University of Queensland team who were declared the 2018 Jessup moot world champions should be congratulated on their outstanding achievements.

ANU Medico – Legal Moot

Elkaim J sat in on the ANU Medico-Legal Moot on Wednesday 9 May 2018. The problem question raised a number of challenging contemporary medico-legal issues and His Honour was impressed by the quality of submissions made by both parties. All participants in the Moot should be congratulated.

Ceremonial sittings

23 March 2018

Ceremonial sitting to mark the retirement of the Honourable Justice Penfold

[EXTRACTS FROM HER HONOUR'S SPEECH] PENFOLD J:

One of the joys and terrors of the ACT Supreme Court is that there is an enormous variety in our work, and even in the last few months I have found myself faced with things that I have never come across before, but over time there were fortunately an increasing number of issues in which I knew as much about them as the practitioners involved and sometimes more.

Two other things at this point that I should say in relation to the court and the community that aren't perhaps said enough because it's always more fun in these contexts to criticise. First, we in the ACT are very lucky with our jury system, partly perhaps because we're lucky with our jury pool, but I think we should be very careful about any suggestion of narrowing its scope.

Sure, it's a bit cumbersome, but so is democracy and any other kind of community involvement, and the jury system is a vital part of community involvement in the legal system. I could talk until lunch time about the beauty of the jury system, but I won't just for today. Secondly, we in the ACT are lucky with our media. They're not perfect, a bit like the rest of us, really, but in my experience the individuals whose pitch is the ACT justice system have been and are routinely competent, thoughtful and honourable, and their editors and owners have at least allowed them to operate that way. You only have to look at a tabloid newspaper or the equivalent Internet site from another jurisdiction to realise just how lucky we are.

I turn now to what might be some of the highlights of my career or perhaps the things that I'm proud of as I look back, and it may not necessarily be the same things. I'm proud to have been the first woman appointed as a resident judge of this court, although obviously there were female additional judges from the Federal Court before that. I believe that I was far from the first woman ever approached about an appointment to this court, but I was just the first one brave enough or stupid enough to accept.

So that in the 10 years since I was appointed the Supreme Court has gone from a court with no female members to a court with equal numbers of men and women. Another thing I'm proud of, especially given my theoretical engagement with the practice of law before this, is that when I got my High Court moment, and that's the one where the High Court upholds your first instance decision and reverses the Court of Appeal's, it was a decision to the effect that when a child witness gives unsworn evidence there is no requirement to direct the jury so as to suggest that the child's evidence may be less reliable than if it had been sworn evidence.

It's a decision which is in a small compass but it may be quite important for child witnesses in general and child complainants in particular. As for the cases in which the High Court hasn't liked my conclusions, well, I rely on the Queensland Byrne J's advice about other courts having as much right to be wrong. I am also proud, although in a much modest sort of way, if I can put it that way, of having made what was certainly until recently and may still be the only surviving declaration of incompatibility under Australian human rights legislation, which Ken has already discussed.



Ceremonial sitting: Penfold J retirement: Penfold J

The modesty is appropriate partly because there are only two relevant pieces of human rights legislation in Australia anyway, so not a lot of opportunities for making these declarations, and partly because, as I understand it, the then High Court cast some doubt on the status of validity of such declarations anyway when they made the decision that knocked out the first one, the Victorian one.

I also take some comfort, and pride I think in this context would be quite dangerous, in the fact that of the several hundred people I have sentenced, and have got quite a good memory for their names having worked through the sentencing remarks, some of them don't seem to have turned up in the court lists again.

Finally, in this list I'm very proud of what terrific progress the ACT Women Lawyers Association has made in the several years since I became its patron, and again Ken has already referred to that and as has Sarah. I personally don't take credit for that process, but I have been thrilled to see how a succession of energetic, consultative and all-around brilliant women from the local profession headed by Juliet Behrens, Prue Bindon and now Daniel Mildren have turned the association into a very active association. It now has 575 members, which is apparently in an Australian context both a high number of members and a very high proportion of the total number of women lawyers practicing in the jurisdiction.

Moving on to the other vital thank yous.

I mentioned first my immediate judicial colleagues local and visiting for their advice, good humour and shared understanding of the problems of dealing with certain regular litigants. I especially thank the Honourable Richard Refshauge who knew a lot more about criminal law than I did when we

started and who learned a bit more about it through me. Not that I taught him anything in particular, but I knew that if I asked him a question to which he didn't know the answer he could be relied on to go and research it. It was just another excuse to go to the library.

I have also enjoyed my role, that again has been mentioned, as the ACT or this court's representative on the Judicial Conference of Australia, which is actually an association, as we know, which draws its members from all judicial offices in the country, and the Supreme and Federal Court Judges Conference Committee involving all states and territories and the Federal Court and the New Zealand court, equivalent New Zealand court. Coming from a relatively small jurisdiction, I have found it educative and personally rewarding to deal with judicial officers from further afield.

Then there are my chambers staff. Trish Jones, the personal assistance I inherited from Crispin J who is up the back there, who taught me almost as much as my judicial colleagues in the early days, and when she deserted me years ago Kerriane Duval-Stewart, who has provided not just terrific support in the court but also terrific sweet treats on several occasions, and then of course my 10 wonderful associates, most of whom are here today.

I should also spread the thank you net a bit more widely and record my debt of gratitude to the Commonwealth Office of Parliamentary Counsel, represented here today by second parliamentary counsel, Meredith Leigh. Thank you, Meredith. Which gave me my start in the law and then 25 years later released me into the wider world with a slightly unusual but valuable set of legal skills.



Ceremonial sitting: Penfold J retirement: [L-R] Mossop J, McWilliam AsJ, Penfold J, Murrell CJ, Burns J, Elkaim J

HIGHLIGHTS

And also to Roxanne Missingham, who is here today, one of my offsidars in the Department of Parliamentary Services who helped keep me sort of approaching sane during the four years I was there. And the Department of Parliamentary Services itself, I suppose, which in the course of those four years made the Supreme Court look like an easy option.

Sitting on a court like this especially with such a varied jurisdiction has been a confronting and also a humbling experience in many ways, especially for me perhaps given my somewhat clinical experience of the law before this. In the courts we see a broad cross-section of humanity, but not very many of them.

We see people who have never really had a chance at a decent life from the day they were born, people who were unlucky to be in the wrong place at the wrong time, people who made one wrong or stupid decision and of course plenty of people who keep making wrong and stupid decisions, and the few who just keep making deliberately wicked decisions. But more commonly we see people whose route to the court has been steered by domestic violence, child sexual abuse, mental illness often unrecognised, whether their own or that of family members, or even by sheer bad luck.

And also we see remarkable courage, whether it's the sexual abuse complainant who turns up to give evidence, the person who comes to court to make a victim impact statement about losing a family member or the people who will have caring responsibilities for the rest of their lives as a result of an injury criminal or not done to a family member.

The work of the court may sound more like a burden when it's described that way, and it is in one sense, but it's also an honour and a privilege not only to be introduced so intensely to the lives of so many others but also to be entrusted on behalf of the community with making decisions affecting the futures of those people and of the community within which they and we live, and more generally to serve the people of the ACT as a member of this court. I have been immensely privileged over the past 10 years and I thank all of you who have supported me and who have shared in that experience in that time.



Ceremonial sitting: Penfold J retirement

26 March 2018

Ceremonial sitting for the swearing-in of the Honourable Justice Loukas-Karlsson

[EXTRACTS FROM HER HONOUR'S SPEECH] LOUKAS-KARLSSON J:

It has become customary, and I would like to acknowledge the people who have supported me over the years, and in doing that I will try not to sound like I'm giving an Academy Award acceptance speech. And in the interests of guarding against plagiarism, I should indicate that line about the Academy Awards is, in fact, borrowed from Justice Natalie Adams of the Supreme Court of New South Wales, present today.

The first people I must acknowledge are my parents, Aphrodite and Ilias, and my sisters, Yvonne and Angelina. My parents were born in a village in northern Greece in a place called Epirus. Scholars of the classics, of whom there are many here today, including Their Excellencies, the Greek Ambassador and the Swedish Ambassador to Australia will know that it was named after King Pyrrhus, who was one of the most determined opponents of ancient Rome. His victories as a general came with heavy losses, and that is, of course, how the term 'Pyrrhic victory' came about. Apparently, my ancestors specialised in victories that looked a lot like defeat.

My parents lived through the Second World War and the Civil War in Greece and their respective families were on the opposite sides of a civil war, the left-right divide, and it is to this that I attribute my ability, hopefully, to listen to both sides of any argument at any time.

My father was part of the Greek contingent of the United Nations Corps in Korea in the 50s and made the decision while there to emigrate to Australia rather than the United States. I'm glad he made the right decision. My father arrived in Australia alone and with no English and commenced working in the outback laying down train tracks. He saved up enough money to bring my mother to Australia. My mother had wanted to go to high school and university and become a teacher, but those opportunities were denied to her as a girl. It was a burning ambition on the part of my parents, both early feminists in their way, that my sisters and I, born in Australia, would receive the education they themselves were denied through the accidents of history and birth.

As has been mentioned, as a barrister I worked at the private bar, The Public Defenders and as a Crown prosecutor, and I want to make three points about that. First, I think it is important to be able to argue the case for either side, and I encourage all lawyers that I mentor to have experience on both sides of the bar table. It is important not to be tribal in the law and, in fact, some of my best friends are prosecutors.

Second, both before and after my time as a public defender I was at the private bar. I began as a reader at Wardell Chambers in 1990 and was at Wardell Chambers this year when my appointment was announced.

And third, I spent many years as a barrister at The Public Defenders. The work was, of course, difficult and stressful and highly rewarding. The Public Defenders of the past and the present are an impressive group of lawyers. It's an important institution and many public defenders have gone on to judicial office.



Ceremonial sitting: Loukas-Karlsson J swearing in: Loukas-Karlsson J

I also want to pay homage to the great women judges who are magnificent role models for all lawyers, men and women. The first woman on the High Court of Australia, Justice Mary Gaudron, who cannot be here today as she is in Paris, has always been very generous to me with her time and her advice, and I recall discussing with her the advice of Joan Rosanove QC on dealing with male detractors in the law. Joan was the first woman admitted to the bar in Victoria and advised that, "You must have the stamina of an ox, the hide of a rhinoceros, and when they kick you in the teeth you must look as if you hadn't noticed it." We spent some time discussing the relevance of that approach today.

Another great pioneer in the law and a great woman of firsts is the first female President of the New South Wales Court of Appeal, Margaret Beazley, who is here today. I am deeply, deeply honoured by your presence. I'm also deeply honoured by the presence of Justice Julie Ward, Chief Judge in Equity, the first woman solicitor to be appointed directly to the bench of the New South Wales Supreme Court, and Justice Anna Katzmann of the Federal Court, a former President of the New South Wales Bar Council, and Justice Julia Lonergan of the Supreme Court of New South Wales and, in another great first, our own chief justice of the ACT, Chief Justice Murrell, just proving yet again that ACT is ahead of the curve. I would also like to acknowledge the mentoring I have received over the years from Justice Melissa Perry and Justice Michael Slattery.

The Chief Justice and my fellow Judges have set a high standard here in the ACT and I will strive to do the same. In an era of fake news and fake facts, the application of proper legal principle to the correct facts by an independent judiciary is ever more crucial for a fair, just and democratic society. I am proud to be joining a court with such an impressive reputation.

And now to Socrates. Socrates stated some two and a half thousand years ago that the essential qualities of a judge are to listen courteously, answer wisely, consider soberly and decide impartially. That statement stands true today, and therefore the time for me to speak is over and it is now time for me to listen. Thank you, Chief Justice.



Ceremonial sitting: Loukas-Karlsson J swearing in: [L-R] Loukas-Karlsson J, Murrell CJ

Selected cases

Canberra Greyhounds Racing Club Inc v Planning and Land Authority of the Australian Capital Territory [2018] ACTSC 25

Canberra Greyhound Racing Club Inc (the Club), the lessee, ran a greyhound racing track on land granted by the Commonwealth, the lessor. The Club sought a renewal of the lease. Renewals of leases previously granted by the Commonwealth were governed by s 254 of the Planning and Development Act 2007 (ACT) (the ACT). In particular, 254(3) of the Act provided for the mandatory renewal of an old lease upon satisfaction of the requirements enumerated in s 254(1).

The issue was whether a writ of mandamus ought to issue against the Planning and Land Authority of the ACT (the Authority) to compel the grant of a lease when it was anticipated that greyhound racing would be banned by legislation. The Authority had not yet made a decision and was waiting for the Domestic Animals (Racing Greyhounds) Amendment Act 2017 (ACT) (Racing Greyhounds Act) to take effect on 30 April 2018.

The Club argued that the delay amounted to a constructive refusal to renew the lease. Her Honour held that awaiting a change in the law of Parliament is no excuse for delay; when a request is made, the statutory body must decide it pursuant only to the law as it stands. Although the soon-to-be-illegal purpose of the renewed lease might only be short-lived, the punch line can be taken from a decision of Burt CJ in *Re Minister for Minerals and Energy; Ex parte Wingate Holdings Pty Ltd* [1987] WAR 190 AT 194:

A party invoking the jurisdiction of the court must be permitted to seek his justice upon [the law as it is] and the court cannot deny him that right because of a reasonable expectation that at some future date the law will be changed ... it may well be that his victory, should he enjoy one, will be Pyrrhic. If it is, then so be it.

However, it was determined that mandamus did not lie as it would be ineffectual or futile. The old lease expired in 2027 and the Club could still conduct greyhound racing until 30 April 2018. Nothing would change if the Court did compel the Authority to renew the lease: the purpose of the lease would still become prohibited on 30 April 2018. The application was dismissed.

Hoyle v The Queen [2018] ACTCA 42

This was an appeal against convictions for acts of indecency and sexual intercourse without consent. The appeal was dismissed.

The appellant was a lecturer at the University of Canberra. In April 2015, he asked five female business law students to attend his office to discuss whether their assignments were plagiarised. The students alleged that, during the meetings, there was sexual misconduct by the appellant. He was found guilty by a jury in April 2017 and was sentenced in July of the same year.

The appeal raised several points, including the probative value of tendency evidence and the distinction between new and fresh evidence.

The Court's decision in *Hoyle* coincided with – and was guided by – the High Court's unified voice in *The Queen v Bauer* [2018] HCA 40, 92 ALJ 846 (*Bauer*). The 'tendency' question in *Hoyle* was whether the appellant's acts of misconduct against the other complainants were 'significantly probative' of whether he offended against the specific complainant in question. The answer was that it was. The High Court in *Bauer* said that 'in a multiple complainant sexual offences case, where a question arises as to whether evidence that the accused has committed a sexual offence against one complainant is significantly probative of the accused having committed a sexual offence against another complainant ... there must ordinarily be some feature of or about the offending which links the two together'. The 'link' in *Hoyle* was that each episode of charged conduct occurred within a short time span of the tendency conduct relied on (the offences against the other complainants) and that the conduct was so similar.

The appeal also concerned fresh evidence; evidence of the appellant's frontal lobe injury and dementia had not been available at the trial. The appellant argued that the absence of such evidence had deprived him of a mental impairment defence and had resulted in a miscarriage of justice. The Court disagreed. It held that the evidence was 'fresh evidence' – 'evidence of which an accused person was unaware at the time of the trial and which could not have been discovered with reasonable diligence'. But the Court was not satisfied that, had the evidence been available at the trial, a jury might reasonably have acquitted. Similarly, there was no basis to find that, if the appellant had known of the fresh evidence, he would have raised a defence of mental impairment at trial.

R v DL [2018] ACTCA 9 (6 April 2018)

This was an application for leave to appeal from interlocutory orders made by Elkaim J on the admission of tendency evidence. The respondent had been charged with four counts of incest and four counts of committing an act of indecency on a person under 10 years of age. In the proceedings before Elkaim J, the Crown sought to adduce evidence three incidents that were, at that point, the subject of a trial that the accused was awaiting in Queensland.

Before Elkaim J, the respondent submitted that the admission of the evidence of these three Queensland-based incidents would have a prejudicial effect on the respondent (*Evidence Act 2011* (ACT) s 101). The respondent submitted that if these incidents were admitted as tendency evidence, he would not be able to respond to the evidence while also maintaining his right to silence in relation to the upcoming trial in Queensland. In considering the test under s 101, Elkaim J reflected on whether the potential prejudice to be considered is confined to be prejudice accruing in ACT proceedings, or whether it may extend to prejudice that the respondent may suffer in defending separate proceedings. Elkaim J found that the potential for prejudice to accrue in separate proceedings was relevant to the test under s 101, and rejected the Crown's application to adduce evidence of the three Queensland incidents.

In considering the Crown's application for leave to appeal from Elkaim J's orders, Burns J acknowledged that this issue of the confines of prejudice in tendency applications was worthy of consideration at the intermediate appellate level. However, Burns J was not satisfied that this issue of the confines of prejudice was raised with clarity in these proceedings. Of primary concern was that the admission of evidence of the three Queensland incidents would have caused prejudice to the respondent in the present proceedings in the ACT. According to Burns J, the adducing of this evidence would not add substantially to the Crown's case in the ACT proceedings, but would add very substantially to the potential prejudice against the respondent "no matter in what sense the term prejudice is used." For this reason, Burns J refused the Crown's application, and as a result, did not consider it necessary to determine the confines of prejudice under s 101.

Leda Commercial Properties Pty Ltd v Brenda Hungerford Pty Ltd [2018] ACTCA 17

This was an appeal from two decisions arising out of a retail tenancy dispute. Leda Commercial Properties Pty Ltd (Leda) subleased premises to Brenda Hungerford Pty Ltd (BHPL). In 2005, Leda sold the premises and assigned its interest in the sublease to Tuggeranong Town Centre Pty Ltd (TTC). In 2008, BHPL abandoned the premises and ceased to pay rent to TTC. The abandonment terminated the lease and TTC brought a claim against BHPL for damages and rent owed together with interest. BHPL made a counterclaim against TTC and a Third Party Claim against Leda for damages arising from alleged misleading and deceptive conduct pursuant to the *Trade Practices Act 1974* (Cth). BHPL's counterclaim against TTC was dismissed with costs by the primary judge. BHPL's Third Party Claim against Leda was successful and Leda was ordered to pay damages to BHPL. The Third Party Claim was the subject of the appeal.

The following three issues were central to the appeal:

1. Whether the primary judge erred by finding a case in favour of BHPL which fell outside the pleadings and in circumstances where there was no acquiescence or joinder of the issue by Leda (the pleadings point).
2. Whether the primary judge should have, but failed to, engage in a 'reasonable expectation analysis' in reaching his conclusion that the asserted undisclosed facts should have been disclosed (the reasonable expectation analysis).
3. Whether BHPL had in fact relied on the non-disclosure to its detriment (the reliance point).

Held: The appeal was allowed. The challenged costs order was set aside and BHPL was ordered to pay TTC and Leda's costs of the original proceedings.

The Pleadings point: The Court held that primary judge erred by finding a case in favour of BHPL which fell outside of the pleadings. It was found that a complaint of misrepresentation by silence must be specifically pleaded. The court also found that Leda or TTC was never faced with evidence indicating a different case to that which was pleaded and that it was therefore unfair to find in favour of BHPL. The result of the pleadings point was that the original judgement against Leda was set aside and judgement was entered for Leda on the Third Party Claim.

The reasonable expectations analysis: The court found that for an allegation of misleading conduct derived from silence to succeed, the judge must analyse whether or not there was a reasonable expectation that the asserted undisclosed facts would have been disclosed. The Court held that the primary judge had therefore erred by failing to engage in the required 'reasonable expectations analysis' before reaching his conclusion.

The reliance point: Notwithstanding his conclusion that Ms Hungerford's evidence was flawed and required corroboration before being accepted, the primary judge accepted Ms Hungerford's evidence that she would not have proceeded with the purchase of the business had Mr Beirne disclosed upcoming plans for the centre. The Court found that there was sufficient contradictory evidence to challenge Ms Hungerford's evidence and therefore it should not have been accepted.

Walters v The Queen [2018] ACTCA 1 (Elkaim, Mossop and Wigney JJ)

In April 2017, Mr Walters was found guilty of a single count of conspiracy to traffic in a controlled drug other than cannabis following a judge alone trial. He was convicted in May 2017 and sentenced to 30 months imprisonment with a non-parole period of 15 months. Mr Walters appealed both the conviction and sentence.

The appeal hearing focused on two grounds of appeal, namely that:

- (a) the evidence did not permit a finding beyond reasonable doubt that Mr Walters had conspired to traffic the drug; and
- (b) the trial judge erred in finding a continued participation in a conspiracy to import after it was known Mr Walters intended to traffic the drug was sufficient to establish beyond reasonable doubt a subsequent conspiracy to traffic the drug.

The Court held that the trial judge had correctly identified the need for the Crown to prove beyond reasonable doubt that Mr Walters had entered into an agreement with the co-offender to traffic the controlled drug and that they both did intend that the drug would be trafficked pursuant to that agreement. However, given the circumstantial nature of the case, it was necessary for the Crown to demonstrate that the only reasonable hypothesis for what occurred was an agreement that the drug be dealt with by on-sale. The Crown had failed to do this. While there was evidence the co-offender was aware of Mr Walter's intention to sell the drug, that expectation was not sufficient to establish an agreement, and therefore a conspiracy, to traffic the drug. As a consequence, the conspiracy charge could not be maintained. The Court set aside the verdict and orders of the Court below and acquitted Mr Walters of the charge.

DN v Paton [2018] ACTSC 20 (19 February 2018)

This was an application by the plaintiff in a civil proceeding for the taking of evidence in London, in the United Kingdom. The relevant proceedings were a claim for damages arising out of a motor vehicle accident in 2009, defended by the second defendant (the Nominal Defendant). The plaintiff had been a passenger in a motor vehicle involved in a collision with another motor vehicle driven by the first defendant. The plaintiff resided in London and had been in the ACT to prepare for her wedding at the time of the accident. An application was made by the plaintiff on 17 November 2017 for an examination order under Division 6.10.8 of the *Court Procedures Rules 2006* (ACT), which would allow for her evidence to be given in London. Burns J made the order sought by the plaintiff and indicated that his reasons would follow.

In his reasons, Burns J considered reports of two psychiatrist consultants retained by the plaintiff, and reports of a psychiatrist consultant retained by the defendant. The plaintiff's psychiatrists gave diagnoses of post-traumatic stress disorder and raised concern regarding whether requiring the plaintiff to return to the ACT to give evidence would adversely affect the quality of that evidence. The defendant's psychiatrist confirmed the diagnosis, but disagreed regarding the severity of the plaintiff's condition and the impact the condition would have on her evidence. The defendant's psychiatrist's report also noted that the plaintiff had travelled overseas for holidays on a number of occasions since the incident.

Burns J highlighted that there is a difference between travelling overseas for a holiday and travelling to Australia for the purpose of giving evidence in court proceedings in which the plaintiff will need to recount a distressing accident. Burns J determined that it was in the interests of justice to make the order sought by the plaintiff (under r 6813 of the *Court Procedures Rules 2006* (ACT)), noting that there was a real risk that should the plaintiff be required to return to the jurisdiction her symptoms may be so exacerbated as to affect her capacity to give evidence in the proceedings.

Luongo v Clarke [2018] ACTSC 81

On 7 May 2014 the plaintiff was walking up Red Hill Drive when the defendant, who was riding his bicycle down Red Hill, collided with her. The plaintiff suffered injuries as a result of the collision. Only a short time before the collision the plaintiff had experienced another close call with a cyclist, who after narrowly avoiding a collision with the plaintiff, had warned her against walking in the middle of the road.

Contributory negligence was a central issue in this matter. His Honour found that both the cyclist and the pedestrian were aware, or should have been aware, that other cyclists and pedestrians used the roadway. Elkaime J found that the defendant was negligent by not keeping proper lookout for pedestrians or slowing down to avoid a collision. The plaintiff, however, was primarily at fault as she was not only walking in the middle of the laneway but had also been warned of the danger and should have had the foresight to have avoided the accident by moving to the side of the road. Elkaime J found that the appropriate contributory negligence was 70%.

R v Shearer [2018] ACTSC 91

Mr Shearer was charged with one count of aggravated robbery in joint commission with another person. He pleaded not guilty and elected to have the matter tried before a judge alone.

The Crown's case was that in the early hours of 1 January 2017, Mr Shearer and Mr Horner were driving in Mr Shearer's car. They started to follow another car, ultimately parking the other car in and assaulting and robbing the driver of the car. The Crown argued the alleged offence was committed in accordance with an agreement between Mr Shearer and Mr Horner as per s 45A(1)(b)(ii) of the *Criminal Code* 2002 (ACT). The key issues at trial were whether there was an agreement or nonverbal understanding to commit the robbery, or alternatively, whether there was an agreement to commit an offence "of the same type" as robbery per s 45A(2)(a) of the *Criminal Code*.

On the evidence presented, Mossop J held that the fact a theft had occurred only became clear to Mr Horner after he had re-entered Mr Shearer's car. This was after the physical elements of the robbery had been completed. As such, Mossop J was not satisfied beyond reasonable doubt there was an agreement or non-verbal understanding between Mr Shearer and Mr Horner to rob the driver. While Mossop J was satisfied there was an agreement between Mr Shearer and Mr Horner to assault the driver, his Honour held that assault was not an "of the same type" as robbery. In the absence of legislative guidance, what constitutes an offence "of the same type" is to be worked out in the context of particular fact situations. While both assault and robbery are offences involving an act or threat of violence against a person, robbery is in essence a more serious example of theft and involved an element of dishonesty. Offences are not "of the same type" merely because they share some elements in common. The antecedent facts of this case did not provide a basis to aggregate the offences so as to allow them to be categorised together. As a consequence, Mr Shearer was acquitted of the charge.

R v Spong

R v Spong was a trial relating to an incident at the 2017 Summernats festival. The accused drove a restored utility vehicle, which had a flatbed tray, along the 'cruise route' of the festival, with a number of passengers on the tray. Whilst attempting to do a 'chirp' manoeuvre with the vehicle, the vehicle lurched forward suddenly, which was not anticipated by the accused. The deceased and another passenger fell from the truck. The other passenger was unharmed, however the deceased died from head injuries.

The accused was charged with the offence of culpable driving causing death by reason of negligence, which has a statutory alternative charge of negligent driving causing death. The accused offered a plea of guilty to the statutory alternative charge, which was not accepted by the prosecution.

The Crown and Defence made differing submissions as to how the jury was to be directed in relation to the standard of negligence required by the offence. The jury were directed that in order to find the accused guilty, they must consider that the driving involved "a high risk that death or injury would follow from the relevant conduct". This direction was later overturned by the Court of Appeal, who held that the requisite negligence is to be determined by reference only to the degree of departure from the required standard of care, rather than by reference to the possible consequences of deviating from the required standard of care.

The jury were required to return verdicts in respect of both the charge of culpable driving causing death by reason of negligence, which has a statutory alternative charge of negligent driving causing death. In spite of the accused's earlier plea of guilty in court in respect of the statutory alternative, the jury returned verdicts of not guilty in respect of both counts.

R v Salcedo; R v Stretton

In *R v Salcedo; R v Stretton*, two co-accused were charged with a number of offences relating to a “home invasion” in 2017. The accused Salcedo sought a pre-trial ruling that an unrecorded admission allegedly made by the accused Salcedo to Senior Constable David be excluded from evidence.

The accused participated in a record of interview when he was arrested on 20 February 2017. After concluding a portion of the interview, the Senior Constable turned the recording equipment off. The Senior Constable gave evidence on a voir dire that before the Senior Constable turned the recording equipment back on to continue the interview, the accused gave a spontaneous utterance “Definitely not the gun used in the shooting. Salt rounds were used”. The spontaneous utterance was not recorded using the audio visual equipment, but was recorded by the Senior Constable in his diary.

The Court was required to consider whether the spontaneous utterance was made in the course of questioning, requiring the admission to be recorded in accordance with s 23V of the *Crimes Act 1914* (Cth). The Court considered that the spontaneous utterance, made immediately after the end of one interview, and immediately before two further interviews, were required to be recorded in accordance with s 23V. The availability for the remarks to have been recorded, and the failure to adopt the utterances in either of the two subsequent interviews, precluded the availability of “Special circumstances” supporting the admission of the evidence despite the failure to record the admissions. As a result, evidence of the admission was excluded from evidence.

The jury returned verdicts on the second day of deliberations. The jury returned verdicts of guilty for both co-accused on charges of aggravated burglary, recklessly inflicting actual bodily harm, intentionally inflicting grievous bodily harm, and making a threat to inflict grievous bodily harm.

Woods v Porter [2018] ACTSC 161

There were three applications for judicial review of a decision made in the Magistrates Court. It concerned the prosecutorial discretion as to what charges to bring and maintain against an accused.

The three plaintiffs who commenced proceedings in the Supreme Court were each charged with dishonestly obtaining a financial advantage from another person by deception, an offence that carries a maximum penalty of 10 years' imprisonment.

The plaintiffs and the Commonwealth DPP (Director) had entered into plea negotiations, with the plaintiffs indicating they would agree to plead guilty to the lesser charge of doing anything with the intention of dishonestly obtaining a gain from another person, a charge with a maximum penalty of 5 years' imprisonment.

In anticipation of the pleas, the Director filed fresh charges with the Magistrates Court. However, no agreement could then be reached on the Statement of Facts for these charges. The Director withdrew the plea offer, and the legal representative for the plaintiffs communicated to the Magistrates Court that the parties would be proceeding on the original charges.

Notwithstanding that communication, when the proceedings for the lesser charges came before the Magistrates Court later that day, counsel for the plaintiffs sought to plead guilty on behalf of the plaintiffs at the same time as announcing his appearance. The Director objected to the attempt to plead guilty to charges that were now being withdrawn.

The Chief Magistrate refused to enter pleas of guilty and instead allowed the Director to withdraw the charges.

On review, the Court found no error in the reasoning of the Chief Magistrate, with the decision to mark the lesser charges withdrawn held to be in line with the common law principles of prosecutorial discretion, and in particular with *Maxwell v The Queen* (1996) 194 CLR 501. McWilliam AsJ found that the independence and impartiality of the judicial process would be compromised if courts were perceived to be in any way concerned with who is to be prosecuted and for what. The applications were dismissed.

Foote v Coroner's Court of the ACT [2018] ACTSC 119

This case concerned the scope of s 93 of the *Coroners Act 1997* (ACT) (Act), and the powers of the Supreme Court when reviewing the findings made at a coronial inquest. The plaintiff was seeking to quash the findings of the Coroner that were critical of his conduct and to have a fresh inquest ordered.

The parties believed there to be ambiguity as to how to proceed with a review under s 93 of the Act. They applied to the Court for the determination of four separate questions, with a view to defining the framework for the future conduct of the litigation. The questions and her Honour's findings were as follows:

1. Is an application made pursuant to s 93(1) of the Act equivalent to an appeal made under ss 273 and 274 of the *Magistrates Court Act 1930* (ACT)? Answer: No. Appeals are creatures of statute and, thus, where there is a different statutory process but no express right of appeal created, a Court cannot simply infer that the process should be treated as an appeal of a particular nature. The text of s 93 plainly does not expressly create 'a right of appeal.'
2. If the answer to Question One is 'No', is an application made pursuant to s 93(1) of the Act equivalent to an application for judicial review made pursuant to s 34B of the *Supreme Court Act 1933* (ACT) and r 3556 of the Rules? Answer: No. The Court's power on judicial review is limited to determining whether the decision-maker acted lawfully, and if they did not, whether to exercise discretion to grant relief. The express words of s 93 encompass more than establishing legal error.
3. If the answer to each of Question One and Question Two is 'No', what rules and principles apply to determining whether it is necessary or desirable in the public interest or the interests of justice that the inquest or inquiry be quashed and that another inquest be held on account of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, discovery of new facts or evidence or otherwise? Answer: Unnecessary to determine. The Court should not attempt to set out what rules and principles apply in advance of the hearing and without the proper factual context before it.
4. On an application made pursuant to s 93(1) of the Act, can the Court grant any substantive relief other than to order that the inquest be quashed and another inquest be held into the death? Answer: No. The words of the statute are clear, and do not allow for partial quashing of individual findings, or comments, of the Coroner. Where an application is brought under s 93, the only relief available is the quashing of the entire inquest.

TECHNOLOGY AND ONGOING PROJECTS

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New Supreme Court building

Construction on the new ACT Supreme Court building progressed well in 2017–18. The Supreme Court has been working closely with the building management team to manage the staged construction process and complete the construction of the new component of the Law Courts Building.



20 June 2018 – External view

The new building will reflect and support a progressive and independent judiciary. Apart from providing eight new courtrooms (six in the first stage of works), and a shared entrance, the building will also provide the Court with mediation and jury facilities which have been lacking in the existing building.

Works commenced on the new building in 2016. As at July 2018, Stage one was 90% complete with the building watertight and only some internal areas needing completion. The new Registry Counter was opened in the first half of 2018 and relocations for registry staff are planned for the first quarter of the 2018–19 financial year.



29 June 2018 – Foyer (installation of revolving door) under construction



29 June 2018 – Foyer (security screening) under construction

TECHNOLOGY AND ONGOING PROJECTS

The first stage of works are due for completion in the 2nd quarter of 2018–19 with the second stage (the refurbishment of the existing Supreme Court including new mediation suites, hearing rooms, court rooms and facilities assessment and support services) to be completed in the second half of 2019.



23 February 2018 – Chambers Conference Room (Murrell CJ, Philip Kellow and Lloyd Easu)



23 February 2018 – Courtroom 6 (Mossop J, Murrell CJ, Elkaim J, Loukas-Karlsson J)

Supreme Court Topping Out Ceremony

Wednesday 26 July 2017

[EXTRACTS FROM HER HONOUR CHIEF JUSTICE HELEN MURRELL'S SPEECH] MURRELL CJ:

I acknowledge the traditional and continuing custodians of this land and pay my respects to their elders past and present.

It is a pagan Scandinavian ceremony. A topping out ceremony involves placing a tree or branch on the highest level of a new building once the construction has reached that point. It began 1300 years ago in Scandinavia as it was thought that the people originated from trees and that their souls returned to trees when they died – hence the need to placate the tree spirits displaced by any new building.

I admit that I queried whether such a ceremony was relevant in the ACT in the 21st century.

However, I now see the connection with Scandinavia – the weather.

More recently the topping out ceremony has been described as “a kind of secular blessing for the building and its future inhabitants.” On that basis, the Supreme Court Judges and Court staff embrace this ceremony.

It is appropriate that I thank some of those involved in the building work.

Thank you to the builders for keeping the site safe, causing minimal disruption to the Court's operations, responding promptly to our concerns and for their general courtesy.

Thank you to the project manager and architects for consulting with the Judges on all aspects of the design of the new Supreme Court.

Thank you to those who had the vision to commission a new building and, as importantly, had the constitution to finance it.



Topping Out Ceremony: [L-R] Murrell CJ and Attorney-General Gordon Ramsay

In Court Technology

March 2018 saw the commencement of user acceptance testing by the court of the audio visual equipment on the building site in the new Supreme Court rooms, jury deliberation, jury assembly, judicial conference room, remote witness suite, and the multi-purpose Black Mountain room.

The court rooms come equipped with evidence monitors for the bench, associate, bar, jury, witness, and accused persons positions, and in addition, a pop up screen behind the witness position for any video conference links. The associates will be able to control via their GUI (Graphical User Interface) room controls such as temperature, lighting, and blind control.

All court rooms have been outfitted with the ability to make multi-party videoconference and teleconference calls, capture evidence annotations from the bar, witness, and remote witness suite location as either JPEGs or record live visually, and the ability to record visually simultaneously two channels of any evidence source or camera feeds from the court room.

The Black Mountain room will provide a conference room with dual video conferencing ability, IPTV facilities, and a direct feed from any court room for viewing of court proceedings and ceremonies.

October 2018 will see the Court commencing to use 6 new Supreme Court rooms, jury deliberation rooms, jury assembly room, judicial conference room, multi-purpose Black Mountain room, and 7 remote witness rooms as part of the stage one construction works completion.

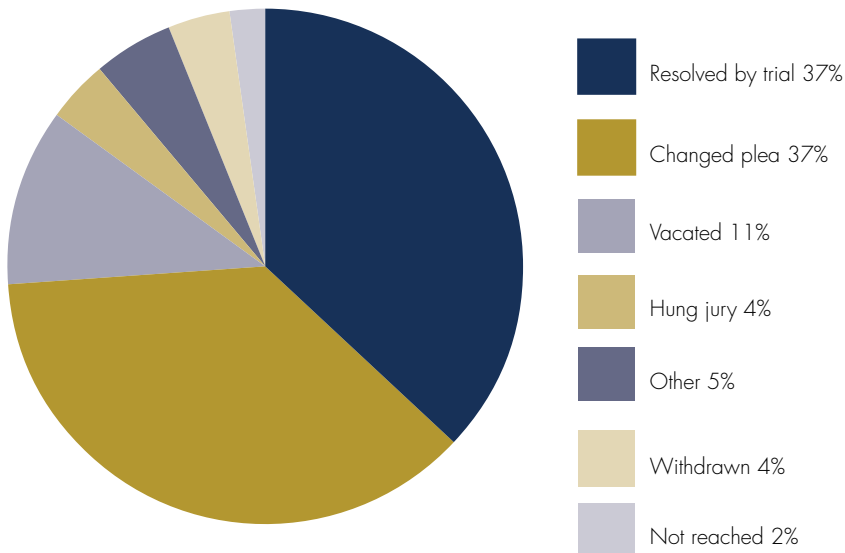
CASE MANAGEMENT

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Criminal Listings

During 2017–18, 110 matters were listed for trial during central criminal listing periods. Of those matters, 41 were resolved by trial. In the remaining 69 matters, 41 accused changed their plea, 12 cases were vacated, 5 resulted in hung juries, 4 cases were withdrawn, 2 cases were not reached and 5 cases did not proceed due to other reasons, including being a mistrial, remitted to the Magistrates Court, a judge directed acquittal and the matter having been stayed.

Criminal listings by finalisation



Supreme Court Registrar,
Annie Glover

Civil Case Management

The Supreme Court has maintained its commitment to reduce the number of pending civil cases. The Supreme Court continues to provide a case management framework that facilitates increased efficiency in the resolution and determination of civil cases.

During 2017–18, the Supreme Court held eight mediation blocks. Parties to the mediations were aware that the matter would proceed to hearing approximately 6 weeks after the mediation, should the matter not resolve at mediation. If the parties were not able to attend during one of the court based mediation blocks, an order was made that the parties participate in a private mediation. The court mediations were conducted by experienced practitioners, mediators and former judicial officers, including the Honourable Margaret Sidis, Mr Russell McIlwaine SC, Mr Campbell Bridge SC, Mr Greg Stretton SC, the Honourable David Harper, Mr Bryan Meagher SC and Mr Graeme Lunney SC.

Court based mediations 2017–18

	No of Matters Listed	Vacated	%	Settled*	%	Did not settle	%
July	6	0	0.0%	3	50.0%	3	50.0%
August	7	0	0.0%	4	57.1%	2	28.6%
Sept/Oct	16	0	0.0%	5	31.3%	11	68.8%
November	20	0	0.0%	10	50.0%	10	50.0%
January	5	1	20.0%	2	40.0%	2	40.0%
February	10	0	0.0%	5	50.0%	5	50.0%
April	9	1	11.1%	5	55.6%	3	33.3%
May	18	0	0.0%	9	50.0%	9	50.0%
Total	91	2	2.2%	43	47.3%	45	49.5%

* Settled at mediation. This figure does not include matters that settled as a result of, and after, mediation.

Central civil list

During 2017–18, 165 matters were listed for hearing during central civil listing periods. Of those matters, 22 proceeded to hearing and judgment was delivered or reserved. A number of matters (3) ran to hearing but resolved prior to the hearing concluding. In the 143 matters that did not proceed to hearing, 8 matters were vacated and one matter was transferred to the Magistrates

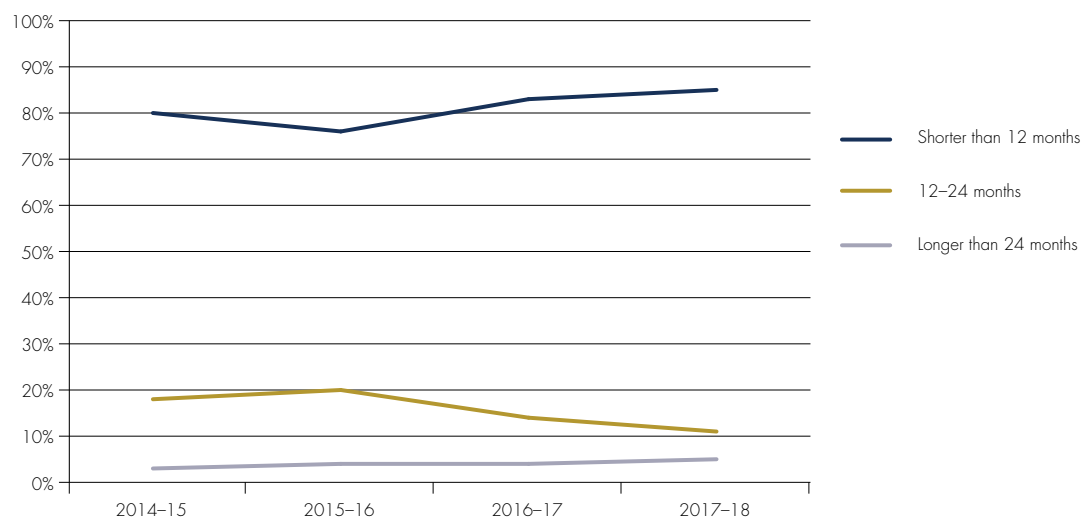
Court. The balance (134) settled, a settlement rate of 81%.

Statistics

Outstanding Matters

Court Time	2016-17	2016-17	2016-17	2016-17	2017-18	2017-18	2017-18	2017-18
	Criminal	Civil	Criminal	Civil	Criminal	Civil	Criminal	Civil
< 12 months	231	346	83%	72%	217	437	85%	80%
12-24 months	39	89	14%	19%	27	74	11%	14%
>24 months	10	46	4%	10%	12	36	5%	7%
Total	280	481			256	547		

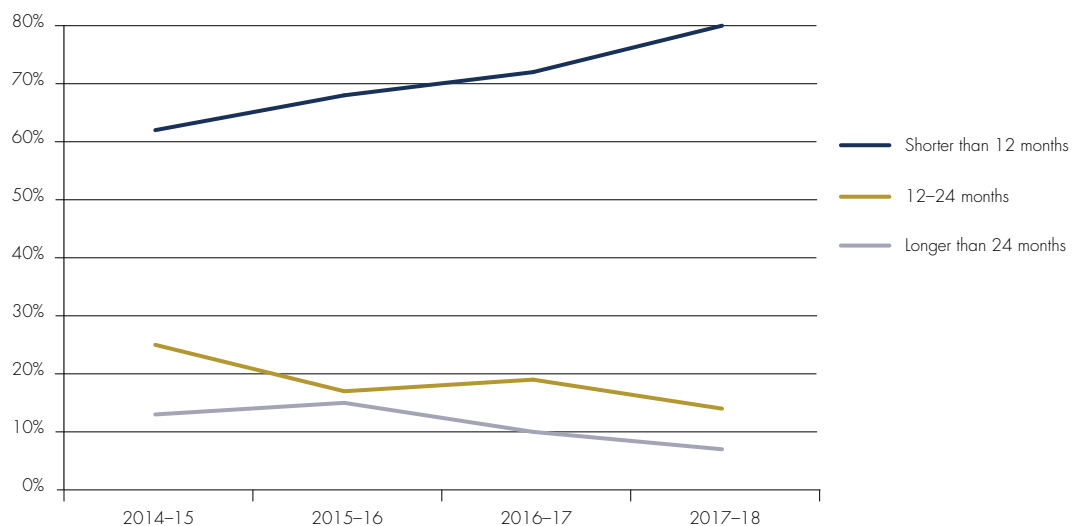
Outstanding criminal matters (in percentages)



	2014-15	2015-16	2016-17	2017-18
Shorter than 12 months	80%	76%	83%	85%
12-24 months	18%	20%	14%	11%
Longer than 24 months	3%	4%	4%	5%

* Includes Magistrates Court Appeals Matters (CA) but not Court of Appeal Matters (AC)

Outstanding civil matters (in percentages)



	2014-15	2015-16	2016-17	2017-18
Shorter than 12 months	62%	68%	72%	80%
12-24 months	25%	17%	19%	14%
Longer than 24 months	13%	15%	10%	7%

* Includes Magistrates Court Appeals Matters (CA) but not Court of Appeal Matters (AC)

Summary data 2017–18

Supreme Court – Civil matters (includes Magistrates Court appeals)	2015–16	2016–17	2017–18
Lodgements	614	561	608
Finalisations	619	648	559
Clearance Rate	101%	116%	91%
Pending Total	634	481	547
Pending < 12 months	430	346	437
Pending > 12 months*	204	135	110
Pending > 24 months	98	46	36

* Includes [> 12 months] + [> 24 months]

Supreme Court – Criminal matters (includes Magistrates Court appeals)	2015–16	2016–17	2017–18
Lodgements	279	319	354
Finalisations	262	270	355
Clearance Rate	94%	85%	100%
Pending Total	270	280	256
Pending < 12 months	206	231	217
Pending > 12 months*	64	49	27
Pending > 24 months	10	10	12

* Includes [> 12 months] + [> 24 months]

Court of Appeal*	2015–16	2015–16	2016–17	2016–17	2017–18	2017–18
	Civil	Criminal	Civil	Criminal	Civil	Criminal
Lodgements	22	33	27	36	37	36
Finalisations	24	26	58	36	31	42
Clearance Rate	109%	79%	215%	100%	84%	117%
Pending Total	48	38	18	33	27	26
Pending < 12 months	15	28	13	28	23	22
Pending > 12 months	10	7	4	5	3	4
Pending > 24 months	23	3	1	0	1	0

* All Court of Appeal (COA) matters are heard as part of the civil jurisdiction for registry purposes.

* In order to distinguish between criminal and civil COA matters, the remedy type lends a description as to whether a matter is civil in origin or an appeal against a criminal process.

