DIRECTOR OF PUBLIC PROSECUTIONS

NORTHERN TERRITORY OF AUSTRALIA

A N N U A L

R E P O R T

2011-2012

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS NORTHERN TERRITORY

TWENTY-SECOND ANNUAL REPORT

FOR YEAR ENDED 30 JUNE 2012

Director of Public Prosecutions
Northern Territory

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Australia

30 September 2012

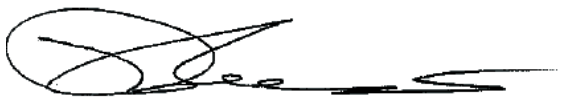
Mr John Elferink MLA
Attorney-General
Parliament House
State Square
DARWIN NT 0800

Dear Attorney-General

ANNUAL REPORT 2011-2012

In accordance with the requirements of section 33 of the ***Director of Public Prosecutions Act***, I submit to you the Annual Report on the performance of the Office of the Director of Public Prosecutions for the period 1 July 2011 to 30 June 2012.

Yours sincerely



RICHARD COATES

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OFFICE LOCATIONS

1. **NORTHERN REGIONAL OFFICE DARWIN (Head Office)**

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ALICE SPRINGS NT 0871

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Fax: (08) 8951 5812

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KATHERINE NT 0851

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MISSION STATEMENT

The mission of the Office of the Director of Public Prosecutions is to provide the people of the Northern Territory of Australia with an independent, professional and effective criminal prosecution service that:

- *operates with integrity*
- *is fair and just to both victims and the accused and*
- *is sensitive to the needs of victims, witnesses and to the interests of the community on whose behalf it acts.*

MISSION STATEMENT
(IN KRIOL)

Wed bla DPP-mob

DPP-mob bin pudimdan dijlat wed la dijan peipa dumaji olabat wandi dalim eberibodi bla no, hau detmob wandi duwim det wek bla olabat brabli raitwei.

Det wek bla olabat, jei gada album yu bla dijkain trabul:

maiti ib pilijimen im rekin samwan bin meigim brabli nogudwan trabul, laiga ib jei merdrem o kilimbat yu; ib jei stilimbat o demijim enijing blanganta yu.

Maiti det pilijimen rekin det ting im lilbit nogudwan, wal olabat pilijimenmob teigim la kot. O maiti det pilijimen rekin det trabul im rili rongwei, wal det DPP-mob gada teigim la kot det nogudwan sambodi.

Det DPP-mob olabat teigim yu pleis la kot, seimwei laig det Liguleid teigim pleis la det sabodi weya olabat rekin imin duwim rongwan ting.

Det DPP-mob gan weistimbat taim en mani en olabat gan libim dijan hiya rul bla olabat wek:

- Ola weka onli gada woriyabat faindimbat raitwan wed bla wot bin hepin - nomo laigim yu o heitim yu o yu femli o enibodi.
  Jei gan toktok la enibodi bla yu bijnij, onli la jeya weka wen jei albumbat yu.

- Det DPP-mob wandim stap gudwan binji seimwei la yu en la det sambodi weya olabat rekin imin duwim det nogudwan ting.
  Jei wandi album yu gidim det samwan hu bin duwim det samting rong en faindat la kot raitwei bla banijim bla wot imin du.

- Olabat DPP-mob wandi meigim bla yu en en det sambodi en ola widnijmob go la kot gudwei, nomo hambag en nomo bla meigim yu fil sheim. DPP-mob duwim dijkain wek bla album eberibodi la Northern Territory jidan seifwan en gudbinjigeja.

DPP-mob bin pudim dan dislat wed la dijan peipa dumaji olabat wandim dalim eberibodi bla no, hau detmob wandi duwim det wek bla olabat brabli raitwei.

DIRECTOR'S OVERVIEW

This is my seventh and final report as my term of appointment finishes on 31 January next year. I am not seeking reappointment but will do whatever I can to assist my successor effect a smooth transition into this important and demanding position.

Whilst I have enjoyed my time in the job, maintaining an independent prosecutorial discretion inevitably draws criticism from the media and politicians. Although I have broad enough shoulders to weather the ill informed condemnation of some of the unpopular decisions I have made, it is important that the public realise that their new DPP will also attract public criticism. It is part and parcel of the exercise of an independent prosecutorial discretion. To stay too long risks raising the perception that it is only the personal failings of a particular DPP that is causing the public discontent. With renewal should hopefully come the gradual realisation that all Directors are bound to make unpopular decisions in the public interest.

One area which has seen some of the more intemperate criticism of my decisions has been in relation to the prosecution of children. The law has long held that the retributive aspect of sentencing has little relevance when children are involved. Yet a desire for retribution seems to motivate the demands by media and politicians for the DPP to seek the imposition of heavier sentences on children.

There is extensive empirical evidence which shows that heavier *deterrent* sentences are not the answer to curtailing youth offending. There is also a body of research which indicates that *naming and shaming* child offenders is more likely to alienate those individuals and diminish, rather than enhance, their prospects of rehabilitation.

Yet the Northern Territory is the only jurisdiction in Australia where the ***Youth Justice Act*** does not impose a presumption of confidentiality for children facing criminal prosecution. I support the call earlier this year by Dr Howard Bath, the NT Children's Commissioner for the ***Youth Justice*** **Act** to be amended so it contains the same confidentiality safeguards for children as exist elsewhere in Australia.

Another contentious issue in the past, concerned decisions by the prosecution to accept a plea to manslaughter instead of proceeding to trial on a charge of murder.

Early in my term there had been a suggestion by some media commentators that sympathy for disadvantaged indigenous offenders was a motivating factor in a prosecutor's decision to accept a plea to a lesser charge.

In my 2007/2008 report I said:

> *I do not know whether the Territory's mandatory minimum term of 20 years imprisonment for persons convicted of murder is a factor taken into account by juries in determining whether to convict an accused of murder. I can say however that it is not a factor which has any relevance to the decision to prosecute.*

Media concern over this issue appears to have largely abated and so it should have. People are being tried and convicted of murder and sentenced to a minimum term of 20 years where the objective circumstances of their offending do not warrant such severe punishment. Any expectation on the part of the community that the DPP will ameliorate the harsher aspects of the mandatory scheme by proceeding with a manslaughter charge even though the evidence supports a charge of murder, is without foundation. Recently, an aboriginal woman who killed her sister in the course of a drunken argument was convicted of murder and stands to be imprisoned for a minimum of 20 years. Such a sentence is not proportionate to the gravity of her crime. The *one size fits all* approach of mandatory minimum sentencing creates injustice and in fact diminishes the relative consequences for more serious offenders.

Another downside of mandatory minimum terms is there is little incentive for people to plead guilty. Therefore most murder charges require a long and costly trial where the outcome is never guaranteed.

Cases where an offender who is jointly charged with murder and pleads guilty on the understanding that he will give evidence against his co-accused, are also problematic when it comes to sentencing. In a recent case of ***The Queen v Darren Jason Halfpenny*** (SCC 21136189) Justice Mildren observed:

> *My own views are that I think that the current provisions of s.53A(7) of the **Sentencing Act** need to be amended. It is unjust and contrary to public interest that prisoners who plead guilty to murder and are contrite and remorseful and who, by virtue of their conscience are prepared to give evidence against their co-offenders, are left in a situation where early release on parole is left in the hands of the executive.*
>
> *The executive is ill-trained to consider these matters and should leave such questions in the hands of the courts, which are not subject to political pressure but which will determine the matters according to law and in accordance with the evidence. Furthermore, the decisions of the courts are subject to appeal, both by the Director of Public Prosecutions and by the prisoner. Executive review is unappellable.*

I respectfully agree with His Honour's suggestion that there be greater discretion in sentencing for murder. I also note that our Court has been prepared to impose the maximum sentence available in an appropriate murder case. In ***Leach v R*** [2007] 232 ALR 325 the High Court upheld the decisions of the then Chief Justice and the Court of Criminal Appeal that Leach be imprisoned for life without any prospect of parole.

Although in the case of Halfpenny, Justice Mildren suggested a broadening of the exceptional circumstances criteria in s.53A(7) of the ***Sentencing Act,*** a more preferable option could be to confer upon the courts an unfettered discretion in relation to setting the non-parole period. This is the situation which applies in most other Australian jurisdictions and if adopted could also warrant removing the partial defences of provocation and diminished responsibility. As it currently stands, provocative conduct on the part of the deceased or a defendant's mental disabilities can not mitigate the sentence where it falls just short of establishing the defence necessary to reduce murder to manslaughter.

In his 2004/2005 Annual Report, my predecessor Rex Wild QC referred to the need for the 1998 Memorandum of Understanding with Police governing summary prosecutions, to be updated and adopted to better reflect changes which had occurred in the co-operative relationship. In my 2007/2008 Report I expressed frustration over the continuing failure of Police to commit to a new agreement. That frustration continues. In 2008/2009 I reported that following a further review of summary prosecutions by a former NT Auditor-General that I was looking forward to working with:

> *the recently appointed Divisional Head of Police Prosecutions to develop a service level agreement which will document our future relationship in relation to sharing the summary prosecutions workload.*

Over the past 4 years Police have raised a number of different possibilities for summary prosecutions. One model envisaged my Office taking responsibility for the conduct of all contested summary hearings across the Territory as the first step in a process which would see responsibility for all aspects of summary prosecutions being transferred to the DPP. Another proposal envisaged police prosecutors being trained to a level whereby they could start conducting contested summary hearings in Darwin and gradually take over the whole summary caseload. Although such a move would seem to run contrary to the O'Sullivan Review recommendations it is ultimately a matter for the Police Commissioner to determine, given that Police are responsible for funding most of the positions in summary prosecutions.

However the current reality is that there are too few police prosecutors trained to undertake hearings and I do not have enough lawyers to assume responsibility for the bail and arrest function across the Territory. If police prosecutors are to take on a greater share of the contested matters then there will be a significant lead time to develop the necessary training modules and to recruit further trained police into the prosecutions division to replace the lawyers. If a decision is made to civilianise the

service then it will take some time to recruit and train more lawyers to handle the increased workload.

With each change of direction by Police I have submitted new versions of a proposed Service Level Agreement (SLA) which is aimed at documenting our respective responsibilities in relation to the prosecution of summary cases. We are now on to version 12 of the SLA which takes a minimalist approach by merely detailing the resources both police and the DPP currently provide for summary prosecutions. It also allows the Police Commissioner on giving reasonable notice to either reduce or increase the number of lawyers I engage to conduct summary cases on his behalf.

Any amendments suggested by Police have been included in the document and I am confident that the proposed agreement accurately records the current arrangement under which my lawyers prosecute summary cases on behalf of police. Yet the SLA has still not been signed off by the Commissioner.

Since we began this process there have been two DsPP, three Police Commissioners and many different Officers in Charge of Police Prosecutions. Unless the current arrangements are documented there will be ongoing uncertainty as to who is responsible for what in summary prosecutions. This is not fair on the hardworking summary prosecutors both police and civilian who are working at the coal face.

My staff and the police officers in summary prosecutions enjoy a good working relationship. We are all committed to getting better outcomes and achieving greater efficiencies within the criminal justice system. However in order to move forward we need a solid foundation to build upon and that is why I am calling upon the Police Commissioner to sign up to the SLA without further delay.

For my part, I believe the mixed model, whereby police and civilian prosecutors work as a team has a lot going for it. I know that the previous Police Commissioner was reluctant to contribute resources to an entity he didn't control, however that will always be the case with a properly functioning prosecution service. Prosecutors, whether they be police or lawyers need to exercise the discretion to prosecute independently of the operational imperatives of the police investigators.

The community has an expectation that as DPP I will exercise my discretion to prosecute free from any direction by the police chain of command. Why should it appear to be any different with summary prosecutions?

Whilst this is my last report as DPP it also represents my swan song after what will have been 27 years working in the law in the Northern Territory. During that time I was also privileged to work as Principal Legal Officer at CAALAS, as a Magistrate in Darwin, as the inaugural Director of NTLAC and as the first CEO of the Department of Justice. I have very much enjoyed the collegiality and support of those who I have worked with and against in the community and public legal sectors. I find myself agreeing with a former Chief Minister Shane Stone, who said that *the Territory*

punches above its weight. No more is that evident than with our judiciary and with the lawyers working as prosecutors and legal aid defenders.

Many of the lawyers who have come to the Territory to work for government or community organisations have been motivated by a commitment to assist in improving the lot of indigenous Territorians. In the years since I first practiced here in the 70's, significant advances have been made toward safeguarding the rights of indigenous people suspected of criminal offending. Yet the numbers of indigenous prisoners continues to rise at an alarming rate. As I wrote in last year's report, the major factor driving indigenous prisoner numbers is the increase in the number of offenders sentenced to prison for a serious assault on an indigenous woman with whom they have been in a domestic relationship.

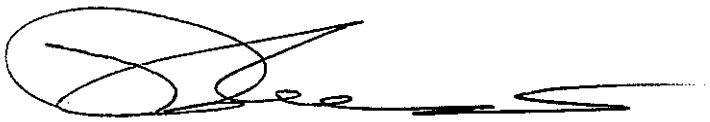
It is only right that the Territory's criminal justice system should strive to protect these most vulnerable Australians, despite the limited utility of imprisonment as a deterrent to this unacceptable violent behaviour. My prosecutors are often operating in highly stressful and emotional circumstances when prosecuting these cases and I am immensely proud of the work they are doing.

The Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda has said that a feeling of powerlessness is driving indigenous men to turn on those who are closest to them. He is calling for indigenous communities to acknowledge the devastating extent of family violence and for indigenous men to take a lead in standing up against this lateral violence directed at the most vulnerable members of our society. I respectfully agree.

I would like to take this opportunity to express my appreciation for the efforts of all my staff at the ODPP. You do a fantastic job. In particular I say thank you to my Deputy Jack Karczewski QC, Assistant Director Dr Nanette Rogers SC, General Counsel Paul Usher and my long suffering executive assistant Patricia Smith.

Directions

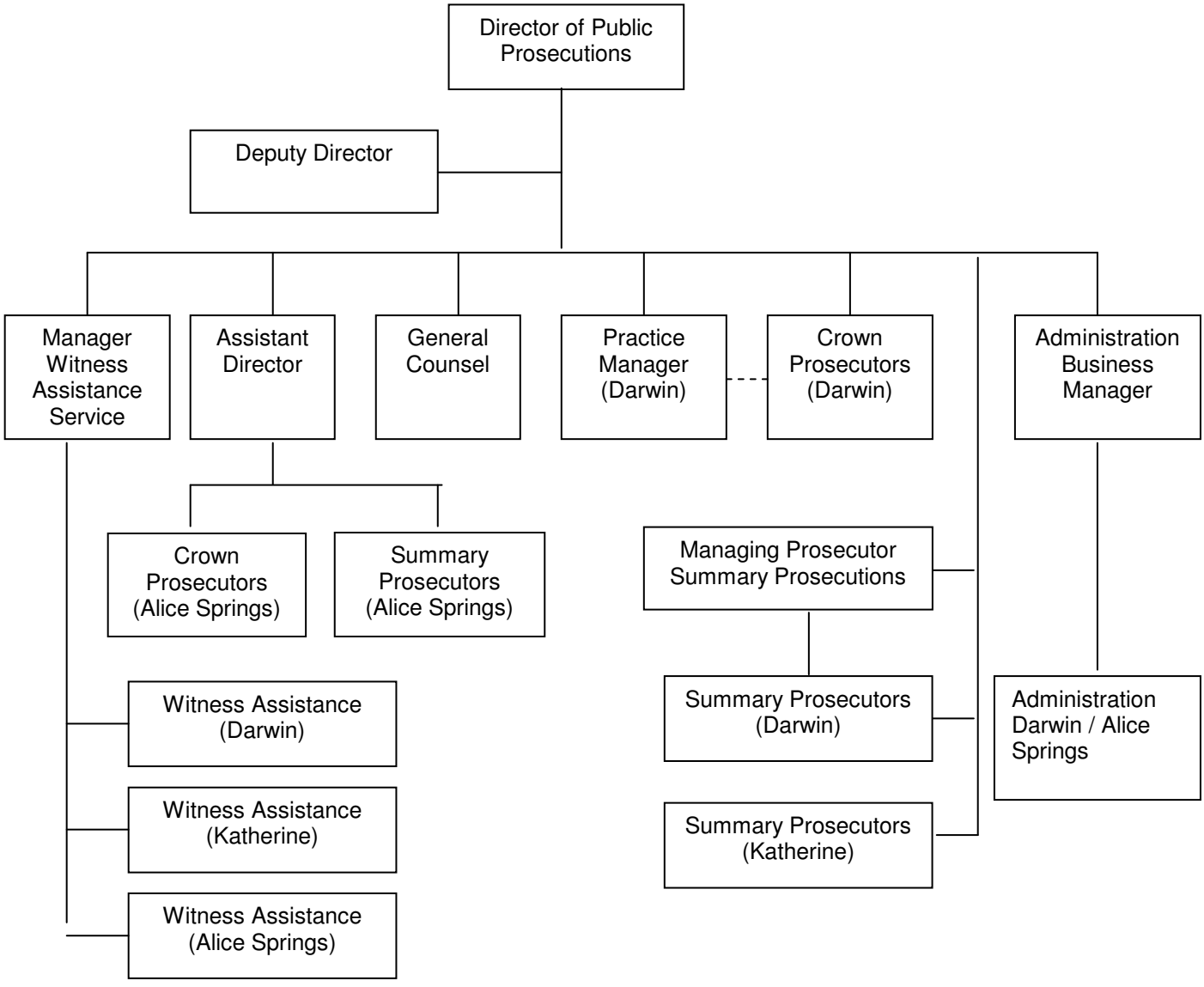
Pursuant to the ***Director of Public Prosecutions Act*** there is provision for the Attorney-General to provide directions to the DPP as to the general policy that we follow in the performance and function of the Director. Any such direction shall be in writing and should be included in the Annual Report. I formally also note that the Attorney-General has not sought to interfere in the conduct of the Director's function. As a result I have been able to enjoy appropriate professional independence in exercising the powers confirmed by the ***Director of Public Prosecutions Act.***



RICHARD COATES
Director of Public Prosecutions

19 September 2012

ODPP ORGANISATION CHART



FUNCTIONS OF THE DIRECTOR OF PUBLIC PROSECUTIONS

The major responsibilities of the Director of Public Prosecutions (hereinafter referred to as the Director) may be identified as follows:

(a) the preparation and conduct of all prosecutions in indictable offences

(b) the preparation and conduct of committal proceedings

(c) to bring and conduct proceedings for summary offences

(d) the assumption where desirable of control of summary prosecutions

(e) to institute and conduct prosecutions not on indictment for indictable offences including the summary trial of indictable offences

(f) the power to institute and conduct or take over any appeal relating to a prosecution or to conduct a reference under s414 of the ***Criminal Code***

(g) the right to appeal against sentences imposed at all levels of the court hierarchy

(h) the power to grant immunity from prosecution

(i) the power to secure extradition to the Northern Territory of appropriate persons

(j) the power to participate in proceedings under the ***Coroner's Act*** and with the concurrence of the Coroner, to assist the Coroner if the Director considers such participation or assistance is relevant to the performance of some other function of the Director and is justified by the circumstances of the case

(k) the power to conduct proceedings under the ***Criminal Property Forfeiture Act*** and if as a result of the proceedings a person becomes liable to pay an amount to the Territory or property is forfeit to the Territory under a court order, it is a function of the Director to take any further proceedings that may be required to recover the amount or enforce the forfeiture or order

(l) to provide assistance in the Territory to other State or Commonwealth Directors of Public Prosecutions

(m) to institute, intervene in and conduct proceedings that are concerned with or arise out of any function of the Director or to otherwise do anything that is incidental or conducive to the performance of the function of the Director

(n) the power to furnish guidelines to Crown prosecutors and members of the police force related to the prosecution of offences

(o) to require information or to give directions limiting the power of other officials.

General Powers

The Director has power to do all things that are necessary or convenient to be done for the purpose of performing the functions of the Director and may exercise a power, authority or direction relating to the investigation and prosecution of offences that is vested in the Attorney-General.

HUMAN RESOURCE MANAGEMENT AND DEVELOPMENT

As at 30 June 2012 the total number of staff was 70.4.

Level	Total	Female	Male
Director	1		1
ECO3	3	1	2
ECO2	1		1
ECO1	4		4
EO2	1	1	
SP2	3	1	2
SP1	6.6	3.6	3
P3	5.2	2.6	2.6
P2	10	5	5
P1	1	1	
Total Legal Staff	**35.8**	**15.2**	**20.6**
SAO2	1	1	
P3	1	1	
P2	2	1	1
AO5	4.5	3.5	1
AO3	1.5	0.5	1
Total WAS Staff	**10**	**7**	**3**
SAO1	2	1	1
AO5	4	4.	
AO4	4	4	
AO3	14.6	14.6	
Total Support Staff	**24.6**	**23.6**	**1**
GRAND TOTAL	**70.4**	**45.8**	**24.6**

OUTPUT PERFORMANCE MEASURES

Performance Measures		2011-12 Estimate	2011-12 Actual	2010-11 Actual	2009-10 Actual
Quantity	New Matters	1400	**2021**	1482	1603
	Finalisations				
	-Supreme Court pleas	220	**397**	235	268
	-Supreme Court trials	50	**49**	66	63
	-Supreme Court withdrawn	50	**43**	49	46
	-not committed to the Supreme Court	20	**1**	2	2
	-Summary hearings/pleas	815	**959**	794	735
	-Summary withdrawn	245	**234**	212	229
	-Appeals at all levels	75	**68**	64	57
	WAS Clients	1300	**1493**	1536	1363
	Duty lawyer days	1000	**1097**	932	1283
	CPF File hours provided by SFNT	3385	**3370**	2574	2524
Quality	Matters committed to the Supreme Court	90%	**100%**	99%	99%
	Findings of guilt (including guilty pleas) in Supreme Court	90%	**95%**	93%	89%
	Findings of guilt (including guilty pleas) in Summary	90%	**91%**	90%	90%
	Convictions after trial or hearing	80%	**91%**	90%	71%
	Files where CPF order obtained	80%	**75%**	90%	72%

Timeliness	Filing of indictments within 28 days of committal	65%	**75%**	70%	62%
	Supreme Court matters withdrawn less than 28 days before a trial was to commence	65%	**63%**	60%	58%
	CPF matters finalised in Local Court within 12 months	90%	**50%**	80%	69%
	CPF matters finalised in Supreme Court within 24 months	90%	**83%**	80%	50%

PROFESSIONAL STAFF

NEIL KUMAR **CROWN PROSECUTOR**

Neil commenced his articled clerkship in 2004, was admitted to practise in 2005, and has both prosecuted and defended criminal cases. He commenced employment with the Northern Territory Office of the Director of Public Prosecutions in January 2012.

LUCINDA WILSON **CROWN PROSECUTOR**

Lucinda graduated from the University of Sydney with a Bachelor of Laws and a Bachelor of Commerce, both with First Class Honours. She is currently studying for a Master of Laws (Criminal Prosecutions) at the University of Wollongong.

Since graduating she worked as a lecturer at the University of Sydney, for a Justice of the Supreme Court of NSW and as a researcher for the Tasmanian Law Reform Institute. She was called to the Bar in March 2007 and has been a member of the Independent Tasmanian Bar since then. She has primarily practiced as a Barrister at the private Bar in NSW since 2008 and joined the Northern Territory ODPP in June 2012. While at the private Bar Lucinda had a general practice, including civil, criminal and appellate work. Of the criminal cases undertaken Lucinda appeared as both defence counsel and prosecutor, as junior counsel and alone. She is a reporter for the Australian Criminal Reports.

PROFESSIONAL ACTIVITIES

General Workload

WORKLOAD OVERVIEW	2011/12	2010/11	2009/10
New Matters	2021	1482	1603
New Phases	2268	1556	1634
Court Appearances [1]	9548	7971	7233
Duty Lawyer days	1097	932	1283
MATTERS COMPLETED IN SUMMARY & YOUTH JURISDICTIONS			
Guilty (including guilty pleas)	959	795	654
Committed	282	296	320
Not Guilty/Not Committed	108	93	81
Withdrawn	234	212	229
Total CSJ & Youth Matters	1493	1396	1284
MATTERS COMPLETED IN SUPREME COURT			
S/C Pleas [2]	401	235	268
S/C Trial guilty	28	33	29
S/C Trial not guilty	16	23	24
S/C Trial Mistrial	5	10	10
Nolle Prosequi	38	42	34
S297 (no true bill)	5	7	12
Total S/C (not incl 297A)	488	343	365

[1] Preliminary Examination Mentions (PEM) was introduced in April 2011.

[2] Increased number of Supreme Court Pleas relates to increase numbers of new matters received by Crown Prosecutions.

SUPREME COURT PLEAS COMPLETED BY WAY OF EX OFFICIO INDICTMENT			
Commenced	58	57	59
Completed	57	54	53

APPEALS	2011/12	2010/11	2009/10
JUSTICE APPEALS			
Commenced	72	65	51
Completed	52	45	34
COA & CCA			
Commenced	18	25	31
Completed	17	19	20
HIGH COURT OF AUSTRALIA			
Commenced	0	2	3
Completed	2	0	3

Appeals

It is a function of the Director of Public Prosecutions to:

(i) institute and conduct, or to conduct as respondent, any appeal or further appeal relating to prosecutions upon indictment in the Supreme Court;

(ii) request and conduct a reference to the Court of Criminal Appeal under s. 414(2) of the ***Criminal Code*** and

(iii) institute and conduct, or to conduct as respondent, any appeal or further appeal relating to prosecutions not on indictment, for indictable offences, including the summary trial of indictable offences.

An explanation of the appeal process together with a summary of decisions of the Court of Criminal Appeal, Court of Appeal and Full Court for the reporting year can be found on the ODPP website.

Table A below contains the results of applications for leave to appeal determined by a single judge *on the papers* during the reporting period.

NB: The figures in brackets in each of the tables below are for the period 1 July 2010 to 30 June 2011

TABLE A

Outcome of defence applications for leave to appeal from the Supreme Court to the Court of Criminal Appeal determined by a single judge upon the papers

2011/2012

	Sentence		Conviction	
Granted	5	(9)	1	(2)
Refused	*5	(6)	0	(0)
Discontinued	0	(0)	0	(0)
Total	10	(15)	1	(2)

* Two applicants applied to have their applications re-heard and determined by the Court of Criminal Appeal constituted by three judges. Both applications were heard and determined following full oral argument before the Court. One application was allowed and one application was refused. These applications are not included in Table B even though the applications were argued as if they were appeals.

Tables B and C below summarise the results of appeals from and to the Supreme Court decided during the reporting period.

TABLE B

Outcome of defence appeals from the Supreme Court to the Court of Criminal Appeal/ Court of Appeal/Full Court

2011/2012

	Conviction		Sentence		Other	
Allowed	3	(1)	0	(4)	0	(0)
Dismissed	1	(4)	4	(6)	0	(0)
Discontinued	1	(0)	1	(0)	0	(0)
Total	5	(5)	5	(10)	0	(0)

Outcome of prosecution appeals and references from the Supreme Court to the Court of Criminal Appeal/Court of Appeal/Full Court

2011/2012

	Sentence		Other	
Allowed	3	(0)	0	(0)
Dismissed	1	(1)	0	(0)
Total	4	(1)	0	(0)

Outcome of referral of question of law to Full Court pursuant to section 21 of the Supreme Court Act

2011/2012

Decided in favour of prosecution	0 (0)
Decided in favour of defence	0 (1)

TABLE C

Outcome of defence appeals from the Court of Summary Jurisdiction to the Supreme Court at Darwin
2011/2012

	Conviction		Sentence		Other	
Allowed	2	(8)	9	(4)	0	(0)
Dismissed	7	(3)	13	(10)	0	(2)
Discontinued	2	(4)	6	(5)	0	(0)
Total	11	(15)	28	(19)		(2)

Outcome of prosecution appeals from the Court of Summary Jurisdiction to the Supreme Court at Darwin
2011/2012

	Dismissal of Charge		Sentence		Other	
Allowed	0	(0)	0	(0)	0	(0)
Dismissed	1	(0)	0	(1)	0	(0)
Discontinued	1	(0)	0	(0)	0	(0)
Total	2	(0)	0	(1)	0	(0)

TABLE C

Outcome of defence appeals from the Court of Summary Jurisdiction to the Supreme Court at Alice Springs 2011/2012

	Conviction		Sentence		Other	
Allowed	2	(1)	7	(11)	0	(0)
Dismissed	1	(1)	7	(5)	1	(0)
Discontinued	2	(1)	0	(5)	0	(0)
Total	5	(3)	14	(21)	1	(0)

Outcome of prosecution appeals from the Court of Summary Jurisdiction to the Supreme Court at Alice Springs 2011/2012

	Dismissal of Charge		Sentence		Other	
Allowed	0	(0)	0	(0)	0	(0)
Dismissed	0	(0)	0	(1)	0	(0)
Discontinued	0	(0)	0	(0)	0	(0)
Total	0	(0)	0	(1)	0	(0)

HIGH COURT

The Office was involved as respondent in one application for special leave to appeal to the High Court of Australia during the reporting period.

Lo Castro v The Queen — **6 October 2011**
Hayne & Crennan JJ
[2011] HCASL 168

A Darwin jury found the applicant, an adult male, guilty of having committed eight offences against victim A, an adult female. The offences were five counts of assault with circumstances of aggravation and three counts of having sexual intercourse without consent (rape). Five of the offences (two assaults and three rapes) were committed on 2 November 2008. The applicant was sentenced to a total of 12 years imprisonment in respect of the offending against victim A.

Following the findings of guilt in respect of victim A, the applicant pleaded guilty to having committed five offences against another adult female, victim B. The

offences were four counts of assault with circumstances of aggravation and one count of attempting to have sexual intercourse without consent. The applicant was sentenced to a total of four years and six months imprisonment in respect of the offending against victim B. It was ordered that one year of the sentence be served cumulatively with the sentence imposed in respect of the offending against victim A.

The total effective sentence imposed was 13 years imprisonment. A non-parole period of eight years was fixed.

On the hearing of the appeal against severity of sentence the applicant sought to adduce fresh evidence which, it was argued, demonstrated that the relationship between the applicant and victim A did not cease for any significant period after the offending which occurred on 2 November 2008. This material was not put before the sentencing judge. It was submitted that the fact the relationship continued was evidence that the trauma Ms A in fact suffered was less severe than that described by Ms A in her victim impact statement; accordingly, a material factor to the sentencing exercise was not brought to the attention of the learned sentencing Judge.

The Court of Criminal Appeal refused to admit the evidence holding that it was impossible to conceive that the fresh evidence, had it been put before the sentencing judge, would have had any significance at all on his sentencing considerations. The appeal was dismissed. See ***Lo Castro v The Queen*** [2011] NTCCA 1, a summary of which can be found on the ODPP website under the heading Decisions Delivered 1 July 2010 – 30 June 2011.

The applicant applied to the High Court for special leave to appeal from the decision of the Court of Criminal Appeal on the ground that the Court of Criminal Appeal erred in refusing to admit the applicant's fresh evidence. The grant of special leave was opposed by the Crown.

The High Court determined the application without listing it for hearing. The Court dismissed the application holding that it had not been demonstrated that the Court of Criminal Appeal failed to act on and apply established principles concerning the reception of further evidence on appeal. Having regard to the conclusions rightly reached by the Court of Criminal Appeal that the sentencing judge had not erred in the way in which he had dealt with the relationship between the applicant and victim A, that the evidence the applicant sought to adduce would have had no significance in the applicant's sentencing, and that the sentences imposed on the applicant were not manifestly excessive, it had not been demonstrated that it was arguable that there had been any miscarriage of justice.

Woods v R

Following a 15 day trial, an Alice Springs Supreme Court jury found the applicant not guilty of murder but guilty of the alternative and lesser offence of manslaughter. The applicant killed the deceased by stabbing him. At trial the accused raised the issue of self-defence. Self-defence is defined in s 43BD of the ***Criminal Code*** relevantly as follows:

> *"(2) A person carries out conduct in self-defence only if:*
>
> *(a) the person believes that the conduct is necessary:*
>
> *(i) to defend himself or another person; … and*
>
> *(b) the conduct is a reasonable response in the circumstances as the person reasonably perceives them."*

The trial judge correctly directed the jury that (i) the onus of proof was on the Crown to negative (disprove) self-defence beyond reasonable doubt, and (ii) if the Crown failed to negative self-defence then they must find the applicant not guilty of murder and not guilty of manslaughter. The verdict of the jury meant that the jury were satisfied that the Crown had negatived self-defence beyond reasonable doubt.

During the sentencing proceedings applicant's counsel submitted that the jury's rejection of self-defence as a ground for acquittal did not necessarily mean they rejected the applicant's claim that he was motivated by self defence or defence of another. It was argued that in the circumstances of the case it was far more likely that the jury accepted that the applicant was trying to prevent himself and his family members from being hurt [s.43BD(2)(a)(i) ***Criminal Code***], but that the defence failed because the action he took in arming himself and then engaging in a confrontation with the deceased fell short of being reasonable [s.43BD(2)(b) ***Criminal Code***]. It was thus submitted that the sentencing judge should find that the accused was acting in self-defence, both to defend himself and his family members.

The sentencing judge rejected this submission holding that the jury's rejection of the defence of self-defence meant that the applicant could not now rely upon any circumstances going to self-defence or the defence of others to ameliorate the culpability of his crime of manslaughter.

The applicant was sentenced to imprisonment for a period of 9 years and 6 months with a non-parole period of 4 years and 9 months.

On 30 August 2011 the applicant was granted leave to appeal against severity of sentence on the ground that:

- The sentencing judge erred in law in giving no, little or insufficient weight to self defence (albeit arguably excessive self-defence).

In the Court of Criminal Appeal the applicant's counsel conceded that the applicant's conduct was not reasonable [s.43BD(2)(b) ***Criminal Code***] but submitted that the case was a "classic case of excessive self-defence". The applicant submitted that excessive self-defence was not inconsistent with the jury's verdict and that the sentencing judge fell into error when he constrained himself from considering any circumstances going to self-defence or defence of others as part of his consideration of the culpability of the applicant.

The Court upheld this ground of appeal holding that it was necessary for the Crown to satisfy the jury beyond reasonable doubt *either* that the applicant did not believe that his conduct in self-defence was necessary to defend himself or another or others, *or* that his conduct in self-defence was not a reasonable response in the circumstances as he perceived them. The fact that the jury rejected self-defence, implicit in the guilty verdict, did not mean that the Crown had satisfied the jury beyond reasonable doubt as to both matters. The jury may have been satisfied beyond reasonable doubt as to one, or the other, or both. Consistent with the verdict of guilty, and the implicit rejection of self-defence, the jury might not have been satisfied beyond reasonable doubt that the applicant did not believe that his conduct was necessary to defend himself or others (indeed, might have even decided that the applicant believed that his conduct was necessary to defend himself or others), but were nonetheless satisfied beyond reasonable doubt that the applicant's conduct was not a reasonable response in the circumstances as he perceived them.

The Court was of the view that as the sentencing judge had wrongly concluded that all issues relating to self-defence for the purposes of sentencing had been necessarily determined by the jury's verdict, he had erred in the sentencing of the applicant by not considering the evidence and determining for himself the facts relating to the case put by the applicant's counsel that the applicant was acting in self-defence, albeit excessive self-defence.

At the invitation of senior counsel for the applicant, the Court considered the evidence relating to the applicant's case as to excessive self-defence, rather than remitting the matter back to the sentencing judge. Importantly, senior counsel for the applicant also acknowledged that, given the jury's verdict, the applicant would have the burden of satisfying the Court of Criminal Appeal, on the balance of probabilities, that the applicant believed that his conduct in self-defence was necessary to defend himself or another or others (although excessive in the sense that such conduct was not a reasonable response in the circumstances as

the applicant perceived them). Counsel's acknowledgement accorded with the decision of the High Court in ***The Queen v Olbrich*** (1999) 199 CLR 270.

The Court examined the evidence relevant to the applicant's belief at the time of the fatal confrontation (contained in the applicant's interview with police) and concluded that although some of the applicant's statements supported the case that he was acting in self-defence, the Court was not satisfied on the balance of probabilities that the applicant believed that his conduct in suggested self-defence was necessary to defend himself or another or others. As the Court was unable to make findings on the balance of probabilities which would enable it to accept the applicant's contention as to excessive self-defence, the position thus remained that the culpability of the applicant was not mitigated by defensive conduct, albeit not for the reasons stated by the sentencing judge.

After reviewing the remaining unchallenged findings made by the sentencing judge, the Court was of the opinion that notwithstanding the identified error on the part of the sentencing judge, no other, less severe, sentence to that imposed by the sentencing judge was warranted in law or should have been passed. Accordingly, the appeal was dismissed. See ***Woods v R*** [2012] NTCCA 8.

The applicant then applied to the High Court for special leave to appeal from the decision of the Court of Criminal Appeal on the ground that the Court of Criminal Appeal erred in holding that the appellant had the burden of satisfying the Court of Criminal Appeal, on the balance of probabilities, that the appellant believed that his conduct was necessary to defend himself or another or other.

The application had not been listed for hearing as at 30 June 2012.

SUMMARY PROSECUTIONS

The Summary Prosecutions section of the Office of the Director of Public Prosecutions is responsible for the conduct, in the Court of Summary Jurisdiction (CSJ), of matters referred to it by the superintendent in charge of Police Prosecutions or his delegate. The matters that may be referred to summary prosecutions include contested matters and any matter that the Police believe should be dealt with by a summary prosecutor.

The majority of the matters are contested hearings and plea matters that are of a complex or sensitive nature.

Across the jurisdictions summary prosecutors deal with a wide range of offences including; traffic, drugs and kava, fraud, domestic violence, firearms, youth crime and marine and fisheries matters. Summary prosecutors also appear on instructions from NT Correctional Services with respect to breaches of suspended sentences, home detention orders and good behaviour bonds.

Summary Prosecutors are based in Darwin, Katherine and Alice Springs.

DARWIN

Summary Prosecutions Darwin (SPD) is staffed by eight (8) prosecutors including a managing prosecutor who, in addition to her own case load, is responsible for the supervision and allocation of work within the section. SPD prosecutors appear in the CSJ in Darwin and in the following remote communities:

Alyangula four days each month;
Borroloola four days or more each second month;
Daly River one or more days each month;
Galiwinku one day each third month;
Gapuwiyak when required;
Jabiru one or more days each month;
Maningrida two or more days each month;

Milikapiti one day each third month'
Nguiu one or more days each month;
Nhulunbuy three or more days each month;
Numbulwar one day each third month;
Oenpelli one or more days each month;
Pirlingimpi one day each month and
Ramingining one day, when required.

SPD receives administrative support from two dedicated professional assistants.

SPD is located on the fourth floor of Old Admiralty Tower, 68 The Esplanade, Darwin.

KATHERINE

Summary Prosecutions Katherine (SPK) is staffed by one summary prosecutor located within the Katherine Police Prosecutions Unit. The current incumbent will leave the position in October and recruitment action has commenced for a replacement.

The SPK prosecutor appears in the CSJ in Katherine and in the following remote communities between one and three days per month:

Barunga
Kakaringi
Lajamanu
Ngukkur
Timber Creek
Yarralin

The SPK prosecutor appears on behalf of police but also appears on behalf of the Director in respect of Crown Matters listed outside the nominated DPP week. As the sole DPP prosecutor in Katherine the SPK prosecutor has a dynamic and at times challenging role.

SPK is located in the Randazzo Building, Katherine Terrace, Katherine.

Alice Springs

Summary Prosecutions Alice Springs (SPAS) is staffed by two prosecutors. The SPAS prosecutors appear in CSJ in Alice Springs and the following communities:

Ali Kurung
Papunya
Tennant Creek
Ti Tree
Yuendumu
Yulara

SPAS is located on 1st Floor, Centrepoint Building, Cnr Hartley St & Gregory Tce
ALICE SPRINGS NT 0870

WITNESS ASSISTANCE SERVICE

DARWIN

Support to victims of crime, witnesses and their families has been provided within the Office of the Director of Public Prosecutions (ODPP) since 1995.

The WAS team consists of nine witness assistance officers.

In Darwin: Louise Ogden, WAS Manager; Colleen Burns, Aboriginal Support Co-ordinator; Jenny Davie, Phil Edgar (who replaced Ken James); Ken James (who was on a transfer to the Aboriginal Interpreter Service); Marion Blackburn; and Georgina van Niekerk (nee Horton) who was on a temporary contract to cover recreation leave and vacancies.

In Alice Springs: Ronda Ross and Debbie Ledbetter. The co-ordinator position in Alice Springs was vacant for most of the year as a result of Susan Cooper taking up a backfilling position in Katherine and sadly not returning to Alice Springs, with Sheriden Appel taking up the position in June 2012.

In Katherine: Michael Devery, WAS Co-ordinator; Susan Cooper (backfilling Michael Devery taking long service leave).

WAS in Darwin also had wonderful administrative support from Krystal Ronayne, Lucy Shannon and Yvvon Carr and in Katherine from Kylie Northey, Caron Leith and Joannah Withers.

During this year an operational manual has been developed and introduced. This included input from all staff during a two day training opportunity which also included the introduction of a new assessment and case management program. The manual and case management program have been reviewed and improved and this remains an ongoing process designed to improve Witness Assistance practice and services.

Support

This involves court preparation and can include court tours, demonstrations of vulnerable witness facilities and observations of court sittings. Support regularly involves accompanying witnesses to court and can include being with a witness in a closed circuit television room, behind a screen or in a closed court.

Information

WAS notifies victims of crime about the service and invites them to make contact. Witnesses are provided with several publications at the appropriate time. These include the Northern Territory Charter for Victims of Crime, the WAS pamphlet and the Victim Impact Statement booklet. WAS also gives information about the time, date and place of court appearances, the stage that the matter is up to and whether attendance by the witness is required. In December 2000 we began writing to referred victims whose matters would be dealt with by Summary Prosecutions Darwin. The numbers of victims contacted through this scheme has varied over the past three years but has increased this year due to police referrals.

Referral

Victims, witnesses and their families can be referred to appropriate agencies for counselling including specialist sexual assault or domestic violence counselling, psychologists or psychiatrists. WAS has established and maintains contact with a wide variety of agencies. The ongoing expansion of Anglicare Resolve in the NT has resulted in increased referrals to that service with anecdotal evidence that there is a corresponding improvement in outcomes for those victims referred.

Explanation

The explanation of legal processes, language and rules of evidence is vital. The aim is to explain technical legal language in plain English. When people have a better understanding and are given timely information about what is happening in relation to court proceedings, they report a higher level of satisfaction with their experience of the criminal justice system.

Liaison

WAS acts as a point of reference for victims, witnesses and their families. Liaison between police and witness, prosecutor and witness, police and prosecutor or counsellor and witness is a valuable function.

Victim Impact Statements

WAS assists victims of crime to prepare victim impact statements (VIS). Victims of crime have the right to present to the court a statement detailing the effect the crime had on their lives. This can include a comment to the court on the appropriate orders that the court may make. VIS were introduced in the Northern Territory in March 1997. Since then many people have decided to participate in the criminal justice system by exercising their right. Since the beginning of this scheme WAS has assisted over 3500 victims to prepare a VIS.

Executive Committee

The WAS Manager attends weekly meetings with the Director and Senior Management of the ODPP.

Professional Staff Meetings

WAS staff attends these meetings.

Training and Community Education

Members of WAS regularly give presentations to groups of people who come into contact with witnesses in their workplace. In the past 12 months this has included attendance at NT Police Command Training Days, along with regular sessions provided to Police recruits and the Aboriginal Interpreter Service.

Parole Board

The Parole Board continues to request input from victims into the considerations of the Board.

Prosecutors

WAS in Darwin gives all new prosecutors, and many other new staff members, whether recruited to Summary Prosecutions or ODPP, an orientation presentation about the role of WAS.

Publications

WAS is responsible for publications, a booklet, *Victim Impact Statements* and a pamphlet, *Witness Assistance Service* and a DVD in English and Kriol. This year the DVD was edited to bring some of the content up to date with current legislation. Plans are underway to further review and film further stories for the DVD. In addition WAS have collaborated with iSee iLearn to develop a Court

Story that can be read and also heard in English and Arrente. Plans are underway to expand the languages in which the story may be heard. Plans are also underway to revise the current publications to ensure they meet the varied needs of our clients.

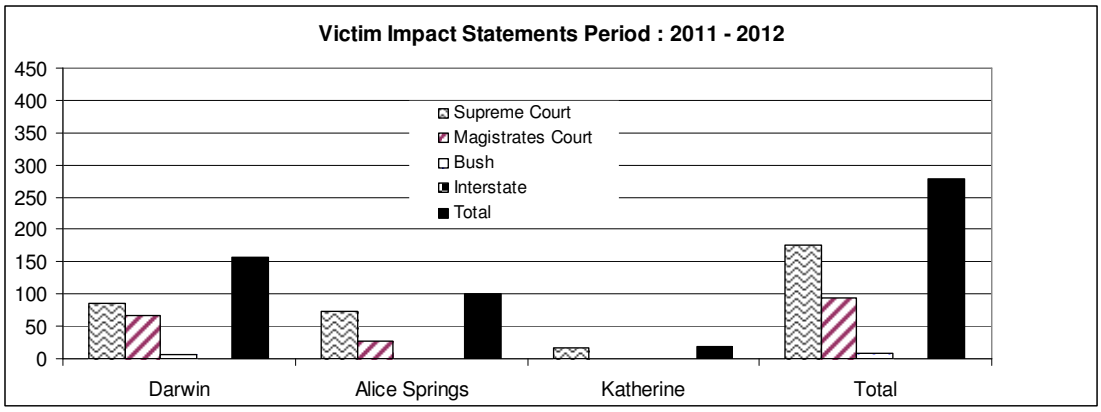
Bush Courts

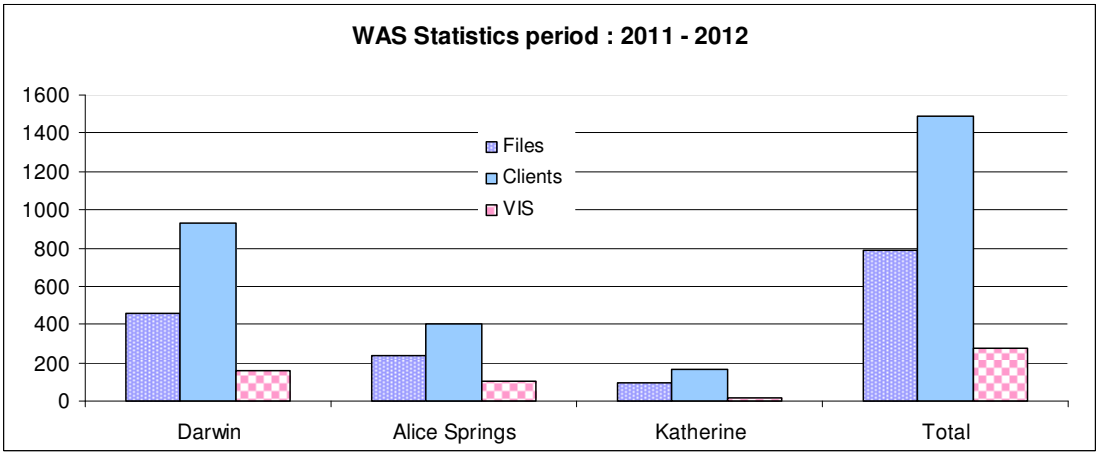
WAS officers have continued to provide services to remote communities. Each member of the WAS team has worked at a number of communities to support witnesses appearing in Bush Courts. This is a demanding and time consuming aspect of our work.

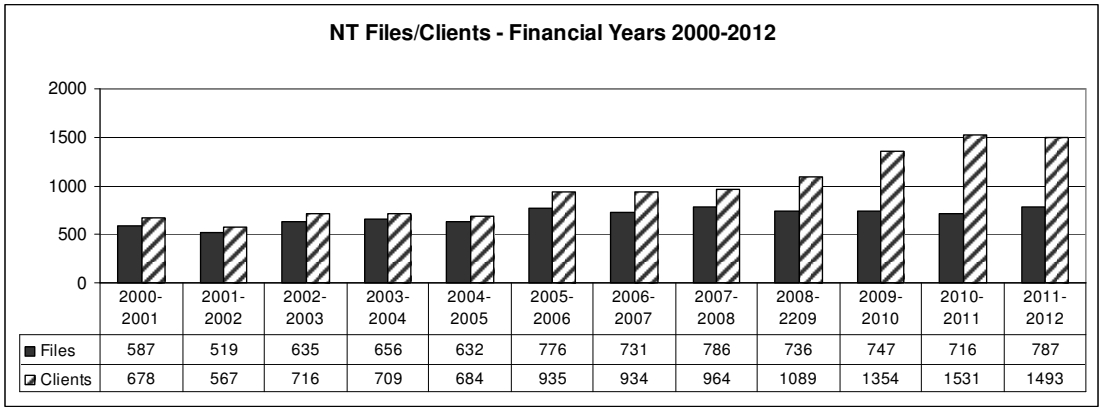
WAS Statistics

The workload of WAS again increased in 2011-2012 as measured by the statistics for files and clients. Approximately 1500 clients were provided with services. WAS staff are busier than ever.

FILES – CLIENTS – VICTIM IMPACT STATEMENTS







	2000-2001	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007	2007-2008	2008-2209	2009-2010	2010-2011	2011-2012
Files	587	519	635	656	632	776	731	786	736	747	716	787
Clients	678	567	716	709	684	935	934	964	1089	1354	1531	1493