SUPREME COURT
OF THE AUSTRALIAN
CAPITAL TERRITORY

2018–19
ANNUAL REVIEW

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"In our system, it may not be in the public interest to prosecute all criminal acts, whether for economic, compassionate or social justice reasons. Prosecutors must exercise a very human discretion when deciding whether it is in the public interest to prosecute, what charge should be laid and whether to accept a plea to a lesser charge.

As Sir Keir Starmer QC MP, former DPP of the UK, remarked:

> *Prosecutorial discretion is a good thing. It takes the edges off blunt criminal laws; it prevents injustice; it provides for compliance with international obligations; and it allows compassion to play its rightful part in the criminal justice response to wrongdoing. The blunt instruments that criminal law statutes necessarily have to be can be honed into compassionate and appropriate casework decisions by the exercise of the public interest discretion.*

The public interest is not stagnant; it changes over time."

quoting: Keir Starmer, Legal Action Group Annual Lecture 2013, quoted in Kim Evans, 'Keir Starmer on "prosecutorial discretion"' in The Justice Gap (online), 6 December 2013, .

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Chief Justice Murrell's Introduction

Annual Review 2018–2019

The Supreme Court had yet another year of innovation and change. We moved into a new building, lost a well-respected former Chief Justice, and integrated new initiatives to support the just and timely resolution of criminal matters.

Since 15 October 2018, the Supreme Court has delighted in Stage 1 of the new Supreme Court courthouse, which was opened with a smoking ceremony performed by Ngunnawal Elder, Adrian Brown. From the courtrooms and jury facilities to the judges' chambers, the new building sets the standard for contemporary court facilities. It includes six courtrooms, five of which are jury courtrooms, and shell structures provide the capacity for two future courtrooms.

Light and landscape permeate every part of Stage 1 of the new Court building, speaking of the openness and transparency of our justice system. The building reflects Canberra's natural environment, which is both directly visible from within the building and referenced in the natural timber and undulating ceilings that mirror the hills surrounding the city.

I acknowledge Lloyd Essau, the project manager, for delivering Stage 1, and Cameron Lyons, the principal architect. Cameron's remarkable vision will be completely realised in early 2020, with the completion of Stage 2 of the project.

The late Honourable Chief Justice Jeffrey Miles AO passed away on 11 February 2019, 83 years young. Chief Justice Miles was appointed the third Chief Justice of the ACT Supreme Court on 17 June 1985 and served for 17 years, returning shortly after his 'retirement' as an Acting Judge in NSW and the ACT. His Honour oversaw the Territory's transition to self-government and instigated the Court's lengthy efforts to obtain a new Supreme Court building. Chief Justice Miles will remain a central figure to the history of this Court and the ACT, and his contributions will be deeply appreciated for a long time to come.

On a daily basis, judicial officers who deal with criminal matters see the cycle of substance abuse, crime, prison time, and then recidivism on release, not to mention the debilitating impact of substance abuse on the wellbeing of offenders and their families. It is time to stop doing the same thing over and over and expecting a different result. At the Ceremonial Sitting to mark the Opening of the 2019 Legal Year, ACT Attorney-General, the Honourable Gordon Ramsay MLA announced the ACT's first Drug and Alcohol Court (DAC). Under the leadership of Justice John Burns, a dedicated team has developed a Drug and Alcohol Court proposal. The DAC will operate as a separate list within the Supreme Court. The presiding judge and their team will address the effects of substance dependence on reoffending by focussing on the rehabilitation of offenders who are referred to the list. We hope that our Drug and Alcohol Sentencing List will commence in December 2019.

In October 2018, the Supreme Court commenced a Criminal Case Conferencing (CCC) pilot scheme. These conferences are mandatory for most matters committed for trial by the Court. The scheme aims to decrease the number of late guilty pleas and to narrow the key issues at trial. Prior to the commencement of the CCC scheme, around 50 per cent of scheduled trials resulted in a guilty plea shortly before the trial date, necessitating the heavy over-listing of trials and the waste of preparation time on the part of prosecution and defence teams. As a result of CCCs, about one third of matters committed for trial now result in a guilty plea prior to the matter receiving a trial date. As well as saving resources for the Court, the AFP, the DPP, and defence lawyers, the early resolution of matters means less trauma for complainants and other civilian witnesses, which enhances the ability of complainants to "move on" with their lives. Acting Justice Robinson has made an invaluable contribution to the development and operation of the CCC scheme, and his Honour intends to implement further changes that are likely to increase the rate of early pleas.

Our experienced panel of senior practitioners continues to successfully mediate in civil matters, achieving outcomes with which the parties are content and conserving Court resources.

In the uplifting environment of our new building and by continuing to seek out and implement best practice, the Court maintains its commitment to ensuring access to justice for all Territorians.

Principal Registrar

During 2018–19 the courts administration continued to focus on the new courts facility, the new case management system (ICMS), courts governance and how the organisational structures and processes best support the business of the Supreme Court.

Stage one of the new ACT Law Courts Building with a single entry for both courts, new remote witness suites and refurbished courts registry was commissioned in October 2018. Work on refurbishing the heritage building to accommodate new conferencing rooms, mediation suites, hearing rooms and Supreme Court courtrooms commenced with a view to completion in late 2019. I would like to thank staff for their patience as they maintained business as usual during the often disruptive building works.

The criminal release of the ICMS took place in February 2019. The criminal release was the most complex of the releases and included interfaces with several justice agencies and the first tranche of online services. Work commenced on the fourth and final stage of the ICMS project which will increase the number of court forms that can be lodged electronically and provide an eDistribution service whereby letters, notices and orders generated from the ICMS will be sent electronically to the relevant party or their representative.

As part of the implementation of the **International Framework for Courts Excellence** a court user satisfaction survey was undertaken in May and June 2019 to identify where services, facilities and processes could be improved. The survey results will be a valuable source of feedback about which services, facilities and processes are working well and which might be improved.

Significant work was undertaken to procure a new jury management system that will better support the effective and efficient delivery of jury trials in the ACT and streamline processes to improve the experience of those asked to perform jury service. The new system is expected to be implemented in two stages during the first half of 2020.

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

In 2018, the ACTCT engaged a consultant to review the Russell Fox Library which provides a wide range of services to the judiciary and wider legal community. The review made 45 recommendations covering governance, marketing and outreach, technology, staffing and operational matters. A new management committee has been established which is overseeing the implementation of key recommendations including the development of a collections policy and the identification of a new ICT system to improve the management and accessibility of the collection.

Significant progress was made to update the content of the Court's website following the development of new information architecture based on feedback from the judiciary and court users.

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

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

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Judges of the Court

Resident Judges

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 then became Deputy President of the Administrative Decisions Tribunal of New South Wales (Head of the Equal Opportunity Division). From 2005 to 2013 her Honour was a Deputy Chairperson of the New South Wales Medical Tribunal.

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

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

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

Justice John Dominic Burns

Justice John Burns was first admitted to practice as a solicitor of the Supreme Court of New South Wales in 1981. He 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, Justice Burns continues to chair the Supreme Court's Criminal Procedure Committee. His Honour is also leading 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 has taken a multi-disciplinary approach with participants specialising in law, health, housing, human rights and corrections.

Justice Michael Elkaim

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

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

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

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

His Honour was appointed Senior Counsel in October 2002. In May 2008 his Honour become 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 for the Aboriginal Legal Service, the Department of Industrial Relations and the Legal Aid Commission prior to being called to the New South Wales Bar in December 1989. Her Honour was appointed Public Defender in 1995 and took silk in 2012. In addition, her Honour was appointed as Acting Crown Prosecutor in 1996.

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

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

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

Associate Justice Verity McWilliam

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

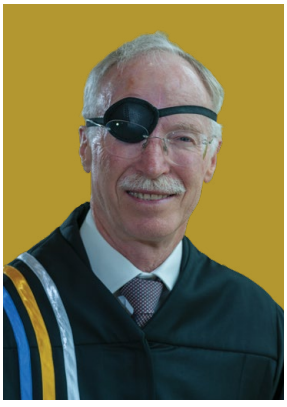
Her Honour obtained BA (Hons I)/LLB degrees from the Australian National University in 2000, and a Masters degree in International Law from the University of Sydney in 2005.

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

Interspersed with her employment as a solicitor, McWilliam AsJ worked as an associate to the Hon. Justice Mary Finn in the Appeal Division of the Family Court of Australia, and the Hon. Justice Beaumont and the Hon. Justice Madgwick in the Federal Court of Australia. In 2006, her Honour was called to the NSW bar, developing a general practice over 11 years across the areas of commercial/equity, criminal, employment, environment/planning, public law and torts. In addition, from 2010 until 2017, McWilliam AsJ lectured variously in public law, federal constitutional law and litigation at the University of NSW, and in public law at the University of Sydney over 2010 to 2012.

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

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.

Additional Judges

In 2018–19 the following additional judges sat:

The Honourable Justice Michael Andrew Wigney

The Honourable Justice Robert James Bromwich

The Honourable Justice Natalie Charlesworth

Acting Judges

In 2018–19 the following acting judges sat:

The Honourable Acting Justice David Robinson

The Honourable Acting Justice Murray Kellam

The Honourable Acting Justice Robert Crowe

Russell Fox Library

About the Russell Fox Library

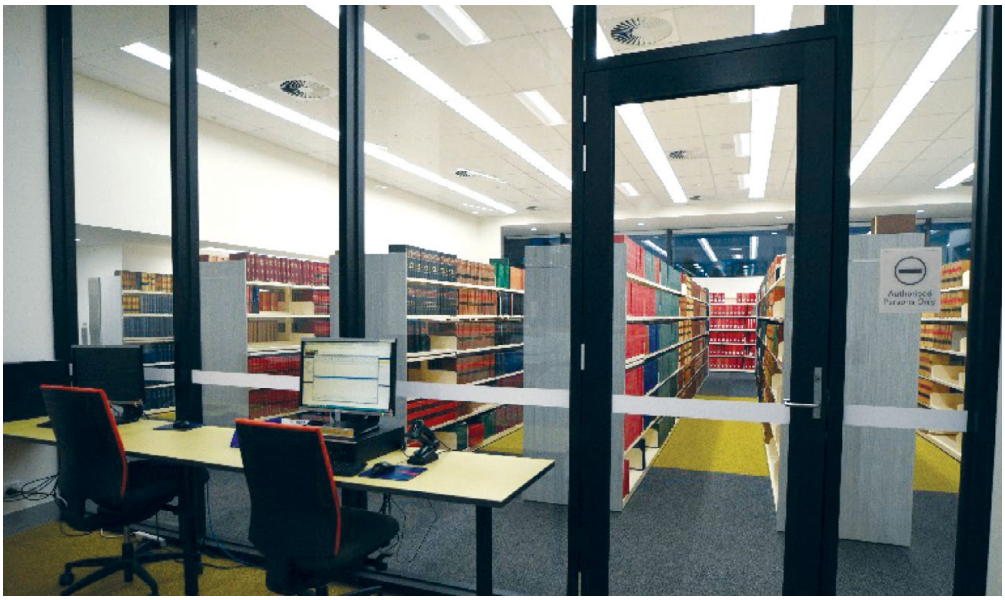
The Russell Fox Library – named after the Territory's first Chief Judge, the late Honourable Russell Walter Fox AC QC – primarily provides and maintains legal resources for use by judicial officers of the ACT Supreme Court, the Magistrates Court and members of the ACT Civil and Administrative Tribunal.

In addition to ensuring that legal resources remain relevant, the Library also 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.

The Library is also 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 Courts and Tribunal employees. However, both print and online collections are available to external clients and members of the public within the main reading area. Although members of the public are welcome to use Library resources, they are unable to borrow Library material – only legal practitioners who are registered Library clients have borrowing privileges.

Public area



Computers available to external clients

Library staff at the public area

New library location

As part of the Library move to the new Court building during October – November 2018, all items previously held in the basement storage were integrated into the main collection where they can be directly accessed by clients. Library staff identified and selected items which were no longer in use or required – surplus material was donated to practitioners and the Aboriginal Legal Service Centre, sold or discarded.

Main storage area

The Library management system (catalogue) records have been updated to reflect changes made within the collections and their locations.

Main storage area

Library shelves are located across the new building which means users can access more than 10,000 items in a wide range of Library material directly outside the main Library location.

Library Review

In 2018, the ACTCT received the review of the Russell Fox Library produced by an external consultant. The Review highlighted the excellent resources and well-received services provided by the Library. It made 45 recommendations on further improvements. Based on the Review, the Library prepared an Action Plan which set up actions, priority, responsibilities and timeframe for each of the recommendations.

The recommendations were categorised into five groups – Governance, Marketing and Outreach, ICT, HR and Operational.

The following high priority recommendations, mainly relating to governance, have been actioned:

- Appointment of the Library Management Committee;
- Developing the Action and Strategic plans;
- Identifying core client groups and services; and
- Securing continuity arrangements for main legal online resources.

The ACTCT Library Management Committee will continue to govern Library activities and oversight the implementation of the recommendations based on the Action plan time frame set up to 2021.

Online resources

The Library will continue to provide access to two main legal online databases – Lexis Nexis and Westlaw – for the next three years. The Library implemented a new single sign-on solution for Lexis Nexis, which means that the Library authorised clients can access the platform without using their login details. A similar arrangement for Westlaw will be implemented in the second half of 2019.

Library fee to external clients

In November 2018, the Library abolished the fee for external clients. This action, which was recommended by the Review, has created a more conducive environment for the Library to establish itself as the main legal resource for the ACT community.

Educational activities

The Library offers regular inductions to new ACTCT staff as well as to others interested in its resources and services. During last year, the Library also participated in a work experience program for students organised by the ACTCT. The participating students were introduced to the Library, its clients and services. Library staff also gave a presentation about its resources, as well as online resources freely accessible on the Internet, to support the students' interest in legal matters.

Statistics

The following table displays the number of judgements and sentencing remarks uploaded onto the ACT Supreme website by the Library during 2018–2019:

Jurisdiction	Number of Items Published
Supreme Court of the Australian Capital Territory Court of Appeal	62
Supreme Court of the Australian Capital Territory Full Court	2
Supreme Court of the Australian Capital Territory	227
Sentencing Remarks	145

Sheriff's Office

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

During 2018–2019 the Sheriff's Office introduced a Security and Intelligence Unit within the Office. This unit is staffed by two officers who are responsible for implementing a security framework within the Court. This Unit works closely with ACT Policing, ACT Corrective Services and security services to ensure all court stakeholders have an uneventful visit during their time at the Courts.

The Sheriff's Office moved into the new purpose built jury assembly area in October 2018. This area has seen immediate positive changes and has allowed the streamlining of processing of jury pools during criminal listing periods. Along with the new jury deliberation rooms, the designated jury areas of the Courts are modern and suitable for the needs of jurors.

Another positive feature of the changes to the court facilities is the Remote Witness Suite. Sheriff's Officers provide assistance to witnesses and facilitate the operations of the remote rooms for the Courts. These rooms are now specifically designed to assist vulnerable witnesses and provide a calm, safe environment for witnesses to give evidence. The new facilities have been greatly appreciated by court users.

During the later period of the financial year, the Sheriff's Office undertook a procurement process to acquire and configure a replacement jury management system. It is anticipated that development of this system will occur next financial year.

Finally, Sheriff's Officers continue to professionally manage the courts and provide an efficient service and friendly face. The Sheriff's Office assist in the smooth operations of the Courts, as well as meeting the needs of the Judiciary, legal profession and members of the public. The Sheriff's Officers continue to strive to meet these requirements in an efficient and professional manner.

Sheriff's Officers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Highlights

Chief Justice Murrell is Chair of the National Judicial College of Australia, and in that capacity her Honour contributed to judicial education programs, including sessions on judicial ethics at the National Judicial Orientation Programs in Broadbeach and Adelaide.

Chief Justice Murrell has continued as Chair of the ACT Judicial Council, the body that deals with complaints about ACT judicial officers.

In addition to speaking at admission ceremonies and ceremonial sittings at the Court, in her capacity as patron of the ACT Chapter of the Hellenic Lawyers Association, Chief Justice Murrell spoke on sentencing in ancient Greece. In March 2019, her Honour spoke at the Mauritius National Day Reception to mark the 51st anniversary of Mauritian independence. Later that month, her Honour spoke at the annual ANU Law Students' Society 'Women in Law' breakfast on Australian women in law and the importance of resilience. All speeches are available on the ACT Supreme Court website.

The Chief Justice continued as a committee member of the Australian Association of Women Judges (AAWJ). Her Honour attended the International Association of Women Judges' biennial conference. The Court hosted a screening by the AAWJ of "The Judge", a film that follows Justice Kholoud al-Faqih, a Shari'a law judge who was Palestine's first female judicial officer.

Justice Burns chaired the Drug and Alcohol Court Supreme Court Working Group, which incorporates members from different disciplines, such as health, housing, human rights, corrections and law, for the purpose of discussing an appropriate model for a Drug and Alcohol Court in the ACT (now the Drug and Alcohol Sentencing List).

This year, the working group deliberated the legislative framework for the ACT Drug and Alcohol Court. Members of the working group also visited various Drug and Alcohol Courts, and rehabilitation facilities around Australia, such as the Sydney Drug Court, the Hunter Drug Court and We Help Ourselves rehabilitation facility. These site visits enabled the working group members to gain a strong understanding of how other Drug Courts operate in practice, which led to useful observations for the ACT model.

On 16 November 2018, their Honours Chief Justice Murrell and Justice Loukas-Karlsson attended the Hellenic Association of Lawyers Oration. Justice Loukas-Karlsson gave the Theophilos Efkarpidis Oration hosted by the Hellenic Australian Lawyers ACT Chapter. Her Honour's speech, entitled *Ancient Greece, Australia and Criminal Justice,* gave a historical overview of the criminal justice system in Ancient Greece and drew parallels with the functioning of the justice system in Australia and specifically in the ACT. The oration was subsequently published in *Ethos,* the ACT Law Society Journal.

The Court supports the ACT Young Lawyers through its participation in the judging panel for ACT Young Lawyer of the Year. On 31 August 2018, Justice Loukas-Karlsson participated in the judging panel, assessing the nominees on their contribution to the legal profession, contribution to the community and legal professional achievement. The 2018 award was shared between Kellin Kristofferson and Georgina McKay.

Chief Justice Murrell, Justice Loukas-Karlsson, Archie Tsirimokos (Chair ACT Chapter of Hellenic Australian Lawyers Association), Elkaterini Xagorari (Greek Ambassador to Australia)

Ceremonial Sittings

15 October 2018

Retirement of Director of Public Prosecutions, Jon White SC

[EXTRACTS FROM THE SPEECH OF DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS] MARGARET JONES:

"Jon is one of the smartest lawyers I know. He is one of the few lawyers in the country who truly understands the Criminal Code, and anyone who has had to grapple with the Code knows what an achievement that is.

He has appeared in the most complex of trials and sentence matters, the most complex appeal cases before the Court of Appeal, and is equally at ease before the High Court. A highlight for Jon, and for those of us who worked on the case, was the High Court decision in GW in 2015, the effect of which is that the evidence of young children cannot be accorded less value merely because their evidence is not sworn. This decision has had application throughout the Evidence Act jurisdictions and has contributed significantly to ensuring the evidence of young children is heard in our courts.

Continuing on with Jon's achievements, one of his first acts was to significantly expand the family violence section, and that is a centre for excellence in the prosecution of family violence offences in the ACT.

But it's particularly in the area of the prosecution of sexual offences, including child sexual offences, that the Office, under the guidance and leadership of Jon, has excelled, and I mentioned before the use of tendency evidence and expert evidence, both of which have been so important in the prosecution of child sexual abuse.

There is no doubt that the community expects more now from more justice agencies and the criminal justice system in terms of justice for victims of sexual offences and child sexual abuse, and this has been an important focus under Jon's directorship."

29 January 2019

Commencement of legal year and official opening of new Supreme Court building

[EXTRACTS FROM THE SPEECH OF CHIEF JUSTICE] HELEN MURRELL:

"At the turn of a new year a common young hashtag is '#New year, new me.' If only reinvention was that simple or even unambiguously desirable. At the start of this new year, as we sit in this marvellous new building, those lawyers who are not of Gen Z may reflect on the journey that has brought us here and consider where we wish to go from here. Not to reinvent ourselves, but to strengthen our profession so that we may better serve justice in the territory and nationally.

The Supreme Court was established for the explicit purpose of enabling the residents of the territory to obtain judicial determinations of such disputes as ordinarily arise between them, in a way that was readily accessible to them. When it was established, in 1933, the court had only one judge, Lukin J. He sat in Acton House, a humble building set in picturesque surroundings. It was described as a neat little cottage that looked vaguely like an official building. It accommodated the Supreme Court registry, the courtrooms and offices of the Court of Petty Sessions, as well as the police station. But for all it's idyllic pleasantness it was too small. As McTiernan J discovered, during the murder trial of Porter, it was ill-equipped for a trial that lasted longer than a day.

In 1936 the court moved to the Hotel Acton, where it sat in a former dining room, sharing the hotel facilities with married public servants and their families and, later, with the Patent Office and the administrative office for the proposed University of Canberra.

In the late 1940s the Supreme Court moved, with its friends from the Patent Office, to the new Patent Office, with the Patent Office staff and the Commonwealth Security Services companions. However, there was a growing appreciation that an independent judiciary must be seen to be independent of the executive and therefore must be housed independently from the executive.

By this stage the Griffin plan for City Hill area of Canberra had been adulterated but at least the site that was chosen for the new courts building was close to that identified by the Griffins as appropriate for municipal courts.

In May 1963 Sir Robert Menzies opened the old Supreme Court building. Originally that building housed both the then ACT Court of Petty Sessions and the Supreme Court. It was state of the art architecture. It became an icon of 60s Canberra, a premier tourist attraction that was commonly featured on postcards of the city.

When the old building was commissioned the Canberra population was about 60,000. With commendable but inadequate foresight the building was designed to meet the needs of a population of 100,000. That population was reached within five years of its construction.

With the Canberra population edging towards 300,000, in 1996 the Magistrates Court moved to its own court house and the Supreme Court became the sole inhabitant of a building containing only two courtrooms that were really fit for its use.

For two decades my predecessors called for a new Supreme Court building, but in vain, until, in December 2013 Simon Corbell, the then Attorney-General, announced the construction of a new Supreme Court building, which was to include eight courtrooms, of which five would be jury courtrooms. The new building and associated facilities were to be delivered through a public/private partnership, the territory's first triple P. At the time of this announcement the population of the ACT was about 375,00, it is now heading towards 450,000.

The judicial excitement generated by the Attorney-General's announcement of a new Supreme Court building was barely dampened by the prospect that during construction work we may be temporarily housed in shipping containers located, cheek-by-jowl, on what was euphemistically described as a grassy knoll. I have searched for, but never found, the elysian grassy knoll. Luckily it became unnecessary to do so. We were able to remain in the old building until decanted last October, only two years behind schedule, into this magnificent new building.

The architecture of public buildings should speak of high public ideals, especially when the public building is one as important as a court of law. The architecture of this building speaks of many things. It reflects Canberra's natural environment, which is both directly visible, when the screens are up, and referenced in the natural timber and undulating ceilings, which mirror the hills surrounding the city. Light and landscape permeate every part of the building, speaking of the openness and transparency of our justice system.

The views and natural light in the building will reassure the public who attends and, literally, brighten the mood of the judges and others who work within the building, no longer consigned to the depressing caves in which they so recently laboured.

The new building respects the Griffin's urban plan for Canberra. It sits on the axis that extends from City Hill, down University Avenue and aligns with Constitution Avenue, to the east of City Hill. When the old Supreme Court building is refurbished as part of stage 2, the axis will remain visually unimpeded, passing through the architecturally significant glass atrium of the old building and an open corridor of the new building.

The new Supreme Court building cherishes our legal traditions. It cradles the old building and will be directly linked to it. Within the old building the two original Supreme Court courtrooms will be refurbished, introducing light, and making them much more attractive workspaces.

Hennessy CJ, of the Massachusetts Supreme Judicial Court has observed this:

> Our courthouses are monuments to our legal tradition, its noble purposes and occasional tragic miscarriages. They evoke the memory of historical events and of aspirations, frustrations and fears of many people: the learned, the dedicated, the articulate the oppressed and the despised, the avaricious and the brutal, whom the law has summonsed to exercise their skills or to account for their actions. They are not merely buildings, room and furniture but are, rather, monuments that evoke several centuries of human effort and progress.

This new building speaks of tradition but also of modernity and change. Both territory courts now have the latest technology. Jurors have personal screens, advocates and witnesses can mark up electronic documents. Vulnerable witnesses are accommodated in comfortable, child friendly and secure remote rooms. The scale of the building speaks of the solemnity of justice. The symmetry of each courtroom reminds us of balance and impartiality in the law. The new Supreme Court building shares an entrance and many facilities with the Magistrates Court, attesting to the comity between the territory's courts.

Most importantly, this building says that our community recognises the importance of the rule of law and the judicial arm of government and that the community values tradition but also looks confidently to the future. We shape our buildings and then our buildings shape us. In the case of this building, let us hope so.

But while the building is an environment in which it may be easier for judges, courts staff and practitioners to confront challenges, it is for us to choose whether we do so. There are many challenges. We face the challenge of reconciling with our Indigenous brothers and sisters and addressing the gross over-representation of Indigenous peoples within our criminal justice system.

We also face the challenge that many talented young women fail to persist with their legal careers, especially at the Bar where double-standards remain evident. Perhaps, before I retire, at an opening of law year women will occupy the front Bar table.

We must address disadvantage wherever we are able to do so. For practitioners, the opportunities to do so are greater. This court must focus on ensuring equal access to justice, holding to the court's original purpose by remaining readily accessible to all Territorians. These are not just new year's aspirations but necessities, if our justice system is to remain vibrant and respected."

29 March 2019

Memorial to pay tribute to the late Hon. Jeffrey Allan Miles AO

[EXTRACTS FROM THE SPEECH OF CHIEF JUSTICE] HELEN MURRELL

"We gather today to honour former Chief Justice Jeffrey Miles who died on 11 February 83 years young. We remember Jeff as a modest man of great integrity. He was a fine jurist, a strong judicial leader and a committed advocate for social justice. At this court he created a friendly and supportive small community. He led the court in accordance with his creed that it is the public and, in particular, the litigants for whom the court exists.

Jeffrey Allan Miles was born in Newcastle on 20 March 1935. After attending Newcastle Boys' High School he studied arts and law at Sydney University. In 1954 he was admitted as a solicitor. He worked in a Sydney law firm for five years. He spent the next two years as a volunteer English teacher with the Indonesia Civil Aviation Institute. His Honour lived with an Indonesian family and became adept at the language.

From Indonesia his Honour travelled to London where he developed an interest in litigation work as well as contacts that resulted in his first appointment of note as solicitor for the Beatles on their Australian tour. Unfortunately, despite the massive show of screaming and fainting fans that met the band each night, the tour gave rise to no litigation.

In 1965 his Honour was called to the New South Wales Bar. He became a public defender in 1978. In 1976 Jeff married Tricia, a true kindred spirit. They had two children, Anna and James and five grandchildren. Their journey through life led Tricia and Jeff on many adventures.

His Honour's first judicial appointment was to the National Court of Papua New Guinea where he sat for two years from 1980 to 1982. Former Chief Justice Higgins who himself later became experienced in that jurisdiction has observed that unlike Australia, in PNG the sources of uninformed criticism of the judiciary are not confined to the shock jocks and politicians, but extend to locals bringing out their bows and arrows and waving war axes.

Upon delivering a verdict in a judge alone trial held in a remote area, Miles J found it prudent to have the departing aircraft already warming up on the airstrip, leaving the translation of the verdict up to local authorities after his departure.

In 1982 his Honour returned from PNG to become a judge of the New South Wales Supreme Court. Three years later on 17 June 1985 his Honour was sworn in as a Federal Court judge and as the third chief justice of this court. His Honour said that his appointment as chief justice seems to have come as a surprise having not practised in the ACT nor been on any Commonwealth list of preferred counsel. It should not have been a surprise. His Honour's intellect, experience and, most importantly, his temperament defined him as a model judicial leader.

In 1989 the Australian Capital Territory became a self-governing territory. His Honour oversaw the transition and stalwartly advocated for safeguards to ensure continuing judicial independence. It was not until 1992 that the Supreme Court became the responsibility of the territory and both the Commonwealth and the newly constituted ACT legislative assembly enacted legislation ensuring the continuing independence of the ACT judiciary including security of tenure.

His Honour said:

> The rule of law in a democracy requires that judicial officers who stand between the citizen and executive government should be free to adjudicate without the threat of removal by that government. Indeed, in a federal system where it is the duty of the judicature, from time to time, to rule on whether a legislature has exceeded its powers, the power even of a legislature to remove a judge or magistrate should be clearly defined and not exercisable lightly.

From the judicial perspective, his Honour's advocacy for judicial independence, which is essential to the rule of law, is his most important legacy.

His Honour's retirement in 2002 was short lived. Thereafter he worked for three years as an acting judge in the ACT and New South Wales. Notably, his Honour presided over the first Eastman inquiry, a challenging task that took its toll.

In December 2008 his Honour agreed to write a history of this court, a feat that he achieved in a matter of months. A History of the Supreme Court of the Australian Capital Territory; The First 75 Years, remains the definitive reference tool concerning the history of the courts and the judiciary in the ACT. Much more recently, his Honour agreed to oversee the drafting of our jury handbook.

When he retired, his Honour reflected with sorrow that during his term the Supreme Court had not found a new and more fitting home. He said:

> I once had fanciful thoughts that like Sir Christopher Wren I would come one day to be able to say with pride, 'If you want to see my memorial, look around you.' I read and digested quite a lot on the subject of court architecture both here and overseas and spoke to many people with skills and experience in that area. Suddenly, it occurred to me about two years ago that I might not see anything achieved in my term of office.

He urged his successor to seek a firm undertaking from the government in writing, in concrete if possible, made known to the world that this court will be provided with the premises and facilities that are necessary for the proper discharge of its role in the public interest.

That dream may not have been realised during his Honour's term but it was realised during his lifetime. This year his Honour toured the new Supreme Court building which was constructed on the foundations of his Honour's efforts. It is a fitting memorial to him.

Of course, the law was only one of many facets to his Honour's life. His Honour loved Canberra and its beautiful natural surrounds. After his retirement, he remained a dedicated Canberran and, renaissance man that he was, he enriched the Canberra community in many ways.

He was founding member of the ACT chapter of the Australian Academy of Forensic Sciences and became a life member of that organisation. He was a dedicated member of the Australian Decorative and Fine Arts Societies. He was a passionate civil libertarian and served as chair of the ACT chapter of the International Commission of Jurists. He was an avid gardener and volunteered in the rose gardens at Old Parliament House for 14 years and he was a habitué of Costco.

His Honour may have missed out on the trip to the Kimberly that he and Tricia had planned to take this year, but there is not much else that he missed out on in a life that was well and fully lived."

Guest Speakers

The judges are grateful for the opportunity to regularly host pre-eminent speakers from a wide variety of disciplines and backgrounds to provide ongoing education on a range of matters. The following people have generously provided a lunch time session over the year.

Date	Guest speaker	Topic
5 March 2019	**Judge Robert Osborn** Former Victoria Court of Appeal judge Currently a judge-in-residence at the Australian National University	
18 March 2019	**Dr Helen Watchirs OAM** ACT President and Human Rights Commissioner accompanied by Executive Manager Sean Costello	
8 April 2019	**Justice Eugene Hyman** Retired Judge of the Superior Court of California. Justice Hyman is currently assisting law students at the University of Canberra to develop practical skills	
15 April 2019	**Dr Catherine Sansum** Medical Director Child At Risk Health Unit (CARHU) Staff Specialist Clinical Forensic Medical Services	Child sexual abuse – how CARHU doctors perform examinations on children who have been sexually abused
20 May 2019	**Dr Heather Roberts** Associate Professor & ARC DECRA Fellow ANJeL Co-Director (Australian National University)	Dr Roberts addressed the Judges on her swearing in research. Broadly, her research examines 'the origins and contemporary practice' of judicial swearing in ceremonies and explores 'changing expectations of judges and judging'. (https://law.anu.edu.au/people/heather-roberts)
25 June 2019	**Professor Renee Knake** Professor of Law and the Doherty Chair in Legal Ethics at the University of Houston Law Center	Innovation in the legal profession – women shortlisted for appointment to the Supreme Court of the United States.
25 June 2019	**Judge Wallace B. Jefferson (retired)** Former Chief Justice of the Supreme Court of Texas	

Engagement with students of Law

Meeting with the ANU and University of Alabama students

On 23 July 2018, the Court received students and staff visiting the ANU College of Law from the University of Alabama, United States. The students were visiting as part of an exchange program that has taken place between the two law schools since 2001. As part of their five weeks in Australia and a comparative law and survey course, the students visited the Court to receive a tour of the facilities and to meet with Justice Mossop. After a tour which included the remote witness facilities, the jury pool room and a courtroom, his Honour met with the students and gave a speech that touched on the history and jurisdiction of the Supreme Court, as well as some points of comparison between the Australian and American legal practices and culture.

ACT Schools Mock Trial Grand Final

On 31 October 2018, Associate Justice McWilliam was pleased to preside over the Grand Final of the ACT Schools Mock Trial Competition organised by Legal Oratory ACT. The competition is for high school students in years 9–12 and aims to provide an opportunity to students interested in the law to learn legal arguments and advocacy skills. The students were able to have an authentic experience of appearing, cross-examining and arguing a criminal case in the new Court building. Congratulations to Canberra College as the winner.

ANU Health Law, Bioethics and Human Rights Moot Trial

Once again the Supreme Court has supported the annual Health Law, Bioethics and Human Rights moot trial as part of the ANU College of Law course convened by Professor Tom Faunce. On 16 May 2019, the event was presided over by Justice Elkaim with the remainder of the bench constituted by Professor Faunce and Associate Justice McWilliam. The event had particular significance for the Associate Judge, who participated in the inaugural moot trial in 1999, when she was a student at the ANU. The event may also be the last of its kind as sadly, Professor Faunce, who was the driving force behind the annual moot requiring knowledge of the combination of legal principle and bioethics, has recently passed away.

Jessup Moot

On 9 February 2019, Justice Loukas-Karlsson presided over the Australian semi-finals of the annual Phillip C Jessup Moot competition. The ultimate winner of this competition proceeded to the Jessup World Cup held in the United States. 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.

University of Canberra Law Prizes Ceremony

Each year the ACT Supreme Court typically sponsors a prize to be presented at the University of Canberra's Law Prizes Ceremony, hosted by The School of Law and Justice. Justice Elkaim presented "ACT Supreme Court Prize" on 18 March 2019 to a student recognised for their outstanding achievements during their studies.

Winner of the University of Canberra Law Prize, Kayleigh Smith, with Justice Elkhaim

Selected cases

R v Johnson [2018] ACTSC 242

The accused faced charges relating to two counts of possession of a prohibited firearm and one count of trafficking in a trafficable quantity of cannabis. The accused made an application seeking to exclude firearms and drug evidence that was obtained during two police searches of his premises – one on 14 November 2017 without a warrant (the first search) and one on 15 November 2017 with a warrant (the second search).

Prior to the first search, the applicant and another man were allegedly seen on CCTV footage in possession of firearms. One of the men was wearing a distinctive singlet. On the night of the first search, the police initially entered the premises to investigate possible injury to occupants. During the police attendance, the applicant moved a bag containing a firearm away from the officers' view; this bag was subsequently located, and the officers conducted the first search. Nothing was seized but they observed green vegetable matter, a set of scales, and clip seal bags.

Early the following morning, police applied by telephone to the Chief Magistrate for a search warrant, which was granted. The Chief Magistrate was outside of the ACT at the time of issue. The warrant authorised the search for particular items (including ammunition and the distinctive singlet) to obtain material that would establish that the applicant was one of the men carrying firearms in the CCTV footage. The warrant also authorised the officers to seize any other thing that they believed to be evidential material in relation to the current offence or any other offence.

The officers executed the second search and found, inter alia, another firearm and a large quantity of cannabis.

Three legal issues arose. First, whether the evidence from both searches was improperly or illegally obtained under s 138 of the *Evidence Act 2011* (ACT) (*Evidence Act*) and if so, whether the evidence should be admitted. Second, whether it was necessary for police to enter the applicant's premises on the occasion of the first search and conduct a warrantless search under s 190 of the *Crimes Act 1900* (ACT) (*Crimes Act*). Third, whether the warrant for the second search was validly issued by the Chief Magistrate under the *Crimes Act*.

The applicant contended that the first search was unlawful, and that the second search was a "follow-up" to the first search, making it inadmissible per s 138(1)(b) of the *Evidence Act*. The respondent submitted that the first search was authorised under s 190 of the *Crimes Act*, which allows police officers to enter premises when the officer believes on reasonable grounds that, among other things, an offence is being or is likely to be committed or there is imminent danger of injury to a person and it is necessary to enter the premises to prevent the commission of an offence or to protect life. The respondent also submitted that the evidence obtained in the second search was not obtained in consequence of the first search, and the evidence of the second search should be admitted pursuant to s 138 of the *Evidence Act*.

Murrell CJ accepted that the police officers had entered the premises in the first search to investigate possible injury but found that the evidence fell short of establishing compliance with the "very strict requirements of s 190": at [21]–[22]. The first search was ruled unlawful.

Her Honour inferred that the police officers' knowledge of the green vegetable matter observed during the first search was an incidental consideration in their decision to obtain the warrant. Her Honour found that there was "a link but no 'chain of causation'" between the observation of cannabis during the first search and the finding of a trafficable quantity of cannabis during the second search; the warrant authorising the second search was issued on suspicion that the applicant was involved in firearms offences: see *Re Lee* [2009] ACTSC 98; 212 A Crim R 442 at [31].

In regards to the validity of the warrant, her Honour found that the Chief Magistrate was an "issuing officer" within the meaning of s 185 of the *Crimes Act,* even though the Chief Magistrate was not in the ACT at the time of issue. Properly construed, s 122 of the *Legislation Act 2001* (ACT) gives statutory recognition to the presumption against legislation asserting extraterritorial effect.

Her Honour stated (at [90]):

> The desirability of admitting evidence of high probative value and critical importance that is the product of well-motivated legal errors far exceeds the significant undesirability of doing so because of the breach of human rights (the right to privacy) associated with the obtaining of the evidence and the fact that the evidence could have been obtained without contravention of an Australian law.

Murrell CJ held that the evidence was admissible.

R v Beowulf [2019] ACTSC 64

The accused were charged with the murder of Katherine Panin (the deceased) by way of joint commission. The prosecution case was circumstantial; it partially relied on forensic evidence relating to the presence of blood and DNA that matched the deceased on a red kilim rug, which had been located in a hallway near the location of the deceased's body.

The prosecution submitted that forensic evidence found on the rug supported the inference that, on the date of the alleged murder, there was an altercation between one or more of the accused and the deceased on the rug. This alleged altercation caused the deceased to spill blood and was connected to the deceased's death. The evidence of one witness suggested that the rug was removed from the crime scene between the morning of the deceased's death and the arrival of investigators later that day. The prosecution argued that the rug was stored on the same day at the family storage unit in Fyshwick; this was corroborated by phone records placing the accused in Fyshwick.

Over 40 samples were taken from the rug and presumptive testing for blood was undertaken for most samples. However, confirmatory testing was not undertaken for locations 4–7 as presumptive testing exhausted the samples.

The accused raised questions of admissibility regarding this evidence. The accused conceded that the forensic evidence relating to locations 1, 2, and 24 was admissible but objected to the remainder of the test results (the contentious evidence) as it was either irrelevant under s 55 of the *Evidence Act 2011* (ACT) (*Evidence Act*) or, if relevant, it should be excluded under s 137 of the *Evidence Act* because its probative value was outweighed by the danger of unfair prejudice to the accused. These arguments were posited on the basis that confirmatory testing did not prove the presence of *human* blood, although blood was present at 34 of the 40 locations.

Murrell CJ agreed with the prosecution's submission that the contentious evidence would be relevant if it related to the existence of the inferred fact (that is, the alleged altercation causing the deceased to bleed on the rug). However, her Honour held that the contentious evidence did not support this inference "even to a slight degree", instead it "refutes the presence of human blood": at [38]. The evidence did not support the proposition that the deceased's blood was at the relevant locations.

Her Honour noted that – if locations 4–7 had been the only locations tested – the presumptive test results that were positive for blood combined with the evidence strongly supporting the presence of the deceased's DNA at the locations as well as the appearance of bloodstain would mean that the evidence was highly relevant per s 55 of the *Evidence Act*.

Murrell CJ held that the results of locations 4–7 were inadmissible under s 137 of the *Evidence*

In doing so, her Honour referred to the strong potential of the "CSI effect" to tempt the jury to "place undue weight on the evidence, which, in the context of other forensic evidence, has almost no probative value": at [41]. The contentious DNA evidence (that is, all DNA evidence except for samples 1, 2, and 24) was not admitted.

R v DU [2018] ACTSC 281

The issue in this application was whether the indictment filed by the Crown resulted in double jeopardy. DU was committed for trial on six counts of engaging in sexual intercourse with a young person who was under the applicant's special care, contrary to s 55A of the *Crimes Act 1900* (ACT) (the Crimes Act). These counts were alleged to have occurred on specific dates within the period commencing 15 March 2017 and ending 31 March 2017. The indictment contained these specific offences, and other charges such as Count 1. Count 1 was an ex officio charge alleging that between 26 February 2017 and 31 March 2017, DU maintained a sexual relationship with the complainant, being a person of 16 years of age and under his special care, contrary to s 56 of the Crimes Act. The six sexual acts which formed the basis for the charges under s 55A were the same sexual acts which the Crown relied upon as the basis for the charge under s 56. The applicant submitted that the Crown could not proceed with Count 1 and the substantive charges, and sought a stay of Count 1.

In his reasons, Burns J considered the statutory interpretation of s 56(8) and (9) of the Crimes Act. In determining the proper interpretation of s 56, his Honour examined the legislative history of the provision, the *Human Rights Act 2004* (ACT), and pleas in bar at common law. His Honour determined that the legislative purpose of the offence found in s 56 was to "avoid evidentiary and procedural difficulties that would preclude the accused being charged with specific offences."

His Honour found that a person could be charged with an offence under s 56(1) and specific offences alleged to have occurred in the same period, but that a conviction could not be recorded for a specific offence which is based upon the same sexual act relied upon to prove the charge under s 56(1). The Crown was not entitled to seek convictions upon both the s 56(1) charge and the other specific charges under s 55A based on the same alleged sexual acts by DU. Burns J refrained from making formal orders to allow the Crown to elect how it would proceed in light of his Honour's reasons.

Potts v The Queen [2019] ACTCA 17

This was an application for leave to appeal out of time against convictions. The applicant was found guilty by jury of making a threat to kill, unlawfully causing grievous bodily harm and assault occasioning actual bodily harm. He was sentenced to terms of imprisonment. The Crown filed an amended notice of appeal against the sentences imposed. The applicant attempted to lodge a cross-appeal against the convictions, but this was invalid as the Crown appeal related only to the sentence imposed. The applicant filed an application to the registrar for leave to appeal out of time against the convictions, which was refused. On 3 April 2019, the applicant applied to the Supreme Court for leave to appeal out of time.

The applicant submitted that Burns J should consider reserving the question of an extension of time to the Full Court to be heard as part of the proposed appeal. The applicant submitted that this was appropriate due to questions about the operation and scope of the *Court Procedure Rules 2006* (ACT), and the operation of the *Human Rights Act 2004* (ACT). The applicant also challenged the decision in *The Queen v Meyboom* [2012] ACTCA 2. His Honour was satisfied that no real purpose would be achieved in reserving the matters raised by the applicant for consideration by the Full Court.

In his reasons, Burns J considered the applicant's proposed grounds of appeal. The applicant argued that the trial judge erred in refusing to leave the question of involuntary intoxication to the jury. Burns J found that the issue of involuntary intoxication was simply not raised by the evidence, and that the trial judge was correct to decline to leave this matter to the jury. The applicant further argued that the trial judge erred in allowing the jury to return an alternative verdict to Count 3, after the Crown had not pursued the alternative charge, and that this change in the way the Crown presented its case came after the close of evidence, resulting in the accused not receiving a fair trial. His Honour found that the Crown opened upon the availability of this alternative charge, and there was no evidence that objection was taken to that opening by the applicant.

His Honour determined that the applicant had no real prospect of success on any of the proposed grounds of appeal. Burns J noted that there was no explanation proffered for the applicant's delay in providing the notice of cross-appeal to the Crown, and nor was there any explanation provided for the subsequent delay in commencing the application of leave to appeal out of time. Burns J refused leave to appeal out of time.

Nouri v Australian Capital Territory [2018] ACTSC 275

The plaintiff's, Ms Nouri and Mr Shaor, were the parents to a child born with severe disabilities. The plaintiffs argued that Canberra Hospital had breached its duty of care by failing to provide certain information about the child's condition, a trachea-oesophageal fistula (a TOF). The plaintiff's submitted that:

1. had they been warned about the prospect of the condition, they would have travelled to the United States, where termination at the stage of Ms Nouri's pregnancy is available; and
2. the extensive costs associated with the child's upbringing would have been avoided.

Elkaim J held that Canberra Hospital breached their duty of care owed to the plaintiffs by failing to inform them of the possibility that the child would be born with a TOF. While Elkaim J was satisfied of the hospital's breach of duty of care, his Honour accepted the defendant's submissions that the earliest date when a duty to inform might have arisen was 22 September 2011.

On the evidence presented, his Honour was not satisfied that the plaintiff could or would have obtained a termination had they been informed of the possibility of the TOF from this date. In his reasons, his Honour considered the likelihood of Ms Nouri travelling to obtain the termination and the probability of the termination being conducted at her stage of pregnancy.

Sparway Pty Ltd v CPQ Corporation Pty Ltd [2018] ACTSC 210

The First plaintiff entered into a sublease of premises with the landlords. The lease was for a term of five years but contained two options to renew the lease. The first plaintiff exercised the first option to renew the sublease, which they failed to return despite three reminders. In 2013, the first plaintiff sought permission from the landlords to assign its interest in the lease to the second plaintiff. The landlords permitted the assignment and sent a further lease to the second plaintiff for execution which was not returned. In 2017, the second plaintiff attempted to renew the lease. The landlords refused on the basis that the conditions precedent had not been met.

Elkaim J heard two applications, the first seeking a declaration to the effect that the second plaintiff had a valid sublease. The second application, filed by the landlords, seeking possession of the premises together with damages. The primary dispute was whether the landlords were entitled to not abide by their obligation to renew the lease once renewal of the lease was requested by the Second Plaintiff pursuant to certain clauses in the lease.

In his reasons, his Honour considered the fact that the second plaintiff had subsequently met the conditions precedent and the period of time since the landlords had mentioned the conditions precedent. However, his Honour held this did not displace the legal principles requiring conditions precedents to be complied with.

His Honour found the landlords were entitled to treat the lease as having ended and allowed the second application subject to final orders.

Lewis v Australian Capital Territory [2019] ACTCA 16

Mr Lewis had originally been sentenced in the Magistrates Court to a period of 12 months imprisonment, served by way of periodic detention, for inflicting actual bodily harm on another person. Mr Lewis failed to attend several of the weekends when he should have presented himself at the prison. As a result, the Sentence Administration Board (The SAB) cancelled the periodic detention order and Mr Lewis was arrested. Mr Lewis challenged the validity of the SAB to cancel the periodic detention. Refshauge J ordered a judgement for Mr Lewis in the sum of $1.00 and that the decision to cancel the periodic detention order was flawed and should be set aside as Mr Lewis had not attended the SAB Hearing. In his reasons Refshauge J concluded that Mr Lewis was always going to serve the 82 days in prison as a result of his sentence and accordingly there was no term of imprisonment giving rise to damages. This was described as the inevitability argument.

Mr Lewis appealed the Court of Appeal this year against the nominal damages awarded in the sum of $1.00. The primary question of this appeal was whether or not it was inevitable that the appellant would be imprisoned. The Court of Appeal dismissed Mr Lewis' appeal. Mr Lewis has now applied for special leave to have this matter heard in the High Court.

Meyers v Commissioner for Social Housing [2018] ACTSC 193

On 15 March 2016, the plaintiff, a resident of public housing in Spence provided for by the Commissioner of Social Housing, was savagely mauled by two pit bull terriers kept by visitors of a tenant of an adjoining unit. The plaintiff sued the Commissioner and the Territory. The plaintiff claimed a breach by the Commissioner of the terms of his tenancy agreement. Further, he claimed negligence by both the Commissioner and the Territory in that he was owed a duty of care by both defendants to prevent him suffering injuries from the dogs and that this duty of care was breached.

Mossop J held that the Commissioner did not break the lease with the plaintiff and though it may have owed a duty of care to the plaintiff, this did not extend to protecting him from attack by dogs owned by other people. Further, his Honour found that the Territory did not owe the plaintiff a duty of care. Much akin to the position of police officers, Territory officials including those who had statutory powers available to them under the *Domestic Animals Act* were not under a positive duty to prevent harm to the plaintiff nor had they assumed responsibility for the plaintiff's safety. The decision was appealed and was heard by the Court of Appeal in May 2019. Elkaim, Loukas-Karlsson and Charlesworth JJ dismissed the appeal.

Dent v Burke [2019] ACTSC 166

On 27 November 2017, the defendant, Don Burke gave a half hour long interview on a television program called "A Current Affair". In that interview, he addressed allegations by a number of complainants relating to bullying and harassing behaviour during the production of the television program "Burke's Backyard". The plaintiff commenced proceedings in June 2018 alleging that the defendant had defamed her in imputing that she had lied when she alleged that the defendant had asked her to audition naked to the waist when she sought to be engaged on "Burke's Backyard" and that she had made a false allegation against the defendant of sexual harassment motivated by her wish to join a "witch-hunt" against Mr Burke.

The hearing on 22 May 2019 related to the hearing of a separate question, namely, whether the alleged imputations were conveyed. His Honour Justice Mossop found that they were not. His Honour noted that the defendant's responses in the interview to the allegations against him were "less than compelling". His Honour emphasised the transient nature of the broadcast, which meant that "impression" rather than "textual analysis" was significant in assessing whether the imputations arose. His Honour's judgment outlined that the allegations which were being put to the defendant were not explained in any methodical way during the broadcast, that the impression created by the program was largely influenced by the collective force of numerous allegations and that the manner in which the interviewer conducted the interview made it clear that the interviewer accepted the allegations made against the defendant as credible. The result was that the defamatory imputations could not be found.

Canberra Greyhound Racing Club Inc v Planning and Land Authority of the ACT [2018] ACTCA 54

In November 2018 Burns, Elkaim and Mossop JJ, heard an appeal concerning a lease from the Commonwealth held by the Canberra Greyhound Racing Club Inc. That lease is a 50 year lease expiring in late 2027 and permits the Club to utilise a greyhound racecourse and ancillary facilities. Following the report of the Special Commission of Inquiry into the Greyhound Racing Industry in NSW, the ACT government expressed its commitment to end greyhound racing in the Territory. The Club applied to the ACT Planning and Land Authority for a further lease. The Authority declined to make a final decision about whether and on what terms it would grant the lease because it believed greyhound racing would soon become unlawful. The Club commenced proceedings seeking an order in the nature of a writ of mandamus to compel the Authority to grant it an additional lease of 50 years. Prior to the proceedings being heard the *Domestic Animals (Racing Greyhounds) Amendment Act 2017* (ACT) and the *Racing (Greyhounds) Amendment Act 2017* (ACT) were passed by the Legislative Assembly which together operated to prohibit the Club from holding races on the land subject to the lease. The primary judge dismissed the application. The most contentious ground of appeal raised by the Club on appeal was that the primary judge erred in finding that there was "no utility in granting the relief sought". The primary judge made that finding on the basis that greyhound racing would soon be unlawful and that the Club could pursue greyhound racing until the end of the lease, to the extent that it would be lawful. The Court of Appeal dismissed the appeal, emphasising that there was no realistic prospect that, with the law as it is, the Club would be offered a lease on terms more favourable than its current lease.

R v Butters [2019] ACTSC 143

In this matter the offender was sentenced for an offence of recklessly inflicting grievous bodily harm arising out of an altercation at a local restaurant. The offender had moved from New Zealand to Australia in 2006. In the course of the sentencing hearing it was submitted that the Court should take into account the prospect of deportation, specifically the impact of deportation on the offender and his family.

In the course of her sentencing remarks Loukas-Karlsson J gave an overview of the inconsistent approaches to the relevance of deportation in sentencing across Australian jurisdictions and the divergent approaches historically undertaken in the ACT. While it was held that the prospect of deportation may be a relevant factor on sentence, her Honour held that the authorities establish an evidentiary hurdle as to the likelihood of deportation. This is despite the insertion of s 501(3A) into the *Migration Act 1958* (Cth) in 2014, regarding mandatory cancellation of visas in certain circumstances.

Relevantly, her Honour noted the cancellation under s 501(3A) is able to be revoked under s 501CA. In the offender's case, given the absence of sufficient evidence to establish the prospect of deportation beyond mere "speculative possibility" based on the terms of the *Migration Act*, her Honour found that this matter was not a relevant sentencing factor for the offender.

However, the relevance of deportation also arose in the context of arriving at a sentencing option whether an Intensive Corrections Order should be imposed. Having regard to the relevance of "potential impracticability" of compliance with the ICO (a relevant assessment consideration under the sentencing legislation), her Honour held it was not appropriate to impose an ICO in the offender's case. In doing so, her Honour noted potential impracticability as being a lower standard than that required for deportation to be taken into account as a matter in mitigation.

R v Green (No 3) [2019] ACTSC 96

In the course of a jury trial in which the accused was charged with two counts of choking, suffocating or strangling a person contrary to s 28(2)(a) of the *Crimes Act 1900* (ACT), a no case submission was made by the accused. The application required consideration of the meaning of the terms "choke", "suffocate" or "strangle" and relevantly whether they required a victim to have stopped breathing, at least to the extent of one breath. In the prosecution's submission a mere restriction on breathing was sufficient to make out the offence.

There being an absence of authority on this question, Loukas-Karlsson J surveyed the law in other Australian jurisdictions and concluded as a matter of statutory construction that the offence did require the stopping of breath, even if only temporarily. Regard was had to the principle from *Beckwith v R* (1976) 135 CLR 569 that courts should not construe penal statutes so as to extend the category of criminal offences. Accordingly, there being no evidence that the complainant had in fact been unable to breathe at any time, her Honour directed the jury to return verdicts of not guilty.

The decision provided the impetus for amendments to the offence under the *Crimes Legislation Amendment Act 2019* to include definitions of the relevant terms, broadening their scope. It is noted that this Court's interpretation of the offence was adopted by Coker DCJ with respect to the equivalent Queensland legislation (*R v AJB* [2019] QDC 169).

In the Estate of Koppie [2019] ACTSC 106

This case concerned the issue of how to construe a will where the deceased bequeathed the residue of her estate to her four children in equal shares, but where one of those four children died before her mother. The question before the Court was whether, on the terms of the will and by applying the relevant provisions of the *Wills Act 1968* (ACT), the estate should be distributed between the three remaining living beneficiaries only, or, whether the deceased beneficiary's share should be maintained and distributed to her surviving children.

The *Wills Act 1968* (ACT) provided for the children of the daughter who had died to take the share that was given to her in her mother's will unless there was a 'contrary intention'. The legal issue before the Court involved construing the words of sub-s 31(4) of the *Wills Act*, and what was meant by 'contrary intention'. The Court had to consider whether the words distributing the estate "to such of my children as shall survive me and attain the age of eighteen years", contained in the deceased's will, ought to be considered as an expression of a contrary intention.

Taking into account extrinsic evidence in accordance with s 12B of the *Wills Act*, her Honour held that a mere statement as to a condition of attaining a certain age was not a 'contrary intention', applying sub-s 31(4) of the *Wills Act*. Further, her Honour held that the words "if more than one in equal shares", which were placed after the general conditions of attainment, should not in and of themselves imply the existence of a contrary intention that the living issue of one of the children of the deceased should not benefit in the event of the child predeceasing her.

Bailey v Bottrill (No 2) [2019] ACTSC 167

This appeal from the ACT Civil and Administrative Tribunal (ACAT) concerned the essential element of publication in the tort of defamation. The appellant had placed a functioning hyperlink with a small amount of neutral text on her Facebook page. The hyperlink directed any person who clicked on the link to material on YouTube that was clearly defamatory of the respondent. The issue was whether that amounted to publication by the appellant, and whether the ACAT applied the correct legal test as to when a person participates in publication.

Her Honour, McWilliam AsJ, considered the distinction drawn in recent decisions in other jurisdictions between what constitutes participation in publication for internet service providers, such as search engines, and those cases that have dealt with individual authors and curators of social media pages and profiles. The level of control the appellant had over the Facebook page containing the link, the text accompanying the link, and, the ease with which any individual clicking on the link could be directed to the content containing the defamatory material were significant factors in her Honour's consideration of whether the appellant participated in the publication of defamatory material.

Her Honour held that the appellant was the author of the content on her Facebook page, and therefore had control over what was placed on it and who had access to it. Her Honour also noted that the link gave immediate access to the YouTube video containing the defamatory material, rather than a more general link to the homepage of the service provider. Her Honour accepted that the snippet of text accompanying the hyperlink may be characterised as being 'neutral' in nature, and that the appellant may have had no hand in producing the text accompanying the link. However, the words were on the appellant's Facebook page because she had shared the link, and they were sufficient to entice a searcher to click on it and be directed to the defamatory material.

Her Honour concluded, "in these circumstances, the appellant participated in the publication of the defamatory content on her Facebook page. The combination of the publication being a personal Facebook page (having the character of a noticeboard), the direct access hyperlink and the existence of a brief description of what the hyperlink related to, for all practical purposes, constituted an incorporation of the defamatory material into the reference." Consequently, the appellant was held to have been a primary participant in the publication of the defamatory material contained in the linked YouTube video and the appeal was dismissed.

Follett v Mann [2019] ACTSC 141

This appeal from the Magistrates Court concerned the actions of the appellant, who in July of 2016, was involved in an incident at the Canberra Casino after she sought to intervene between security officers employed by the Casino and her twin sister, whom they were purporting to arrest. The appellant along with her sister were eventually arrested and detained by the security officers, with one of the grounds of appeal going to the issue of whether the arrest had been lawfully executed.

The Magistrate at first instance found that the appellant had been lawfully arrested by the Casino security officers in accordance with s 218 of the *Crimes Act 1900* (ACT), colloquially known as the 'citizen's arrest power'. In making this finding, the Magistrate implicitly read into the text of the provision the additional requirement that the arrest must be 'necessary' in the circumstances, relying upon recent NSW case law where the equivalent NSW provision had been considered.

Her Honour held that the test of 'necessity' does not form part of the test that must be applied when considering whether an arrest has been executed in accordance with s 218 of the *Crimes Act*. There are two clear criterion that must be met for a citizen's arrest to be deemed lawful: the arrestee must hold a belief that a person is committing or has just committed a crime, and, such a belief must be on reasonable grounds. If these elements are met, the person may arrest without a warrant. Such discretion limited at common law, with cases such as *Kruger v The Commonwealth of Australia* (1997) 190 CLR 1 and *Zavarinos v State of NSW* [2004] NSWCA 320; 62 NSWLR 58, holding that the exercise of a statutory power includes an implied requirement that the power be exercised reasonably, and, that any statute that authorises the detention of a person must be strictly construed.

Eastman re-trial proceedings, Jun – Nov 2018

Acting Justice Murray Kellam presided over the re-trial of David Harold Eastman for the murder on 10 January 1989 of Colin Stanley Winchester. The trial commenced on 18 June 2018 and ran for 87 days. On 22 November 2018 a jury returned a verdict of not guilty. This finding concludes the criminal proceedings against Mr Eastman.

The proceedings involved a substantial logistical exercise. The Sheriff's Office issued 2500 summonses to potential jurors for the trial. After exemptions, excusal and deferments there was a pool of 492 people. Further requests for excusals by pool members were made on day one of empanelling, the pool was subsequently reduced to just over 150 people. A jury of 16 people were chosen from this group on day two of empanelling.

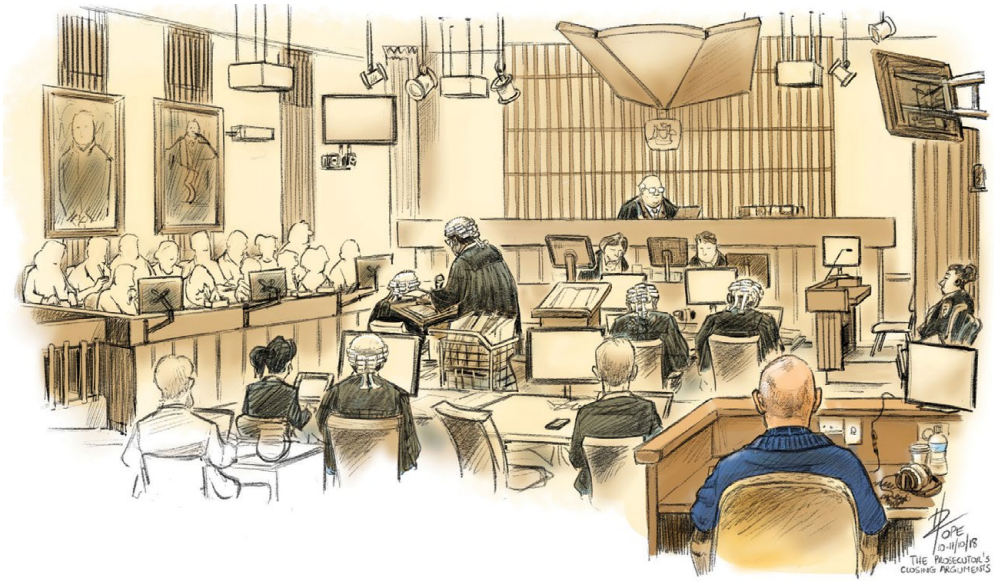
Due to the significant pool size the Sheriff's Office were unable to facilitate the empanelment of the jury at the Courts precinct, empanelling was undertaken at Albert Hall, which was possible as the *Supreme Court Act 1933* states that the jurisdiction of the Supreme Court is exercisable by a single judge, within Canberra.

The logistics of empanelling at a location outside of the Court premises was significant. The Sheriff's Office hired Albert Hall from the Territory for the purpose of empanelling. Equipment, such as chairs, tables, urns etc were hired from a local business. Additional security was required to undertake the security procedures for pool members. There were 20 Sheriff's Officers and Court staff at the Hall to ensure pool members were checked in and seated in an efficient manner. Additional arrangements were made in relation to emergency evacuation processes, parking and accommodation for the Judge, counsel and staff, parking for pool members, location for the media and the times of parties arriving at the Hall.

Additional catering was required to feed pool members and surplus food was donated to Oz Harvest at the conclusion of each day. Approximately 50 kilograms of food was donated.

During the re-trial, evidence was presented from over 180 witnesses either in person or by videolink from locations around Australia and internationally. The trial also considered evidence given in earlier proceedings by witnesses who were no longer alive or otherwise unable to testify.

Nearly 300 exhibits were tendered during the re-trial. Due to the large volume of material this evidence was managed digitally using an electronic litigation system and displayed on screens around the courtroom. This use of technology greatly enhanced access to information by the parties and the jury and reduced the volume of physical material that would otherwise have had to be managed.



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TECHNOLOGY AND ONGOING PROJECTS

New Court Facilities 52

New Court Facilities

In December 2015, the Territory entered into an agreement with Juris Partnership, comprising Laing O'Rourke, Macquarie Capital and their partners, to deliver a new $165 million justice precinct for the Australian Capital Territory.

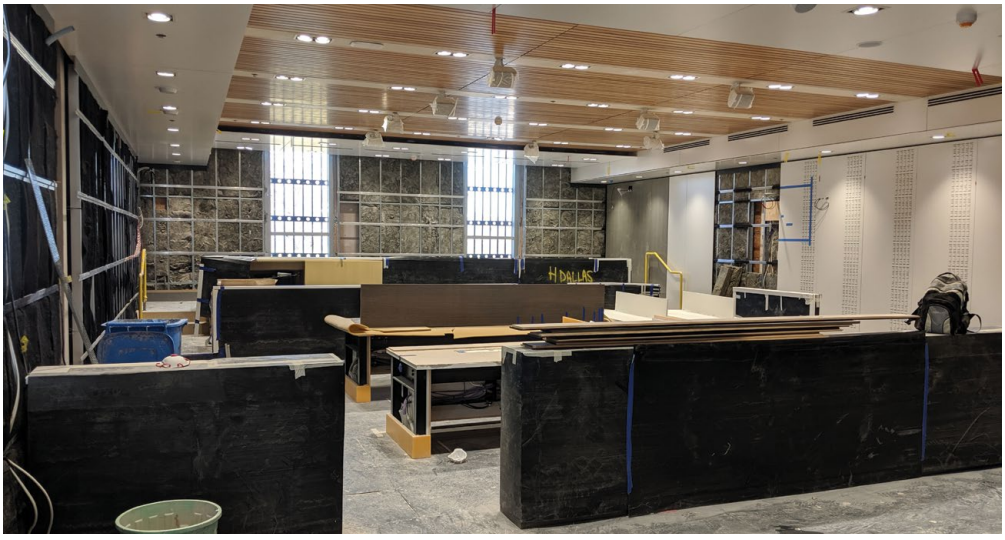
The ACT Courts project in the centre of Canberra is the Territory's first public–private partnership (PPP).

The project will create a combined courts facility for the ACT which will support operational efficiencies while respecting the jurisdictional separation between the Supreme Court and the Magistrates Court.

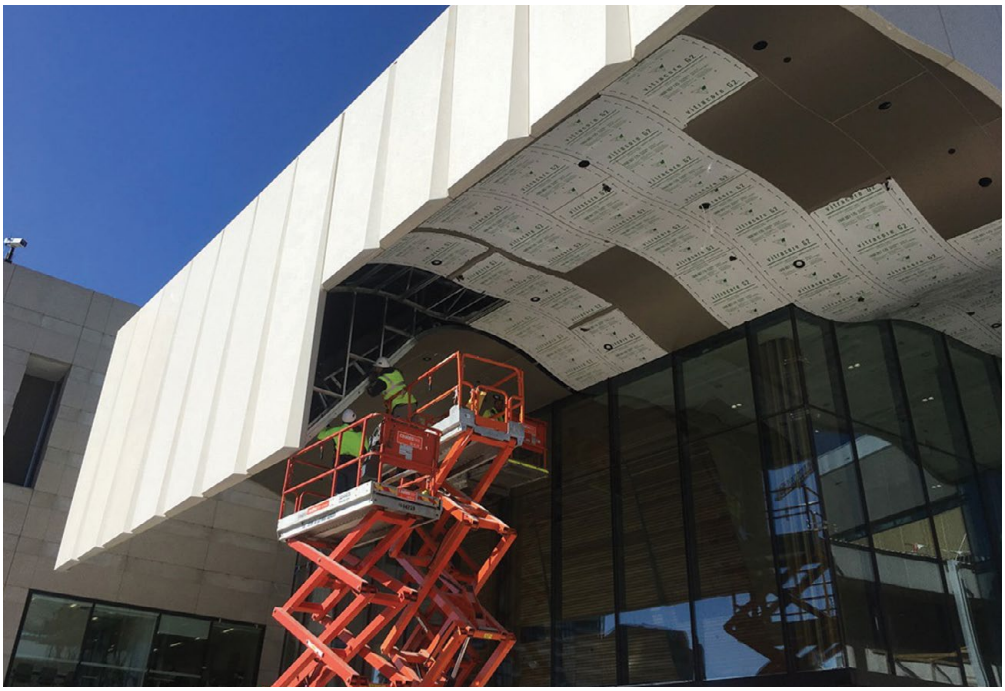
The Supreme Court is located within a new four-storey building constructed along Vernon Circle. It will also occupy parts of the existing Supreme Court building following its refurbishment.

Works commenced on the new building in 2016 with Stage One being completed and court operations commenced in October 2018. Stage One delivered six new courtrooms for the Supreme Court, new library accommodation, jury facilities, remote witness suites, new registry and new public entrance. The second stage (which includes the refurbishment of the existing Supreme Court building) is due for completion in early 2020 and will see two additional courtrooms (including the Drug and Alcohol Sentencing List), new combined custodial facilities, facilities for justice support agencies, such as Legal Aid, Domestic Violence Crisis Service, Justice Health, Community Corrections and Youth Justice. It will also have mediation facilities and hearing rooms.

When the project is finished the ACT will have modern court facilities that expand capacity for trials and alternative dispute resolution processes, improve jury and vulnerable witness facilities, enhance the custodial areas and support the use of courtroom technologies.



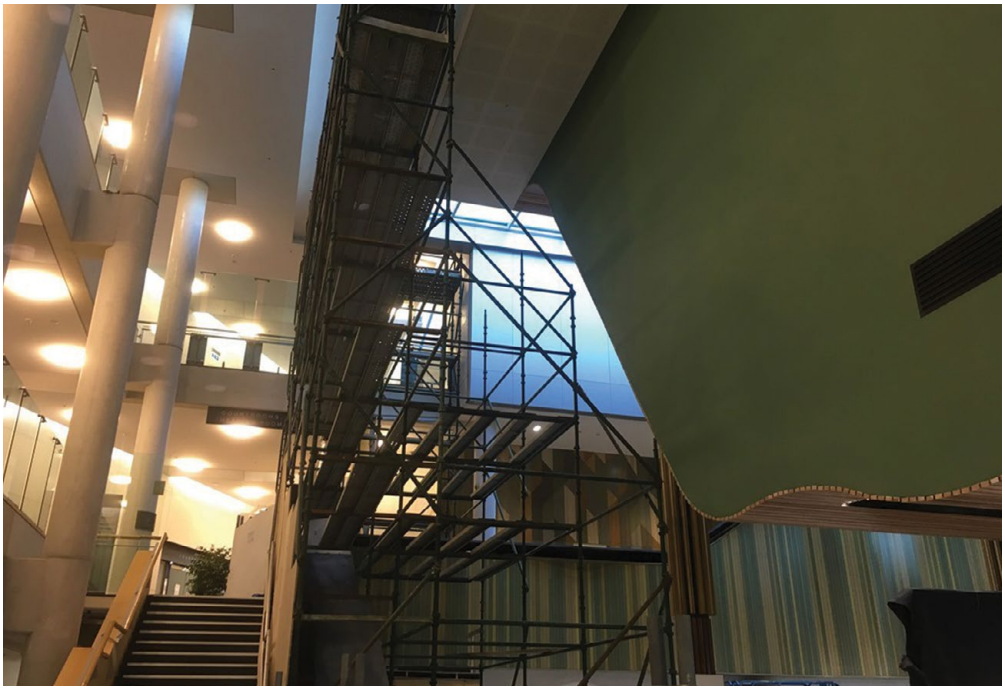
Construction in Courtroom 2



External construction

Construction in the Heritage Building

Construction in the Heritage Building: atrium



Main foyer under construction

CASE MANAGEMENT

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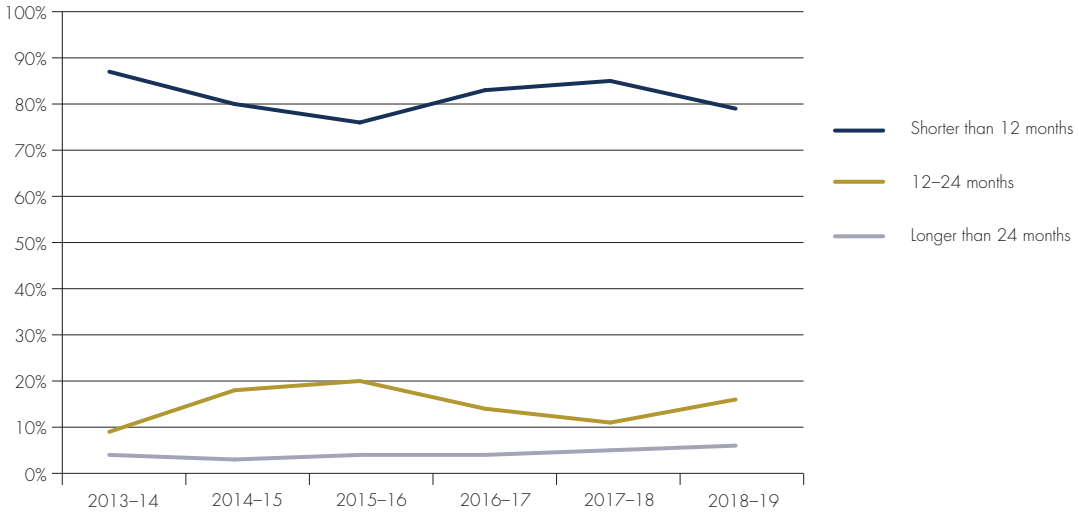
Statistics

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**		

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

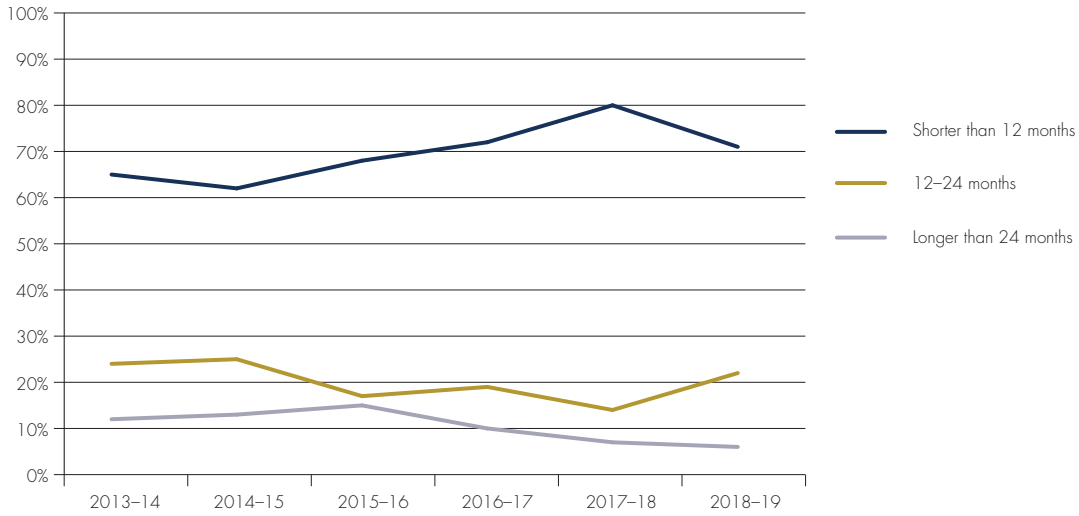
Outstanding criminal matters (in percentages)



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

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

Outstanding civil matters (in percentages)



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

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

Supreme Court Registrar, Annie Glover

Summary data 2018–19

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

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

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

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

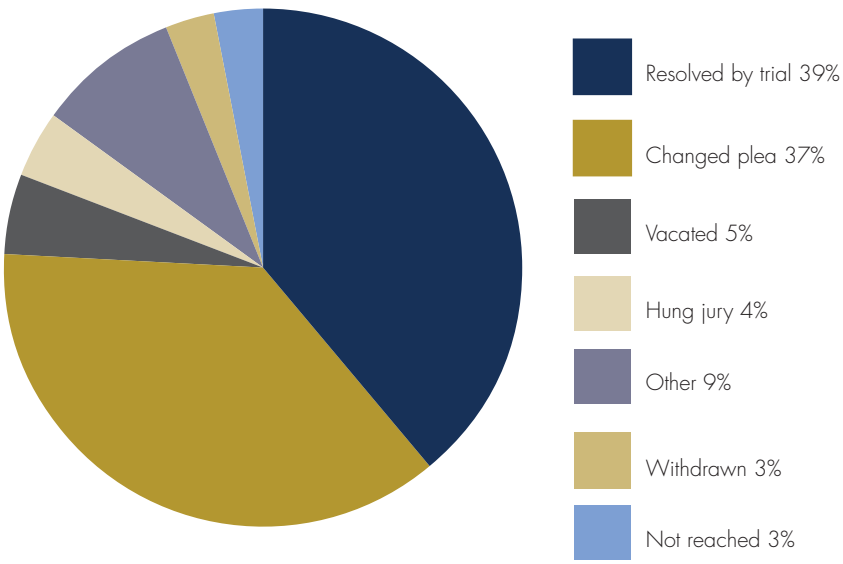
Court of Appeal*	2015–16	2015–16	2016–17	2016–17	2017–18	2017–18	2018–19	2018–19
	Civil	Criminal	Civil	Criminal	Civil	Criminal	Civil	Criminal
Lodgements	22	33	27	36	37	36	25	35
Finalisations	24	26	58	36	31	42	30	37
Clearance Rate	109%	79%	215%	100%	84%	117%	120%	106%
Pending Total	48	38	18	33	27	26	23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

Criminal listings by finalisation

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