

SUPREME COURT

OF THE AUSTRALIAN
CAPITAL TERRITORY

ANNUAL REVIEW 2019–20

LAW COURTS
OF THE
AUSTRALIAN CAPITAL TERRITORY

A photograph of the Law Courts of the Australian Capital Territory building. The building features a large, light-colored, rectangular facade with vertical panels. Below this, there is a glass-enclosed entrance area. In the foreground, there is a paved plaza with several tall, thin, silver flagpoles and a small tree in a planter. The sky is blue with scattered white clouds.



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"During an emergency, be it a public health emergency or another sort of emergency, short-term legislation may restrict personal freedom and confer unusually broad powers on administrators. In such times, it is even more important than usual that the courts continue to operate effectively, independently and impartially, and be seen to do so."

R v IB (No 3) [2020] ACTSC 103 at [91] (Murrell CJ).



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Chief Justice Murrell's Introduction

From July 2019 to June 2020



The year 2019–2020 was difficult for the Court as an institution, and was difficult for our judges, Court staff and Court users. A series of disasters—widespread bushfires, a colossal hailstorm and then a pandemic—challenged our flexibility, resilience, and capacity to innovate. I think that we rose to the occasion.

The year commenced on a positive note with the birth of Associate Justice McWilliam's baby on 8 July 2019 and the appointment of Acting Justice "Bobby" Crowe to preside over the Associate Judge's list during her absence on maternity leave.

On 1 August 2019, Acting Justice Walker was appointed to oversee the new Drug and Alcohol Sentencing List (DASL). Her Honour's hard work brought the DASL to fruition. The DASL relies on an interdisciplinary team comprising representatives from ACT Health, Corrective Services, the Director of Public Prosecutions, ACT Policing, Legal Aid ACT, and Child and Youth Protection Services. Unfortunately, in 2020, the pandemic temporarily halted an expansion of the DASL. When the pandemic struck and Acting Justice Walker returned to lead the Magistrates Court, Justice Loukas-Karlsson kindly took charge of the list.

In late 2019, we were saddened by the departure of Registrar Annie Glover, who retired after 13 years as our registrar. During my time as Chief Justice, Annie worked indefatigably to





Associates Dragon Boat racing L-R Edward McGinness, Philippa Swayn, Jock Gardiner, Kate Martin



"Supreme and Federal Court Judges Dinner" outside the Ceremonial court (photo by Philippa Swayn)

introduce major listing reforms and new civil mediation procedures, as well as playing a key role in the development of the new Supreme Court building and the introduction of the new integrated case management system (ICMS). She oversaw the many Eastman proceedings and other very significant cases. Annie was known throughout the Court for being infallibly kind and loyal, while never missing a beat.

We were pleased to welcome Registrar Amanda Nuttall, who brought her extensive experience with the ACT Magistrates Court. She returned to the Court after advising on judicial reform in the Solomon Islands and Papua New Guinea and quickly adapted to her new role.

In January 2020, the Court hosted the Supreme and Federal Court Judges' Conference. Despite being on maternity leave, Associate Justice McWilliam organised a wonderful event, enabling judicial officers from across Australia to come together for a series of interesting talks, dinners, and dragon boating. We were able to showcase our new courthouse. A memorable hailstorm caused considerable excitement (and damage). As it transpired, for many judicial officers, the Conference was their last opportunity to enjoy a convivial collegial event before the pandemic halted substantial in-person events.



*Hail from January storm
– Photo by Jesse Dichristofaro*



The renovated atrium

The opening of the new Legal Year provided an opportunity to celebrate the opening of the Heritage Building and to recognise the new DASL. The ceremony was held in SC1 of the Heritage Building, the Court's original ceremonial courtroom. The refurbished courtroom was a welcome surprise to many. It has been designed to accommodate the DASL, and the associated DASL team offices and an urinalysis suite are located near to the courtroom itself.

Unfortunately, the opening ceremony occurred against the backdrop of a summer marred by bushfires. At the time of the ceremony, there were bushfires within and quickly approaching the Territory's border.

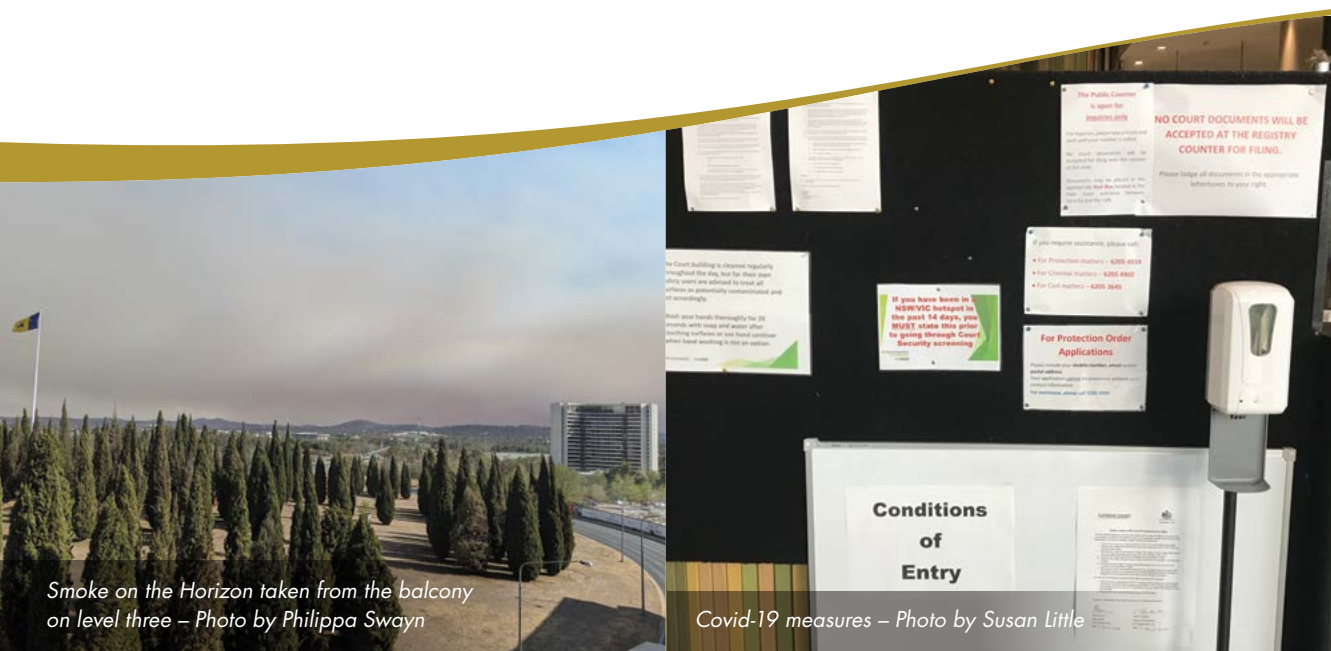
But more was to come. On 11 March 2020, the World Health Organisation declared that the COVID-19 outbreak could be characterised as a pandemic. On 16 March 2020, the ACT first declared a public health emergency.

The ACT Supreme Court quickly adopted processes and procedures to ensure the safety of practitioners, staff, and the public. Practitioners and prisoners began to appear by audio-visual link. The last jury empanelment occurred on 23 March 2020. For a short period, legislative amendments permitted the Court to order a judge alone criminal trial where that was in the public interest, facilitating the conduct of a significant number of judge alone criminal trials. On 15 June 2020, the Court resumed jury trials in limited types of cases and for a limited number of cases. Two jury trials could be run in tandem, using twinned courtrooms to allow for jury deliberation.

In the last quarter of 2019–2020, the pandemic resulted in judges and Court staff working harder than ever to deliver justice efficiently despite the many constraints on our operations. Practitioners were understanding and flexible.

The Court was shocked and saddened by the sudden passing of Acting Justice Ashford on 19 June 2020. Her Honour had spent six years as an Acting Judge of the Court, after 15 years on the NSW District Court bench. Her Honour is sorely missed by judges, associates, and Court staff.

It could hardly be described as a good year, but it was a year in which many people revealed great resilience and creativity, and the Court as an institution demonstrated those qualities.



Smoke on the Horizon taken from the balcony on level three – Photo by Philippa Swayn

Covid-19 measures – Photo by Susan Little

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Judges of the Court

Chief Justice Helen 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 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. Her Honour maintains an 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), Patron of the ACT Justices of the Peace Association, committee member of the Australian Association of Women Judges and a Fellow of the Australian Academy of Law.

Justice John Burns



Justice John Burns was first admitted to practice as a solicitor of the Supreme Court of New South Wales in 1981. He practised 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 Solicitor's 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.

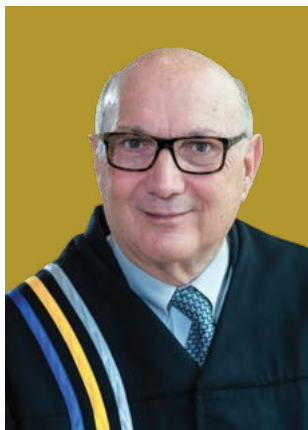
In April 1989 his Honour commenced practice at the bar at Blackburn Chambers. His Honour practised in criminal law and general civil litigation.

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 Childrens Court Magistrate. His Honour also took over responsibility for managing the lists of the Magistrates Court as List Coordinating 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. From 2012 to 2018, his Honour was a member of the ACT Law Reform Advisory Committee. From 2016 to 2018 his Honour was the Section Editor of the Australian Law Journal for the Australian Capital Territory.

As of 2019–2020, Justice Burns continues to chair the Supreme Court's Criminal Procedure Committee. His Honour also led the Drug and Alcohol Court Supreme Court Working Group for the purpose of developing an appropriate Drug and Alcohol Court model for the ACT. The working group was successful in establishing the Drug and Alcohol Sentencing List, which commenced operation at the beginning of the 2020 legal year.

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 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 of NSW 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 as a solicitor, including at the Aboriginal Legal Service 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 was appointed Senior Counsel 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 of the New South Wales Bar Association from 1991 to 2003, 2007 to 2014, and 2016 to 2018. Her Honour was elected to the executive of the New South Wales Bar Council in 2015 and elected a 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

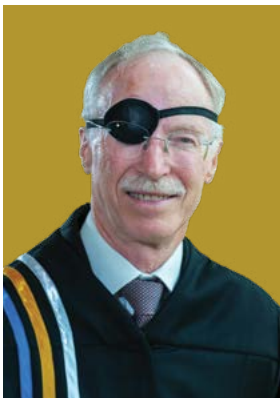


Verity McWilliam was sworn as the Associate Judge of the Supreme Court of the Australian Capital Territory on 26 June 2017. Her Honour welcomed a daughter in July 2019 and was on maternity leave for most of the 2019–2020 period.

Her Honour holds Bachelor of Arts (Hons I) and a Bachelor of Laws from the Australian National University, and a Master of Laws (International Law) from the University of Sydney. In 2002 her Honour was admitted as a solicitor of the Supreme Court of New South Wales and was called to the NSW Bar in 2006.

Before her appointment, her Honour was also a Lecturer at the University of New South Wales and the University of Sydney. Her Honour is currently a committee member on the Judicial Council on Cultural Diversity.

Acting Justice Robert Crowe



On 22 May 2019, Robert Crowe was sworn in as an Acting Judge of the Supreme Court of the Australian Capital Territory.

Acting Justice Crowe graduated from the Australian National University with a Bachelor of Arts in 1977 and a Bachelor of Laws in 1979. His Honour was admitted as a barrister and solicitor of the Supreme Court of the Australian Capital Territory in 1980. His Honour practiced as a solicitor in Canberra from 1980 to 1988.

In 1988, his Honour commenced practice as a Barrister at Blackburn Chambers. His Honour's main practice areas while at the Bar included civil appeals, common law and professional discipline.

His Honour was the President of the ACT Bar Association from 2003 to 2005 and was a member of the ACT Law Courts Rules Advisory Committee for over 25 years.

His Honour was appointed as Senior Counsel in 2003 and retired from practice in 2017.

Acting Justice Lorraine Walker



Acting Justice Lorraine Walker holds a Bachelor of Arts and a Bachelor of Laws from the University of Sydney.

She was admitted as a solicitor in New South Wales in 1987, working briefly as an employed solicitor until joining the Royal Australian Air Force later that year. She served as a legal officer for three years in Melbourne and the Northern Territory before relocating to her birthplace, the United Kingdom. She was employed by the Crown Prosecution Service as a prosecutor from 1990 to 1996.

On returning to Australia, she practised as a solicitor in the ACT for one year prior to being made a partner in a national law firm. Her Honour was called to the Bar in 2000.

Her Honour was appointed as Magistrate and Coroner at the Magistrates Court of the Australian Capital Territory in 2010. Her Honour was subsequently appointed Chief Coroner and Chief Magistrate in 2011.

In August 2019, her Honour was appointed as an Acting Judge of the Supreme Court of the Australian Capital Territory. Her Honour set up and presided over the Drug and Alcohol Sentencing List, which commenced in December 2019.

In April 2020, amidst the early stages of the COVID-19 crisis, her Honour resumed her role as Chief Magistrate.

Russell Fox Library

About the Russell Fox Library

The Russell Fox Library, named after the Territory's first Chief Justice, 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 provides research services to judicial officers and their associates and assists them with locating reference material. Library staff also serve, in a limited capacity, legal practitioners, self-represented litigants and members of the public.

Further, the Library is responsible for the publishing of judgments and decisions on the ACT Courts website, updating web pages, and assisting 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>.

Since the Library moved into the new ACT Law Courts building in 2018, physical access to the Library's collections has been restricted to judicial officers and employees of the Courts and Tribunals. However, both print and online collections are available to external clients and members of the public within the main reading area. Only legal practitioners who are registered as Library clients have borrowing privileges.



Main storage area

Due to the COVID-19 pandemic, the Russell Fox Library closed to the public in April 2020, with all access to library resources being moved to online services upon request and by prior appointment. All physical resources that were returned to or used at the Library were subject to a 72-hour quarantine, in accordance with Australian Library and Information Association recommendations. With the easing of restrictions in the ACT, the Library has gradually been reopening for public use.

Library Review

In 2018, the ACTCT commissioned the Russell Fox Library Review, which made 45 recommendations covering governance, marketing and outreach, technology, staffing and operational matters of the Library. A management committee was established in 2019 overseeing the implementation of key recommendations. Based on the Review, the Library prepared an Action Plan, which set up actions, priorities, responsibilities and timeframes for each of the recommendations.

The following recommendations have been actioned in 2019–20:

- Strategic Plan.
- Collection Management Policy;
- Procurement Policy;
- Procurement of a library management system; and
- Core clients and services—targets set up to 2021.

The ACTCT Library Management Committee will continue to govern Library activities and oversee the implementation of the recommendations of the review.

Library Management System

In November 2019, the Library Management Committee endorsed joining the Australian Court Libraries Consortium to improve accessibility of the collections and to enhance interoperability.

The implementation phase was scheduled between March–June 2020 but, due to COVID-19 restrictions, this was rescheduled for the 2020–2021 financial year.

Online resources

The Russell Fox Library continued providing access to online legal databases, including Lexis Advance, Westlaw and CCH, for judicial officers and external clients on computers located at the Library public area.

More details about Library online resources can be found on the Collections page of the Library website, at <https://courts.act.gov.au/about-the-courts/russell-fox-library/library-collection>.

Educational activities

The Library offered regular inductions to new ACTCT staff as well as to others interested in its resources and services. In December 2019, the Library also participated in a work experience program for students organised by the ACTCT.

Work anniversary

On 7 March 2020, Anne Butler celebrated 35 years of service with the ACT Courts.

Anne has assisted with many important projects, such as the Library's move to the new building, setting up the new Magistrates Court library, preparing collection items for digitising, and curating the judgments and decisions of the ACT Supreme Court, Magistrates Court and ACT Civil and Administrative Tribunal.



Anne Butler



L-R Phillip Kellow, Shona Kowalski, Anne Butler, David (Frank) Butler, Chief Justice Murrell

Statistics

The following table displays the number of judgments and sentencing remarks uploaded onto the ACT Supreme website by the Library during 2019–2020:

Jurisdiction	Number of Items Published
Supreme Court of the Australian Capital Territory Court of Appeal	47
Supreme Court of the Australian Capital Territory Full Court	3
Supreme Court of the Australian Capital Territory	199
Sentencing Remarks	174



‘Scribbly Gum’ installation Artist Jade Oakley

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 and Court attendants, and security within the Supreme Court precinct.

Sheriff's officers strive to meet the demands of the Courts in an efficient and professional manner. This has never been more important than during the COVID-19 pandemic.

The COVID-19 pandemic placed challenges on the Sheriff's Office and its operation. The Sheriff's Office made changes to internal processes to comply with COVID-19 restrictions and to support the continuation of the Courts' operations. These changes included:

- undertaking the empanelment process via video link instead of within the courtroom due to spacing requirements
- reducing in the number of members of the public attending for jury empanelment to allow for social distancing
- enforcing a redesigned courtroom layout that affecting legal counsel (bar table), jurors (seating in the public gallery to allow for social distancing) and members of the public (limits placed on how many people were allowed in the courtroom)
- supervising an adjacent courtroom for the purpose of jury deliberation
- temperature testing of jurors
- movement of jurors to allow for social distancing (no use of lifts)
- provision of individual hand sanitiser sprays, gloves and face masks
- lunches for jurors individually packaged to reduce handling of food
- water bottles provided within the courtroom (instead of communal jugs)
- ongoing contact with potential jurors via text messaging to reduce the risk of someone attending the Court premises when unwell
- supervising the Court public areas to ensure social distancing

With the support of the Sheriff's Office, the ACT was the leading jurisdiction in Australia in relation to the continuation of jury trials. In fact, at one point, we were the only jurisdiction undertaking jury trials. Other jurisdictions within Australia have now implemented the same or similar processes to meet the risks associated with the COVID-19 pandemic.

COVID-19 has also affected the development and implementation of our much-anticipated Jury Management System (JMS). Our new JMS is being developed by Tyler Technologies, who are based in Texas, United States of America. The pandemic reduced capacity to work on the project, particularly because Tyler staff could not fly to Australia. Consequently, the JMS project has been delayed, with a completion date now set for the next financial period.

The Sheriff's officers continue to professionally manage services and processes within the Courts in the face of the challenges presented by COVID-19. The Sheriff's Office has been instrumental in ensuring the smooth operation of the Courts as well as meeting the needs of the judiciary, legal profession and members of the public. Their contribution to the continued running of the Courts during the COVID-19 pandemic has significantly contributed to the continuation of open justice in the Territory.

Court precinct view
– Photo by Philippa Swayn



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Highlights

In mid-2019, Attorney-General Gordon Ramsay appointed Chief Magistrate Lorraine Walker as an Acting Judge of the ACT Supreme Court. Ms Walker was sworn in by Chief Justice Helen Murrell on 1 August 2019. Acting Justice Walker oversaw the establishment of the new Drug and Alcohol Sentencing List—an initiative to reduce recidivism and improve rehabilitation.



*Walker AJ swearing in
Photos by Philippa Swayn*

On 8 November 2019, the ACT Supreme Court bid farewell to their long serving and much-admired Registrar, Annie Glover. Annie served as the Supreme Court Registrar since 2007. Prior to this, she was the Deputy Registrar for six years. Annie's association with the ACT Supreme Court had been longstanding—earlier in her legal career, she was the Associate to Master Connolly and then Magistrate Burns.



L-R Refshauge AJ, Burns J, Crowe AJ, Penfold J, Loukas-Karlsson J, Murrell CJ, Annie Glover, Mossop J – Photo by Philippa Swayn



Amanda Nuttall

Amanda Nuttall commenced her appointment as the ACT Supreme Court's Registrar on 12 November 2019. Prior to this, Amanda held advisory positions in the Solomon Islands and Port Moresby, strengthening the National Judiciary and High Court through support programs to improve access to justice, as well as developing a criminal bench book. Amanda was the ACT Magistrates Court Registrar and Deputy Coroner from 2013 to 2018.

The 2020 Supreme & Federal Court Judges' Conference

The annual Supreme & Federal Court Judges' Conference attracts members of the judiciary from both Australia and New Zealand. Over five days in January 2020, the ACT Supreme Court welcomed more than 70 judicial delegates and their partners to Canberra. The Conference was held amidst the national bushfire crisis and an extreme hailstorm. Our thoughts were with those affected by what was happening throughout the country, a sentiment expressed by Chief Justice Murrell in the Conference welcome:

Given what is going on, it is fortunate that we have still been able to come together; yet it is important that, as leaders in one of the three arms of government, we find the time to do so.

The Conference was filled with intellectual debate, thought-provoking guest speakers and roundtable discussions, focusing on topical and developing areas of law. The Conference's social program was designed to showcase both the cultural and natural offerings of Canberra and its surrounds. It included a lunch at the Lake George Winery and dragon boating on Lake Burley Griffin.



Opening address Supreme and Federal Court Judges conference – photo by Sebastian King

Delegation from the Supreme Court of Japan

On 11 February 2020, Chief Justice Murrell hosted a delegation of members from the Japanese judiciary including Justice Yuko Miyazaki and Judge Masayuki Sakaniwa of the Supreme Court of Japan. They were accompanied by officials from the Embassy of Japan, as well as academics from the ANU College of Law.

Their visit included a tour of the Supreme Court, where they were able to observe how technology had been implemented in the courtrooms and remote witness suites. The tour was followed by a morning tea with the judicial officers and Principal Registrar.



Murrell CJ and Supreme court staff with the Japanese Supreme Court delegation – Photo by Philippa Swayn

Burying of the time capsule

On 5 March 2020, a time capsule was placed under the Heritage Building to mark the occasion of the redevelopment of the ACT Law Courts building. The time capsule contains items from throughout the history of the Courts, including the Supreme Court's official stamp, photographs of the judicial officers and associates, and a copy of the Daily List for the first sitting in the new ACT Law Courts building.

The time capsule will be opened in 25 years' time, on 4 March 2045.



L-R acting Chief Magistrate Theakston and Chief Justice Murrell – photo by Philippa Swayn



Time Capsule seal – photo by Philippa Swayn

Memorial to pay tribute to the late Hon. Linda Ashford

[EXTRACT FROM THE SPEECH OF CHIEF JUSTICE HELEN MURRELL, DELIVERED 27 AUGUST 2020]

I extend my condolences and those of the ACT Supreme Court to Carol and other members of Linda's family.

People sometimes say that your best friends are those whom you meet early in life and with whom you have travelled life's road. But that is not necessarily the case; given time and consideration, good friends can be found at any stage of life. Linda was proof of that.

Linda had a talent for friendship, both human and animal. Throughout her life, she cultivated new friends as well as nurturing old friendships. Look around you and you will see Linda's friends from the many different phases of her personal and professional lives. She made the effort to keep up with all of us—from time to time, most of us have answered our phone to hear Linda's warm and genuine inquiry, "how's things?".



I met Linda in about 2004, when she was in the prime of her life (still in her early 60s) and I was a judge on the NSW District Court. That year, there were rumblings on the Court because the Compensation Court was to be abolished and the judges of that Court transferred to the District Court. With the charity so characteristic of lawyers, my District Court colleagues grumbled about the likely impact of the incoming hacks and time servers on our universal reputation for efficiency and brilliance. More importantly, the seniority of existing District Court judges might be diminished by that of the interlopers!

As far as Linda was concerned, those fears were ill-founded. She seized the new challenge, quickly mastered the criminal jurisdiction, and established herself as one of the most efficient judges on the Court. If she did receive a boost to her seniority, it was thoroughly deserved.

The capacity to change and learn new ways was part of her genetic makeup.

Upon finishing school at Fort Street Girls High School, she trained as an obstetrics nurse at the Royal Prince Alfred Hospital and then studied midwifery at Hornsby Hospital.

She was an early adopter of the “gap year”. In 1964, she travelled to London, where she worked in a hospital and travelled around Europe with friends. The “gap year” extended to four or five years. She never lost the taste for adventure; thereafter, she fearlessly travelled to all corners of the earth.

Not long after she returned from Europe, she decided to change careers and she began to study law at night.

Why did she do that? I am sure that Linda was a wonderful nurse. The qualities that made her a good judge would have made her a good nurse—compassion, industry, and common sense. On the other hand, I doubt that she liked taking orders from young doctors imbued with their own self-importance. She would have seen herself as better suited to giving orders than receiving them.

While studying law, Linda slaved as a law clerk in personal injury law firms, putting her nursing knowledge to good use. In one such job, at McClellands, she met Greg Keating, who became a lifelong friend.

In 1984, she was admitted as a solicitor. She began to work for Taylor and Scott, and was soon promoted to partnership.

In 1987, she was appointed as one of the first Commissioners of the Compensation Court and, in 1997, she was appointed as a judge of that Court. In 2003, she was appointed to the Dust Diseases Tribunal.

At the Compensation Court and Tribunal, Linda made close friends, including John O’Meally. Linda was possibly one of the few people who fully appreciated his outlandish sense of humour, which aligned with her own wicked sense of humour.

It was only when she retired in 2013 at the mandatory 72 years of age that I first realised how old Linda was. She certainly didn’t act like a 72-year-old ready for the judicial dumpster—and history proves that she wasn’t.

In the following year, 2014, she was, at last, appointed as an acting judge of a first world court, the ACT Supreme Court. She relished the variety of our work. She was always willing to take on matters, even at short notice. She became a much-loved member of our Court family—joining the more functional side of the family.

Linda’s great interest in young people extended to our Supreme Court associates, with whom she enjoyed chatting. She would pick up conversations where they had been left off months ago, when she was last in Canberra, and volunteer recommendations on all manner of subjects, from books to antique furniture shops. Her loss was strongly felt by the associates.

Linda was always keen to sample Canberra restaurants. Our plans to dine at a dumpling restaurant recommended by the associates were thwarted by Linda's untimely passing. But, in the week after Linda's death, the associates held a dumpling lunch to honour her memory.

For more than three decades, Linda applied her compassion, pragmatism and strong intellect to difficult issues affecting ordinary people—people who were often disadvantaged. Her decisions were rarely appealed—and when they were, she took it in her stride.

These days, we hear a lot about change and the need for resilience. Linda was a living example of resilience in the face of change, but at the same time she valued constancy—as fundamental to equality before the law and to true friendship.

Linda was a gifted judge, and she loved being a judge. On the Friday that turned out to be her last day on this earth, she did the work that she loved as a judge - and it was a good day. She completed her allocated short matters and then assisted another judge—no reserved judgments, of course. She chatted to me and my chambers staff, showing snaps of Dicky Bird, a handsome homing pigeon from South Australia who had found refuge in her Annandale backyard. And why not? He was fed breakfast, lunch and dinner, and found companionship with Bella, the dog, who usually chased away the birds. Incidentally, I must claim credit for playing a small role in the adoption by Linda and Carol of their beloved dogs Hugo and Bella, who, by coincidence, had earlier acquired the same names as my dogs, Hugo and Bella.

That last day, as she had time to spare before her flight from Canberra, I suggested that she sit with me on an admissions ceremony. It is always a joy to see fine young people, especially women, joining the next generation of lawyers—and that was Linda's last act as a judge.

This ceremony was particularly special because my senior associate, whom Linda knew well, was admitted. We also admitted a young Indigenous woman who was wearing her grandmother's ceremonial headdress. She had provided us with some information about the laws of her country, Fraser Island, and their generosity and good sense appealed to Linda. After the admissions ceremony, Linda shared a bottle of champagne with my senior associate and her family.

Linda then made her way briskly—but not too hurriedly—to the airport. I expect that she relaxed in the airport lounge with a glass of wine. As always, she would have been looking to the future—phoning Carol and her friends, planning her weekend, and anticipating the next busy week of judging. Had she paused to look backwards, she would have reflected on a life filled with many friendships, a rewarding career, and rich experiences—a life well and fully lived.

Ceremonial sittings

Commencement of legal year, 28 January 2020



Commencement of legal year – Photo by Randal photography

[EXTRACT FROM THE SPEECH OF CHIEF JUSTICE HELEN MURRELL]

One of the few developments that did accord with the Griffins' original plan for Canberra was the ACT Law Courts building, which was belatedly constructed on the site proposed by the Griffin Plan for the "municipal courts". The part of the building in which we sit was opened in 1963 by Sir Robert Menzies, who was then Prime Minister of Australia. It became emblematic of Canberra, acquiring significant heritage value.

Initially, the building housed the Supreme Court, the Magistrates Court, the Registry Office, a Law Library and a Companies and Land Titles Registry. However, as it had been designed for a population of 100,000, it was soon inadequate to fulfil all functions. Even after the Magistrates Court Building was opened in 1996, the Heritage Building struggled to meet the needs of the Supreme Court, with only two courtrooms that were sufficiently large to be of any real use to the Court. Today, as we sit cheek by jowl in SC1, based on our experience of our fabulous new courtrooms, we can appreciate the limitations of the SC1 and SC2 courtrooms, beautifully reimagined as they may be.

It is a testament to the architects of the new Supreme Court building that the old building has been seamlessly integrated into the new part of the Court and that its most iconic features have been preserved – the marble façade, the oriental atrium and the golden Commonwealth coat of arms that faces University Avenue.

Our building – which integrates the old with the new – reminds us that “the court environment is not just a set of rooms, corridors and entrances: it is a cultural, intellectual and emotional world”. Any court “embod[ies] social values and [has] psychological implications for what happens within [it] and for the wellbeing of those who work, visit or engage in other activities within”.

The courthouse environment and other seemingly peripheral aspects of the way in which justice is delivered are themselves capable of healing or harming. As judges, we deliver therapeutic – or anti-therapeutic – jurisprudence, whether we like it or not. At our best, we consciously leverage on our capacity to heal rather than harm.

Therapeutic courts such as drug courts harness the healing capacity of the justice system and apply evidenced-based reasoning to its processes.

The Supreme Court has long advocated for a drug and alcohol sentencing list that partners justice with health. The 80/20 rule would say that 20% of drug users use 80% of the drugs, commit 80% of the drug-related crime and do 80% of the time. Our new drug and alcohol sentencing list (DASL) is directed at this group. The DASL aims to treat the underlying psychological and social problems that have caused this group to self-medicate and commit serious crimes to finance their drug problem, or to exhibit antisocial behaviour under the influence of drugs or alcohol. It is an approach to sentencing that eschews populist calls for harsher penalties despite the evidence that, for most serious offenders, heavier prison sentences achieve neither personal nor general deterrence.

In other respects, too, as reimagined, this distinguished building will facilitate the delivery of contemporary justice through cooperative resolution rather than traditional adversarial methods. It houses modern mediation facilities that will be used in civil proceedings. We will utilise Hearing Room 3 for criminal case conferencing, a 2018 Supreme Court initiative led by Acting Justice Robinson. Criminal case conferencing is designed to promote the sensible resolution of criminal proceedings.

It is to the credit of the local profession that it has supported all these innovations.

Paradoxically, it is the old part of the Supreme Court building that will house our newest processes – those that are less adversarial.

I doubt that, when Prime Minister Menzies originally opened this building, he foresaw these uses, particularly the possibility that the building would one day house a urinalysis suite!

None of us can predict the future. What you as lawyers can do is apply evidence-based thinking, embrace therapeutic jurisprudence, and fearlessly advise your clients about the long-term consequences of self-interested decision-making. By doing so, you may help to nudge the future in the right direction.

Bows Ceremony of Shane Drumgold SC

On 12 November 2019, the ACT Supreme Court held a sitting to recognise the appointment of Shane Drumgold as senior counsel. Shane Drumgold took office as the ACT Director of Public Prosecutions in January 2019.



Director of Public Prosecutions Shane Drumgold – Photo by Irene Dowdy idphoto.com.au

Guest speakers

Date	Guest speaker	Topic
15 July 2019	Dr Anthony Hopkins Associate Professor and Director of Clinical and Internship Courses, Australian National University	His recent trip to Toronto, Canada, observing the Gladue (Indigenous) Courts and talking with judges, prosecutors, defence lawyers and Indigenous report writers and case workers.
12 August 2019	Professor Lorana Bartels Professor and Criminology Program Leader, Centre for Social Research and Methods, Australian National University	The Australian Parole Project which involved surveys with around 1,200 Australians, 30 of whom were then invited to decide whether to release a hypothetical prisoner to parole, based on the types of information before parole boards.
29 August 2019	Distinguished Professor Elizabeth Loftus Cognitive Psychologist, University of California, Irvine Professor Erin Newman Lecturer, Research School of Psychology, Australian National University	The study and science of human memory, its malleability, and consequences for the criminal justice system and beyond.
16 October 2019	Justice Melissa Perry Federal Court of Australia	Water law, and its intersection of Indigenous culture with the law, with a focus on constitutional reform.
28 November 2019	Professor Kim Rubenstein FAAL, FASSA Professor, University of Canberra and Honorary Professor, Australian National University	Citizenship in a constitutional context, and with respect to the stripping of citizenship, including the then pending matters before the Federal Court of Australia.

Date	Guest speaker	Topic
9 December 2019	Professor Penny Cooper Barrister and Professor of Law Ms Heidi Yates Victims of Crime Commissioner, ACT Human Rights Commission	The introduction of witness intermediary programs in the UK and NSW, a discussion of the benefits and challenges that have arisen and the insertion of new provisions into ACT legislation to introduce a similar scheme.
4 March 2020	Professor Nicola Lacey CBE Professor of Law, London School of Economics	‘Dual Process without Blame’ keynote address at the National Judicial College of Australia and Australian National University Joint Sentencing Conference. This had a focus on addressing victim’s interests in the sentencing process.
12 March 2020	Former Justice Monika Schmidt Supreme Court of New South Wales	Her judicial experience, including her workload at the NSW Criminal Court of Appeal and also about her time in Canberra as part of the ANU Visiting Judges Program.

Engagement with students of law

Legal Oratory ACT Schools Mock Trial (October 2019)

On 24 October 2019, Justice Loukas-Karlsson presided over the Legal Oratory ACT Schools Mock Trial grand final, in which ACT high school students argued a Commonwealth criminal law case.

Jessup Moot (February 2020)

On 15 February 2020, Justice Loukas-Karlsson presided over the Australian semi-finals of the annual Philip C Jessup Moot competition, along with Mr Jonathon Redwood and Dr Christopher Ward SC. The competition required competitors to present oral and written submissions on a hypothetical international law problem before a panel of judges representing a simulated International Court of Justice. The successful semi-final winners then competed at the High Court in the grand final.



Loukas-Karlsson J, Jonathon Redwood, Dr Christopher Ward, SC with Jessup Moot competitors.

Presentation to ANU law students (May 2020)

In May 2020, Justice Loukas-Karlssoon gave a presentation to ANU students via Zoom as part of the clinical legal program at the Legal Aid Youth Law Centre.

COVID-19

Less a highlight and more a low point, the threat of COVID-19 intruded into the ACT jurisdiction at the beginning of March 2020. The Supreme Court continued operations, albeit in some reduced capacity and with some operational limitations. The largest effect of COVID-19 on Court operations and the ACT community was the restriction and limitation on jury trials. An early mistrial over growing community concern of the virus in March 2020, and the announcement of the public health emergency measures, led to a suspension of jury trials from 3 April 2020, resuming 15 June 2020. Judge alone trials continued throughout the period and technological solutions were sought to ensure the vital work of the Court continued uninterrupted, albeit in a novel manner. The Court continued to conduct trials, sentencing, applications and lists throughout the COVID-19 restrictions by employing the use of audio-visual links and smart device technology to allow for remote appearances before the Court. Had this occurred prior to the completion of the upgraded and integrated courtrooms, the process may not have been possible. COVID-19 required the redirection of resources and staff quickly upgraded their skills and knowledge to cope with the rapidly evolving situation and changing public health orders. The Court will continue to monitor and respond to the public safety risk posed by COVID-19.



Contactless filing – Photo by Susan Little

Selected cases

Criminal Jurisdiction

R v Masina (No 3) [2020] ACTSC 154

The accused was charged with four sexual offences against the complainant, which were alleged to have been committed “on or about 2 February 2018”. During the course of the trial, the timing of the alleged incidents became the central issue in the case. The accused challenged the Crown’s case questioning whether or not it had been established beyond reasonable doubt that the offending occurred “on or about 2 February 2018”. The accused had served an alibi notice for 2 February 2018 and, as a result, the Australian Federal Police had obtained mobile phone records. The mobile phone records of the accused’s and the complainant’s phone were tendered and these became significant in demonstrating that the accused, if it was assumed he was with his mobile phone, was only in Canberra on dates upon which the complainant said the charged incidents did not occur. Call charge records also supported the alibi notice that the accused had served, indicating that his phone was in Sydney on 2 February 2018.

Mossop J was therefore required to consider the significance of “on or about 2 February 2018” on the indictment. The Crown had not sought to amend the indictment following the further investigations conducted by the Australian Federal Police, so as to specify a range of dates. The Crown contended in closing submissions that it was sufficient to establish that the incident occurred on a date that was a “reasonable approximation to 2 February 2018”.

After considering case law in the area, his Honour concluded that the position appears to be that where the Crown has specified a date of the charged offence, that does not necessarily become a fact that must be proved beyond reasonable doubt. However, there can be situations where the practical consequences of an allegation in that form mean that fairness to the accused requires that the case be determined on the basis that it is made out beyond reasonable doubt in relation to the specific date or dates alleged, or not at all. Such an example would be where there is an alibi in relation to the date or dates that is on the indictment. Mossop J agreed with the accused’s submission that the expression “on or about” should be interpreted narrowly. His Honour noted that the expression “on or about” serves the function that a minor error as to when an event occurred is not material. It would be inappropriate to give the expression such as broad operation so as to defeat the point of the precise identification of a date

His Honour concluded that he was satisfied beyond reasonable doubt that the elements of each of the offences charged were established. However, as the evidence meant that his Honour could not be satisfied beyond reasonable doubt that the alleged offences occurred “on or about 2 February 2018”, verdicts of not guilty were entered for each count.

KN v Frizzell [2020] ACTSC 217

The appellant had been sentenced in the Magistrates Court for a failure to appear after a bail undertaking and for driving a motor vehicle without consent. He was sentenced to two months' imprisonment for the failure to appear and three months' imprisonment for the motor vehicle offence. At the time of his sentence hearing, the appellant had already spent over five months in custody on remand. He was a young Aboriginal boy with a hearing disability and a background of significant disadvantage.

The sentence was appealed on the ground of manifest excess. The appellant particularly raised the issue that the Magistrate had not properly considered alternatives to fulltime imprisonment. The appellant submitted that the case of *Ursino v Read* [2005] ACTSC 106 had been used by the Magistrate to presume a starting point of fulltime imprisonment for offence of failing to appear, which is contrary to law. Loukas-Karlsson J found that the Magistrate was not in error in making a "veiled reference" to *Ursino* in the context of emphasising to the young person the seriousness of the offence. Nevertheless, her Honour found that "the phrase in *Ursino* should certainly not be interpreted in a manner that is inimical to, and inconsistent with, the individual sentencing discretion and instinctive synthesis".

The judgment set out the principles relevant to the sentencing of young offenders, including sections of the *Crimes (Sentencing) Act 2005*, the *Children and Young People Act (2008)* and the *Human Rights Act (2004)*. Her Honour also considered the importance of the High Court decision of *Bugmy v The Queen* [2013] HCA 37; 249 CLR 571 when sentencing in the context of a background of childhood disadvantage. Taking into account these principles, her Honour found that the sentence was manifestly excessive, noting that, in the case of young offenders, imprisonment must be a sentence of last resort. Her Honour found that possible alternatives to imprisonment were not properly considered by the Magistrate; the appeal was upheld, and the appellant was re-sentenced.

R v IB (No 3) [2020] ACTSC 103

In April 2020, the *Supreme Court Act 1933* (ACT) was amended to insert s 68BA(3), which, during the COVID-19 emergency period, enabled the Court to order that a trial proceed by judge alone if that would “ensure the orderly and expeditious discharge of the business of the court” and was “otherwise in the interests of justice”.

In 2017, the accused had fled overseas on the third day of his trial on one count of sexual intercourse without consent and two counts of act of indecency. He faced retrial.

The parties opposed a s 68BA(3) order.

Murrell CJ considered the accused’s rights under the *Human Rights Act 2004* (ACT) and noted that “it is well-established that the right to a ‘fair trial’ is not a ‘right to a jury trial’”.

Her Honour noted that judges understand human behaviour and the factors that may cause an accused person to behave in an “illogical and unreasonable” manner and are well-versed in determining matters of credit and assessing community standards.

Her Honour found that the expression “the interests of justice” is broad and derives substance from the context in which it is used.

It directed attention to matters other than the expeditious conduct of the Court’s business that serve or detract from “the interests of justice”. Relevant factors included:

- The age of the incident;
- The interest of the accused in a prompt trial;
- The need for serious allegations to be decided promptly;
- The fact that the proceedings raised no issue of community standards; and
- The capacity of a judge to determine the complainant’s credibility.

Her Honour considered that, while some factors weighed against the making of an order, they were outweighed by those favouring an order. The Court ordered that the trial proceed before a judge alone.

Brown v Australian Capital Territory [2020] ACTSC 70

The plaintiff claimed compensation for unlawful detention or false imprisonment against the ACT.

The plaintiff and his de facto partner (X) were driving from Vincentia, NSW towards Wreck Bay in the Jervis Bay Territory (JBT) when they had an argument. The plaintiff struck and injured X at the last curve on “Jervis Bay Road” before the entrance to Booderee National Park (which marks the border between NSW and the JBT).

The AFP statement of facts and the ACT Policing summary document erroneously stated that the incident had occurred in the JBT. This was used by police to lay charges in the ACT Magistrates Court, and a warrant was issued. The plaintiff was arrested and remanded in custody for 43 days, until the charges were dismissed.

The main issue to be considered was whether the plaintiff’s detention was “unlawful” within the meaning of the *Human Rights Act 2004* (ACT) (*HRA*) or, alternatively, whether he was falsely imprisoned.

Murrell CJ found that the plaintiff’s detention was not unlawful within the meaning of the *HRA* and that he was not falsely imprisoned. Because the proceedings for the offences were commenced through the laying of charges that were, on their face, valid, it followed that the plaintiff’s detention was not unlawful.

Her Honour considered it unnecessary to decide whether s 18(7) of the *HRA* creates a freestanding right to compensation, as the plaintiff was neither unlawfully arrested nor unlawfully detained.

Her Honour questioned the plaintiff’s assumption that the common law tort of false imprisonment is “more or less a subset of deprivation of the human right to liberty of person”, i.e. that “unlawful detention” is broader than the tort of false imprisonment. Her Honour discussed the case of *R (on the Application of Jalloh (formerly Jollah)) v Secretary of State for the Home Department* [2020] UKSC 4, where the House of Lords stated that the concepts of imprisonment for the purposes of false imprisonment and deprivation of liberty under art 5 of the *European Convention on Human Rights* were not aligned. While there could be an imprisonment at common law without a deprivation of liberty, it was open to doubt whether the reverse applied.

R v Fairclough [2019] ACTSC 215

Mr Fairclough, the applicant, made an application to withdraw his guilty plea. The applicant had been committed to trial for one count of intentionally inflicting grievous bodily harm and one count of intentionally and unlawfully using an offensive weapon likely to endanger human life or cause a person grievous bodily harm. On 18 July 2017, the offender pleaded guilty to the second count in full satisfaction of the indictment, after the date of the trial had been adjourned twice.

On 22 September 2017, the applicant's lawyers sought leave to withdraw from the proceeding as the applicant had been arrested and remanded in custody in Victoria. The sentencing date was vacated, and the matter adjourned to 23 October 2017 for mention. On that date, leave was granted for the Crown to issue an arrest warrant for the offender. The applicant was next before the Court on 11 December 2018 when he was represented and in custody. The date of 8 February 2019 was set for sentence. On 25 January 2019, the applicant's lawyer filed a notice that he was no longer acting, and on 30 January 2019 the offender appeared at the sentence hearing unrepresented. He informed the sentencing judge that he sought to withdraw his guilty plea and was in the process of seeking a new lawyer. On 8 February 2019 the applicant appeared with representation, seeking to withdraw his guilty plea.

The application came before Burns J. In his judgment, his Honour noted that a plea may be permitted to be withdrawn where there is not a "consciousness of guilt" on the part of the accused. His Honour considered the authorities referred to by Higgins J (as his Honour then was) in *Gee v Hulbert & Ors* [2002] ACTSC 118 regarding the proposition that an application to withdraw a plea of guilty may be satisfied by the applicant establishing that there is a real chance the applicant did not genuinely accept the prosecution statement of facts, and the applicant asserts a version of the facts which, if believed, would result in their acquittal. However, Burns J considered that the cases cited by Higgins J did not support the widely framed test suggested by his Honour.

Rather, his Honour noted not all disputes about Crown facts will evidence a lack of consciousness of guilt. In the present case, the applicant had maintained a version of events that he stabbed the complainant in self-defence. Burns J held the term "consciousness of guilt" means an acceptance of guilt based upon an acceptable level of knowledge of the facts alleged in the Crown's case, an understanding of the charges and the relevant law.

Burns J was satisfied the applicant pleaded guilty after his counsel provided proper and comprehensive advice about the nature of the charge and the law concerning self-defence. Thus, the applicant accepted his actions were in excess of self-defence, was guilty of that offence and the plea demonstrated a consciousness of guilt. The application was dismissed.

Civil Jurisdiction

SMA v John XXIII College (No 2) [2020] ACTSC 211

The plaintiff was a university student who made a claim of negligence against John XXIII College (John's). The plaintiff had sexual intercourse with another student (NT) on the night stretching over 6 and 7 August 2015. Both students resided at John's. The plaintiff did not consent to the activity and had no memory of the event due to her level of intoxication. The reason the plaintiff was intoxicated to such a degree was because she had attended an event known as Pub Golf held at the John's premises. The plaintiff only became aware of this encounter about 10 days later, upon receiving information from her friend.

The plaintiff's claim centred around the following three grounds:

1. The defendant should not have allowed the Pub Golf event to occur.
2. The defendant should not have directed the students to leave the John's premises in the evening of 6 August 2015; and
3. The defendant's manner of dealing with the plaintiff's complaint was inappropriate.

The plaintiff claimed that she had suffered psychological injury which led to significant suffering, as well as economic loss.

The defendant's involvement in these three actions was alleged to be in breach of the duty of care it owed to the plaintiff. The defendant submitted that its duty of care was no more than that of an occupier.

Elkaim J found the defendant owed a pastoral duty of care to the plaintiff, which it had breached on the basis of Grounds 2 and 3 above. The plaintiff's claim was successful and damages in the sum of \$420,201.57 were awarded.

Eastman v The Australian Capital Territory [2019] ACTSC 280

The plaintiff claimed compensation after he was found to have been wrongly convicted and imprisoned for murder in 1995. In 2014, the conviction was quashed, and the plaintiff was re-tried and acquitted in 2018. The plaintiff had been in custody for 6,860 days. He was aged 50 when he went to prison and almost 69 when he was released. The plaintiff sought compensation arising from his imprisonment between 10 November 1995 and 22 August 2014.

Elkaim J found the plaintiff was entitled to compensation in the sum of \$7,020,000.

The plaintiff submitted that his right to compensation arose out of sections 18(7) and 23 of the *Human Rights Act 2004* (ACT) (*Human Rights Act*).

The defendant asserted that the plaintiff was not entitled to compensation under the *Human Rights Act* because his conviction was not “reversed” as the Full Court in 2014 had ordered a re-trial. The defendant further argued that there had been no miscarriage of justice. Elkaim J rejected the argument that the conviction had not been “reversed”, noting that when the Full Court quashed Eastman’s conviction, he returned to being an innocent person and therefore the conviction was unequivocally reversed.

The defendant further submitted that the quashing of the plaintiff’s conviction did not show “conclusively” that a miscarriage of justice had occurred. In rejecting this submission, Elkaim J noted that if that argument was accepted, it would have the effect of limiting the scope of section 23 of the *Human Rights Act* to cases where subsequent new evidence shows a crime had been committed by someone other than the convicted person. As a result, this would mean that cases where subsequent discoveries establish that a trial had been improperly conducted, leading to a miscarriage of justice, would not be covered by this section. His Honour further noted that the Martin Report on the plaintiff’s case left no doubt as to the extent of the miscarriage of justice.

In assessing the compensation payable to the plaintiff, his Honour took into account, amongst other things, his loss of his working life and economic capacity, the insult to his reputation and his experiences in prison.

This was the first decision to award compensation under the *Human Rights Act*.

Subasic v Hewlett-Packard Australia Pty Ltd [2020] ACTSC 2

This case involved an alleged breach of an employment contract. The plaintiff was previously employed by the defendant as a sales executive. She was paid by the defendant in two main ways – first, through a fixed sum, or lump payment; and second, through a performance payment, which was dependent on the plaintiff reaching certain sales targets. In addition to this, if the plaintiff met a specified sales quota, she would earn an additional commission, which was calculated at a more generous rate.

The plaintiff brought proceedings against the defendant seeking to recover over \$309,000 (plus interest). The plaintiff alleged that the money was payable to her by way of additional commission earned as a result of sales she had made when she was employed by the defendant. The defendant had paid only part of the additional commission, which the defendant said had been capped at 350 per cent of the specified sales quota.

McWilliam AsJ found that the plaintiff had a contractual entitlement to the additional commission, which was to be calculated at the generous rate in accordance with the criteria established by the defendant. As that had to be paid, the defendant's conduct constituted a breach of contract. McWilliam AsJ also accepted the alternative argument that the employment contract contained an implied duty to act in good faith and a duty to cooperate. The defendant had breached these implied duties by capping the additional commission without giving prior notice to the plaintiff after the plaintiff had performed the work that entitled her to the commission in question. McWilliam AsJ ordered judgment for the plaintiff in the amount sought.

In the Estate of Jansen [2020] ACTSC 130

The applicants sought a declaration pursuant to s 11A of the *Wills Act 1968* (ACT) that the undated document signed by the deceased constitutes his will, notwithstanding that it had not been executed in accordance with the formal requirements. The applicants also sought an order that there be a grant of probate in relation to that will to them. The issue with the document was that neither of the purported witnesses to the will were present when it was actually signed. The respondent, who was the son of the testator, opposed these orders. He submitted that r 3030 of the *Court Procedures Rules 2006* (ACT) had not been complied with. He also submitted that the document should not be admitted to probate because it was not executed in accordance with the *Wills Act*, there was no evidence from the alleged attesting witnesses and the Court could not be satisfied that the document reflected the testator's instructions.

In his reasons, Mossop J noted that the failure to execute a will in accordance with the statutory requirements is not a barrier to making an order under s 11A. This is because it is in fact the purpose of that section to permit documents within its scope to be taken to be a will. Secondly, his Honour found that r 3030 has no application in a case where it has been conceded that there has been non-compliance with the *Wills Act*. That rule operates where it is not clear on the face of the will that has been attested to as required by law, and therefore is not relevant in circumstances where it has been accepted that s 9 of the *Wills Act* was not complied with. His Honour considered that even if r 3030 had any application, it would not be necessary to obtain evidence of the signing of the will from those who signed it because they were not in fact attesting witnesses, as neither were present when the deceased signed the document. Lastly, his Honour found that due to the unchallenged evidence concerning the circumstances surrounding the making of the will, the Court could readily be satisfied that the document reflected the intentions of the deceased. His Honour held that the document satisfied the requirements of s 11A, and he granted probate to the applicants.

Foote v The Coroners Court of the ACT [2020] ACTCSC 141

This case involved a statutory review of the findings in a coronial inquest, the subject of which was a person who died shortly after giving birth to twin daughters. The Coroner found that the deceased was suffering pre-eclampsia, which continued undiagnosed and untreated following the birth of her twins. The plaintiff in this case was the obstetrician with care of the deceased person. The Coroner made several findings that were critical of the plaintiff's diagnosis and treatment of the deceased.

Pursuant to s 93 of the *Coroners Act 1997* (ACT), the plaintiff sought that the findings of the coronial inquest be quashed, which would result in a new coronial inquest being ordered. Under s 93, and in the circumstances of this case, McWilliam AsJ considered two questions:

1. Whether the Court was satisfied that there was a ground/s to quash the inquest; and
2. Whether the Court was satisfied that because of such ground/s, it was necessary or desirable in the public interest or the interests of justice that the inquest be quashed and that another inquest be held.

In relation to the first question, the plaintiff raised five reasons why the Court should quash the inquest, including that the Coroner did not give the plaintiff proper notice of the adverse findings made against him; the inquiry was insufficient; and there was new expert evidence which would cast doubt on the Coroner's findings. McWilliam AsJ found that, while not all of the plaintiff's grounds met the necessary threshold, aspects of the Coroner's Report were unsatisfactory. For example, the new evidence raised by the plaintiff did not indicate an error in the original finding as to manner of death, but the Coroner's Report was procedurally unfair with regard to the adverse findings made about the plaintiff. The plaintiff had not been given an opportunity to respond any proposed adverse comments, as was required by s 55 of the *Coroners Act*.

In relation to the second question, McWilliam AsJ found that the entire inquest had not miscarried and that it was not in the interests of justice to order a new coronial inquiry.

Court of Appeal

KN v The Queen [2019] ACTCA 37

The appellant appealed against six convictions, including four convictions for engaging in sexual intercourse without consent with a young person (LL) and one conviction of maintaining a sexual relationship with LL.

The Court had to consider the interpretation of s 56 of the *Crimes Act 1900* (ACT).

The Court criticised the legislative drafting. The Court found that, although the legislature had intended to make the sexual relationship the physical element of the offence, the wording adopted by the drafters did not achieve that purpose.

The Court stated (at [63]):

Somewhat reluctantly, we are driven to the conclusion that, as s 56(2) of the *Crimes Act* plainly states, an offence of maintaining a sexual relationship with a young person is committed “if, on two or more occasions and over any period the adult engages in a sexual act” with the young person.

In other words, a s 56 offence is established by proving two or more “sexual acts”. There is no additional requirement to prove a “sexual relationship”.

The Court expressed concerns about “double jeopardy”, but concluded that the Act expressly allows for a person to be convicted of both a relationship offence and the specific sexual offences relied upon to establish the relationship offence, if all offences are charged in the same indictment.

Although the appellant successfully established that s 56 did not require proof of a “sexual relationship”, because the Act allowed for the conviction of a person for both a relationship offence and the foundational sexual offences, there had been no miscarriage of justice. The appeal was dismissed.

Cornwall v Jenkins as Trustee for the iSpin Family Trust [2020] ACTCA 2

The appellant brought a claim for negligence when she was injured while participating in an “aerial sling” exercise class, run by the respondent. Participants of the class took part in exercises using a fabric sling attached to the ceiling. While undertaking a particular manoeuvre, the appellant fell from the sling and broke both wrists. She fell onto a relatively thin yoga mat as fall protection. The respondent had thicker crash mats available but did not require participants to use them.

At first instance, the primary judge entered judgment for the respondent on the basis that the evidence did not establish a breach of duty. On appeal, the appellant pleaded the primary judge erred in finding the respondent had not breached its duty of care to the appellant by failing to require her to use a crash mat, and, in the alternative that any breach of duty had not caused the appellant’s injuries.

The Court of Appeal, constituted by Burns, Loukas-Karlsson JJ and Crowe AJ, found the primary judge erred in determining the evidence did not establish a breach of the respondent’s duty by failing to insist upon the use of crash mats when the appellant was undertaking the particular manoeuvre. Further, their Honours found the risk of falling from the top of the sling was plainly foreseeable, notwithstanding no evidence of prior falls or accidents within the respondent’s studio.

Having regard to the expert evidence, their Honours concluded a reasonable person in the position of the respondent would have provided adequate fall protection by way of crash mats to protect against injury resulting from a fall of the greatest height anticipated being undertaken by the participant. While the risk of injury by not using the crash mats may not have been high, the risk of significant injury if a person fell from the top of the sling was substantial.

In the judgment, the Court considered there were clear parallels between the principles governing liability in negligence matters enunciated by Gummow J in *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; 234 CLR 330, [18] and s 43 of the *Civil Law (Wrongs) Act 2002* (ACT) (the Wrongs Act). Accordingly, their Honours held in determining liability of claims for damages to which the Wrongs Act applies, one applies the common law principles of negligence as necessarily modified in the Wrongs Act.

The respondent submitted that it was incumbent on the appellant to lead evidence to establish how many mats, and of what size, type and construction ought to have been provided. Their Honours rejected this submission and held that a reasonable person in the position of the respondent would have used fall protection, most probably by way of crash matting, and required the participants to use it. There could be no suggestion that this was not possible or would place an unacceptable burden on the respondent.

The respondent filed a notice of cross-appeal seeking orders that the appellant’s damages be reduced by reason of contributory negligence. Their Honours found the appellant was an adult person who was experienced in the manoeuvres undertaken at the respondent’s studio, and she had not been instructed to use a crash mat for fall protection in those circumstances. The greater responsibility for the appellant’s injuries rested with the respondent, therefore the appellant’s damages were reduced by one third by reason of contributory negligence.

Urlich v The Queen [2019] ACTCA 30

The appellant had been sentenced following a trial by jury for the offence of murder, and for a transferred offence of interfering with a deceased human body. On the third day of the trial, there was an agreement between the accused and the prosecution as to a number of the relevant facts. This agreement substantially shortened the length of the trial and reduced the number of witnesses required by the Crown. In addition, a representation was made by the appellant's counsel to the Crown as to whether a plea to manslaughter would be accepted on the basis of facts which did not form part of the Crown case. These discussions did not progress any further and the trial continued. The jury subsequently acquitted the appellant of the murder charge and instead returned a verdict of guilty for the alternative charge of manslaughter.

The appeal was brought on the basis that the sentencing judge had not imposed a lesser penalty for the appellant's assistance in the administration of justice, or if he did, had failed to state the penalty he would have otherwise imposed, in accordance with s 37 of the *Crimes (Sentencing) Act 2005*. The Court of Appeal conducted a review of the nature and effect of such an error, and the public policy purposes underpinning the inclusion of s 37 in ACT sentencing legislation, contrasting it with similar legislation in New South Wales and Queensland. The Court concluded that, while the sentencing judge had referred to the admissions and their impact on the administration of justice, this was an error of significance, and one which required the sentencing discretion to be exercised again in accordance with the law.

The Court accepted that an unaccepted offer to plead to a charge which ultimately became the jury's verdict at the conclusion of the trial could be taken into account on sentence. However, the utilitarian value of the representation in this case was undermined by the late stage at which it came. The Court also determined that this representation had been nothing more than a sounding out, rather than an unaccepted offer to plead.



CASE MANAGEMENT

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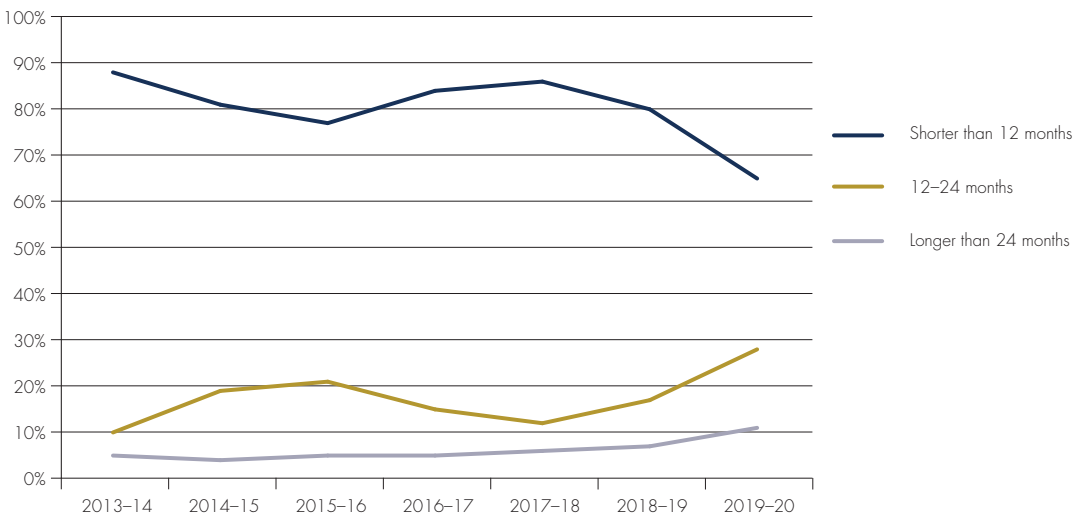
Statistics

Outstanding Matters

Court Time	2017-18	2017-18	2017-18	2017-18	2018-19	2018-19	2018-19	2018-19
	Criminal	Civil	Criminal	Civil	Criminal	Civil	Criminal	Civil
< 12 months	217	437	85%	80%	206	455	79%	71%
12-24 months	27	74	11%	14%	41	142	16%	22%
>24 months	12	36	5%	7%	15	40	6%	6%
Total	256	547			262	637		

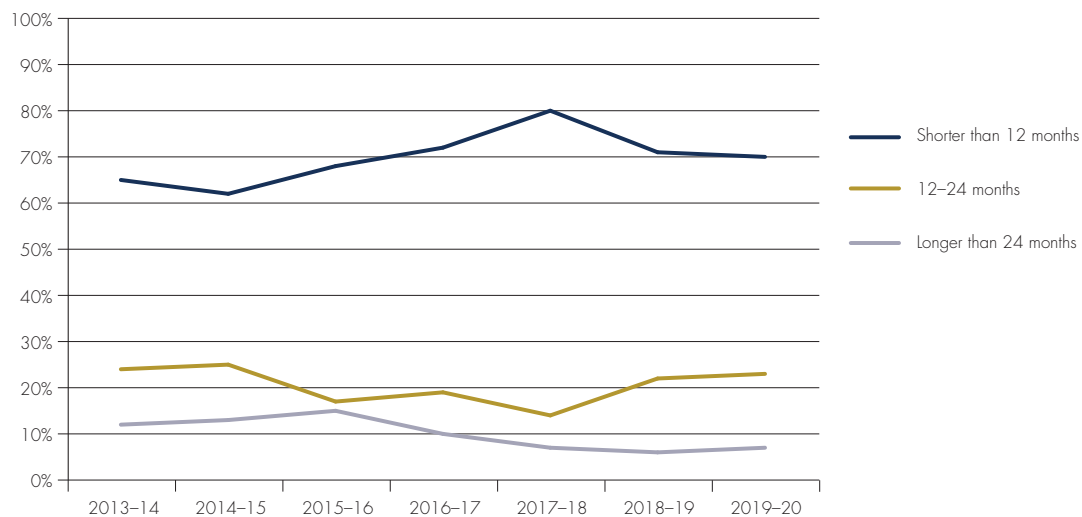
Court Time	2019-20	2019-20	2019-20	2019-20
	Criminal	Civil	Criminal	Civil
< 12 months	213	433	64%	70%
12-24 months	89	142	27%	23%
>24 months	33	40	10%	7%
Total	335	615		

Outstanding criminal matters (in percentages)



Criminal	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20
Shorter than 12 months	87%	80%	76%	83%	85%	79%	64%
12-24 months	9%	18%	20%	14%	11%	16%	27%
Longer than 24 months	4%	3%	4%	4%	5%	6%	10%

Outstanding civil matters (in percentages)

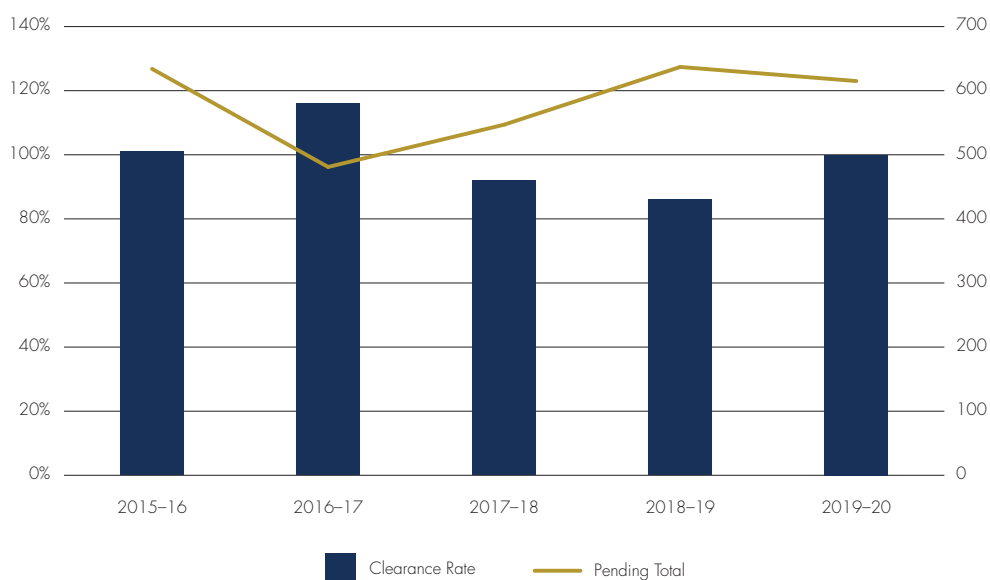


Civil	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20
Shorter than 12 months	65%	62%	68%	72%	80%	71%	70%
12-24 months	24%	25%	17%	19%	14%	22%	23%
Longer than 24 months	12%	13%	15%	10%	7%	6%	7%

Summary data 2019–2020

Supreme Court – Civil matters (includes Magistrates Court appeals)	2015–16	2016–17	2017–18	2018–19	2019–20
Lodgements	614	561	608	639	603
Finalisations	619	648	559	550	603
Clearance Rate	101%	116%	92%	86%	100%
Pending Total	634	481	547	637	615
Pending < 12 months	430	346	437	455	433
Pending > 12 months*	204	135	110	182	182
Pending > 24 months	98	46	36	40	40

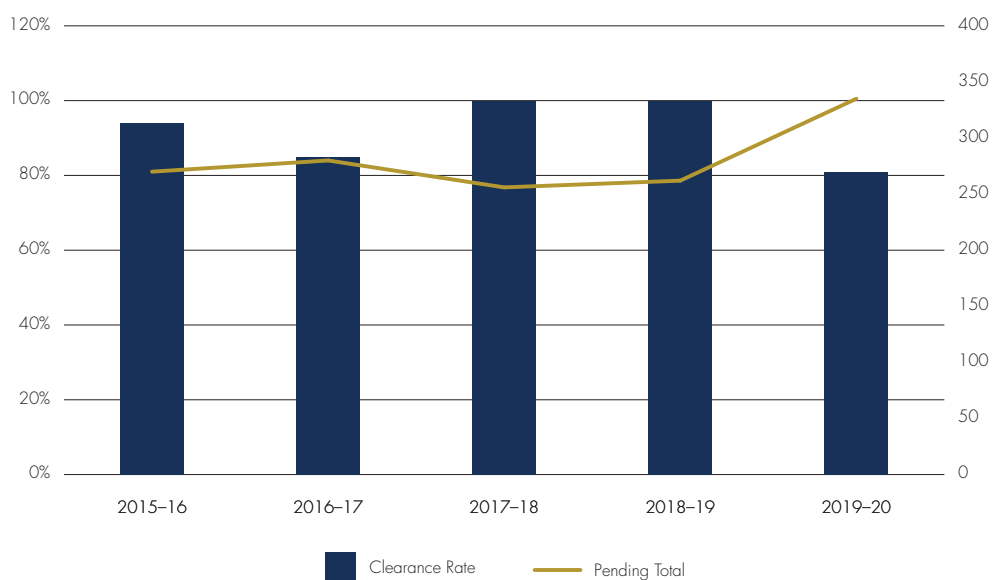
* includes [> 12 months] + [> 24 months]



Summary data 2019–2020

Supreme Court – Criminal matters (includes Magistrates Court appeals)	2015–16	2016–17	2017–18	2018–19	2019–20
Lodgements	279	319	354	323	335
Finalisations	262	270	355	323	272
Clearance Rate	94%	85%	100%	100%	81%
Pending Total	270	280	256	262	335
Pending < 12 months	206	231	217	206	213
Pending > 12 months*	64	49	27	56	122
Pending > 24 months	10	10	12	15	33

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



Court of Appeal*	2015–16		2016–17		2017–18		2018–19		2019–20	
	Civil	Criminal	Civil	Criminal	Civil	Criminal	Civil	Criminal	Civil	Criminal
Lodgements	22	33	27	36	37	36	25	35	20	28
Finalisations	24	26	58	36	31	42	30	37	25	27
Clearance Rate	109%	79%	215%	100%	84%	117%	120%	106%	125%	96%
Pending Total ^	48	38	18	33	27	26	17	22	12	23
Pending < 12 months	15	28	13	28	23	22	13	20	12	20
Pending > 12 months *	10	7	4	5	3	4	10	2	0	3
Pending > 24 months	23	3	1	0	1	0	6	0	0	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

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

^ In 2018–19 6 matters considered pending in the Court of Appeal had been finalised in prior periods in the first instance. These have been removed from this pending value in 2018–19



**LAW COURTS
OF THE
AUSTRALIAN CAPITAL TERRITORY**