

THE PUBLIC DEFENDERS
ANNUAL REVIEW
2011 - 2012

The Public Defenders

11 December 2012

The Hon. Greg Smith SC MP
Attorney General and Minister for Justice
Level 31 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2001

Dear Attorney

2011 – 2012 Annual Review

Pursuant to section 17 of the *Public Defenders Act 1995*, I am pleased to forward the Public Defenders' report for the year ending 30 June 2012 for tabling in Parliament.

Yours sincerely



Mark Ierace SC
Senior Public Defender

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Foreword

After 20 years in Liverpool Street, following the expiration of our lease we moved Chambers to a new location just a block away (1 Oxford Street) and so still close to all the CBD courts. The new premises are spacious and feature natural light for all Public Defenders and support staff, which is a quantum leap in the quality of our accommodation. The relocation project was completed with minimal disruption to our services, coinciding with the Christmas vacation period.

The design and fit-out includes a multi-functional area which is ideal for seminars, training and floor functions and doubles as a staff break-out area at other times. The integrated communications equipment allows us to convene floor meetings and conduct seminars with the participation of regionally-based Public Defenders, and is spacious enough for us to include other agency staff and private practitioners in our seminars, so as to complement our annual conference in the provision of legal education to the legal profession.

We resolved to re-name ourselves as Public Defenders Chambers, in honour of all former Public Defenders who have contributed to our proud reputation. At the opening of our new Chambers by the Hon. Greg Smith SC MP, NSW Attorney General and Minister for Justice, we were privileged to have as our guest of honour Don Champion, the son of the first Public Defender, Gordon Champion (1941-45). This was particularly fitting given that 2011 had marked the 70th anniversary of Gordon Champion's appointment. The night brought together many former Public Defenders including judges of the District, Supreme and High Courts.

This year, in collaboration with Legal Aid NSW, the Aboriginal Legal Service and the private profession, we devised a joint response to deal with the consequences of the High Court judgement of **Muldrock v The Queen**, which entails a review of some 1,000 cases in which a standard non-parole period was taken into account by the sentencing judge. This response capitalises on the productivity benefits of the public legal services working jointly with the private profession.

The year ended, to our delight, with the appointment of Deputy Senior Public Defender, Richard Button SC to the Bench of the Supreme Court, which was a fitting finale to his career as a Public Defender (1991-2012) and to a momentous year for the Public Defenders. We wish his Honour well in his challenging new role.

Finally, I take this opportunity to pay tribute to the hard work and dedication of each of the Public Defenders and to thank our support staff whose efforts allow us to focus on our demanding caseload. We are particularly grateful to our Chambers Manager Ruth Heazlewood, Senior Administrative Support Officer Susan Lock and the Department's Assets Management section (particularly Director, Kerry Marshall and project officer, Kerrie Kent), for their commitment to the realised objective of our new state of the art Chambers.



Mark Ierace SC
Senior Public Defender

Our Role

Public Defenders are barristers and members of the New South Wales Bar Association. All Public Defenders are independent statutory officers, appointed by the Governor in Council under the *Public Defenders Act 1995* (“the Act”).

The terms of appointment under the Act were changed in 2007 to remove life tenure for Public Defenders appointed after the commencement of the new provisions. Public Defenders may now be appointed for a period of up to seven years and may be reappointed after that term expires. The Senior and Deputy Senior Public Defenders are appointed for set but renewable terms of seven years.

The principal duty of a Public Defender under the Act is to represent people charged with serious criminal offences who have been granted legal aid by Legal Aid New South Wales (“LAC”), the Aboriginal Legal Service (NSW/ACT) Limited (“ALS”), or community legal centres (“CLCs”). Public Defenders may also assist in other matters such as inquests and government inquiries.

As barristers, Public Defenders are bound by the New South Wales Bar rules and are subject to the same disciplinary regime in relation to professional conduct as other counsel. The head of Chambers is the Senior Public Defender.

Functions of the Senior Public Defender

The Senior Public Defender is responsible to the Attorney General for the due exercise of his functions under the Act. Those functions are set out in detail in Section 8(1) and include:

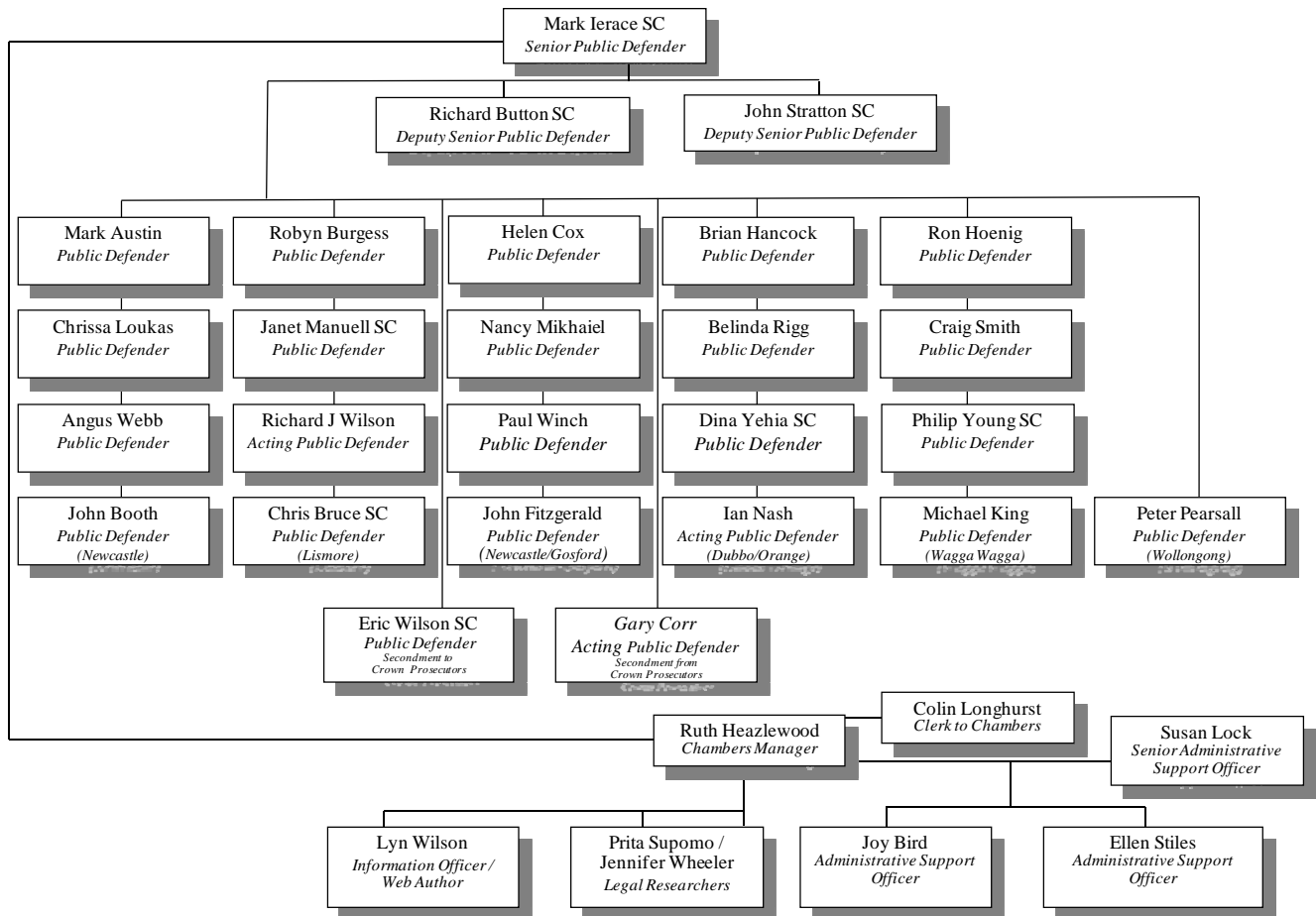
- the making of arrangements and giving of directions to ensure the effective and efficient conduct of Public Defenders’ work;
- providing advice and assistance to Public Defenders and monitoring their work;
- consulting with the LAC, the CLCs and the ALS on the provision of legal assistance to legally assisted persons; and
- advising the Attorney General on law reform.

Two Deputy Senior Public Defenders, John Stratton SC and Richard Button SC, assisted the Senior Public Defender in his duties in this reporting period. Richard Button SC was appointed to the Supreme Court of NSW on 12 June 2012.

Functions of Public Defenders

- The functions of a Public Defender are set out at Section 10 of the Act and include:
 - advising and appearing in criminal proceedings;
 - advising on matters referred by the Senior Public Defender;
 - carrying out other related functions as may be specified by the Attorney General in consultation with the Senior Public Defender; and
 - providing representation in Parole Board and *Mental Health Act* proceedings and related matters.

The Senior Public Defender may establish written guidelines on the exercise of the above functions by the Public Defenders.



Service Level Agreements

Public Defenders represent legally assisted people as defined by the Act. Most of this work is briefed by the LAC (about 86 per cent) either directly or by private solicitors acting under a grant of legal aid. Matters referred by the ALS account for 14 per cent of Public Defenders' work, with a small number of matters briefed by community legal centres. Formal arrangements for access to our services are contained in Service Level Agreements ("SLAs"), which are negotiated annually with the LAC and ALS.

The SLAs set a framework for the type of work undertaken by Public Defenders, with priority given to more serious and complex matters, such as appellate work and Supreme Court trials. By focusing on these high-cost matters, Public Defender services are used in the most efficient and effective manner. These agreements ensure we regularly consult with the parties. This helps maintain strong relationships with the LAC and ALS.

The SLAs also set out the regional and metropolitan sittings of the Supreme and District Courts covered by Public Defenders. We aim to balance our resources to ensure that regional and remote communities have equal access to Public Defenders whenever possible. The ratio of Sydney court matters to regional courts was 55:45 this year.

Seven full-time Public Defenders are based in regional locations at Dubbo/Orange, Lismore, Newcastle, Parramatta, Wagga Wagga and Wollongong.

Regional Public Defenders appear predominantly in the District Court sittings and to a lesser extent in Supreme Court matters. Sydney-based Public Defenders attend regional District and Supreme Court sittings across NSW as determined by the SLAs and their availability.

Public Defenders receive funding from both the LAC and ALS under these agreements (see Funding and Accountability).

Public Defenders and the Justice System

Public Defenders have long been regarded as an integral part of the justice system. Their extensive experience as criminal barristers is well recognised by all participants in the administration of criminal justice. Both the LAC and ALS use the services of Public Defenders in difficult and complex cases whenever possible to ensure the most effective use of legal aid resources.

In addition to providing representation to legally aided clients, Public Defenders play an important role beyond the courtroom through their involvement in government and other committees tasked with policy development. The Senior Public Defender and Deputy Senior Public Defenders participate in the District and Supreme Court User Groups in addition to other committees listed in this report.

The Senior Public Defender is a member of the Sentencing Council, the Supreme Court Media Consultation Committee and other departmental committees that aim to improve the administration of the criminal justice system in NSW.

Public Defenders work closely with the NSW Bar Association and have an elected representative on the Bar Council. A number of Public Defenders are also actively involved in the Association's committees as well as being consulted on criminal law issues. One Public Defender provides training for newly admitted barristers through the Bar Association's practice course and also provides regular advocacy training for the Australian Advocacy Institute to Australian and international lawyers.

Funding and Accountability

Funding

The primary source of funding is the Department of Attorney General and Justice. The Public Defenders' budget for this financial year was \$8,542,140, which represents the net cost of services. Employee-related expenses continue to represent about 85 per cent of the budget.

Additional revenue is obtained under the service level agreements from:

- The LAC, which provided \$762,609. This amount funds two Public Defender positions and provides partial funding for one legal research officer.
- The ALS, which provided \$165,000.

Fees from the Public Defenders annual criminal law conference and for private use of our video conferencing facility help offset some operational costs.

Public Defenders ended this year well within budget due to careful monitoring of expenditure and through additional revenue raised from the annual criminal law conference. Delays in filling vacancies also reduced salary costs.

(Full details of the Public Defenders' budget are available from the Department of Attorney General and Justice.)

Accountability

The Public Defenders are accountable to the Attorney General and his Department through the provision of standard quarterly reports on agreed performance indicators which are based on the number of completed briefs within defined jurisdictions. Regular reports are also provided on the progress of business plan initiatives, financial management and risk assessments.

Public Defenders are regularly audited and make progress reports to the Department on issues identified by internal audit reports. Ad hoc and yearly reports are provided to the LAC and ALS as required under the SLAs or as requested.

Public Defenders are not public servants under the *Public Sector Employment and Management Act 2002*. However, Public Defenders have adopted the administrative policies and procedures of the Department. Administrative staff are public servants and therefore bound by both the *Public Sector Employment and Management Act 2002* and *Public Finance and Audit Act 1983*.

Senior clerks employed by Public Defenders are responsible for the day-to-day management of administrative and financial matters.

Business Plan

The Business Plan for 2011/12 focussed on three initiatives:

- implementation of CASES brief management system;
- increasing representation for Sydney District Court matters; and
- relocating chambers.

Brief Management

The CASES software project's aim is to improve the process of receiving and dealing with requests for Public Defenders' services; to improve the tracking of work done on briefs; and ensure statistics are as accurate as possible. It will also streamline a number of administrative procedures. The implementation of CASES was delayed due to the higher priority of relocating chambers within a very short timeframe. Although work has continued on the project, technical issues also contributed to the delay. The implementation date has been pushed back to October 2012.

Sydney District Court

Public Defenders appear in the Downing Centre District Court when available, however due to issues in that court, the number of briefs to Public Defenders in the Downing Centre has dropped over the years.

The Senior Public Defender has sought to address the LAC's need for Public Defenders at this court by directing a Public Defender to accept briefs specifically for this court.

Relocation of Chambers

After 21 years at the same location Public Defenders were required to vacate their chambers at 175 Liverpool Street, Sydney by the end of December 2012. Fortunately new chambers were found nearby and at a lower rent. The Senior Public Defender and senior support staff worked closely with the Department's Assets Management project team, the architect and builders to design suitable premises. It was not an easy task but the move was successfully completed with minimal disruption to services just before the end of court term. The new premises provide an ideal work environment, and has the capacity to incorporate new offices in the future if needed.

The chambers were officially opened on 9 March 2102 by the Hon. Greg Smith SC MP, the Attorney General and Minister for Justice, and were renamed Public Defenders Chambers.

Legal Representation

There are 25 Public Defender positions for the whole of NSW. This number fluctuates in any given year due to unfilled vacancies, long service leave and other leave. It is inevitable that the demand for Public Defender representation exceeds our capacity. This year Public Defenders accepted 886 requests for assistance and declined 1,219 requests. Matters are declined for a number of reasons, including conflict of interest and unavailability of a Public Defender.

The acceptance and allocation of briefs to Public Defenders is largely determined by the service level agreements with the LAC and ALS. The purpose of these agreements is to ensure the most cost effective use of our mutual resources. The types of matters where Public Defenders are briefed include:

- Supreme Court trials;
- long and/or complex District Court trials;
- circuit work at nominated regional centres;
- appellate work in the High Court, Court of Criminal Appeal and Court of Appeal; and
- murder committal hearings and other committals involving serious charges.

Public Defenders also appear in coronial inquiries either at the request of the LAC, the ALS or the Crown Solicitor's Office. The distribution of work (matters completed) across the various court jurisdictions is as follows:

- District Court, 47%;
- Supreme Court, 12%;
- High Court and Court of Criminal Appeal, 23%; and
- Local, Coroner's and Children's Courts, 18%.

Preparation time amounted to 3,473 days with an additional 2,758 conference hours spent with solicitors, clients and witnesses. This year Public Defenders spent 1,691 days in court.

Representation in regional and non-metropolitan court sittings accounts for approximately 45 per cent of our work. In addition to the placement of Public Defenders at Dubbo, Lismore, Newcastle, Wollongong and, more recently at Wagga Wagga, Public Defenders spend many weeks attending regional District and Supreme Court sittings.

Muldrock v The Queen

In 2003, standard non-parole periods for specified offences were introduced into NSW sentencing law in Part 4 Div 1A of the Crimes (Sentencing Procedure) Act 1999. The decision of ***R v Way*** (2004) 60 NSWLR 168 was the leading authority on how the standard non-parole period provisions should be applied. In ***Muldrock v The Queen*** (2011) 244 CLR 120 the High Court determined that the interpretation of the legislation concerning standard non-parole periods by the NSW Court of Criminal Appeal in ***Way*** was wrong and that, among other matters, the standard non-parole period cannot have "determinative significance" in sentencing for an offence carrying a standard non-parole period. In the light of ***Muldrock*** the LAC set up a team to review the cases of all offenders who have been sentenced for an offence carrying a standard non-parole period to determine whether there is a "***Muldrock*** error" which has adversely affected the sentence, with a view to applying for a review of the sentence where such error is found. Initially Public Defenders provided advice to the review team, and reviewed all relevant Crown and applicant appeals in the Court of Criminal Appeal. At present Public Defenders are assisting the review of relevant decisions of single judges in the District and Supreme Courts. Public Defenders will be briefed to appear in matters where merit is found.

Statistics on these matters are reported separately as this work is undertaken in addition to the usual work of Public Defenders. There are currently two Public Defenders working almost exclusively on these cases with the ad hoc assistance of two other Public Defenders.

Matters Completed 2011 – 2012		
Jurisdiction	State	Commonwealth
High Court advices & appeals	3	1
Court of Criminal Appeal advices & appeals	182	10
Court of Appeal	6	1
Supreme Court trial & sentence matters	106	2
District Court trial & sentence matters	404	12
Local Court committals & related matters	137	4
Coroner's Court	1	0
Children's Court	17	0
Total	856	30
Total matters	881	
Other assistance (non-court)	347	

SNPP ("Muldrock") Matters	
Total Matters	304
Merit	21
No Merit	261
Days to Prep	518
Conferences (hrs)	25
Days in Court	0

Secondments

Public Defenders have arranged occasional secondments between these Chambers and the Crown Prosecutors for a number of years. The secondment is an acting appointment and, as such, is limited in time by each of the relevant Acts to no more than 12 months at a time. The secondment may be extended by the Attorney General.

Gary Corr, Crown Prosecutor and Eric Wilson SC, Public Defender, continued their secondments to the Public Defenders and the Crown Prosecutors respectively.

Other Assistance Provided

Public Defenders are an important resource for the legal profession and this year they provided 347 instances of telephone and brief written advice to the profession on legal, ethical and practice issues. Public Defenders often provide urgent telephone advice to practitioners attending court. Although this is often an interruption to their own work, all calls are taken and dealt with as soon as possible by a Public Defender.

The Public Defenders website is a valuable resource for the profession, students and the general public. The sentencing tables and other resources on the website are used both by practitioners and the judiciary, who regularly comment on the usefulness of this resource.

Law Reform

An important function of Public Defenders under the Act is the provision of advice to the Attorney General and others on law reform. We regularly make submissions on criminal law reform at the request of the NSW and Australian Law Reform Commissions, Criminal Law Review and Parliamentary Committees of Inquiry. In addition, a number of Public Defenders participate in law reform committees and advisory groups.

Mark Ierace SC, Senior Public Defender, is a member of the NSW Sentencing Council.

Written submissions were made on the following:

- NSW Law Reform Commission report on 'Cheating at gambling'.
- NSW Law Reform Commission review of the *Bail Act*.
- NSW Law Reform Commission review of the *Crimes (Sentencing Procedure) Act 1999*.
- NSW Law Reform Commission review of instructions to jurors.
- Statutory Review of Part 8 of the *Crimes (Appeal and Review) Act 2001*.
- Review of Disclosure Practices of Prosecution Authorities.
- Legislative Council Standing Committee on Social Issues inquiry on domestic violence.
- Criminal Justice Division of the Commonwealth Attorney General's Department review of Chapter 2 Model Criminal Code.

Participation in Committees

Public Defenders are frequently invited to participate on various committees involved with the administration of justice. This year Public Defenders were members of the following committees:

- The NSW Bar Association Criminal Law Committee.
- The NSW Bar Council.
- The Court of Criminal Appeal and Common Law Division Court Users Group.
- The Supreme Court Media Consultation Group.
- NSW Sentencing Council.
- The DNA Review Panel.
- District Court Criminal Listing Committee.
- Western NSW Community Legal Centre Committee.
- Crime and Justice Reform Committee.
- Corrective Services NSW Legal Practitioners Committee.
- DAGJ Forensic Procedures Working Group.
- LAC Specialist Barristers panels.

Aboriginal Lawyers Program

Since 2001, Public Defenders have provided an Aboriginal Law Graduates Program following approval by the then Attorney General for funding under the Indigenous Justice Strategy. Funding of \$48,061 was provided this year.

The initial aim of the program was to assist Aboriginal law graduates establish themselves at the NSW Bar.

The program was expanded in 2006 to include all Aboriginal law graduates needing assistance to move into a legal career, not just those wishing to go to the Bar. Funding can now be directed to pay for the practical legal training component necessary for admission to practise as a solicitor. Under this program, Public Defenders may pay the course fees and salary for up to six months for successful applicants. Eleven graduates have completed the program since its inception and have been admitted as legal practitioners in NSW.

This year Kirsten McClellan was accepted into the program.

Continuing Professional Education

The Public Defenders Annual Criminal Law Conference continues to be a highlight of the continuing legal education calendar for NSW and interstate practitioners.

The opening address was by the Attorney General and Minister for Justice, the Hon. Greg Smith SC MP, who spoke on developments in criminal law policy. The keynote speaker was the Hon. Michael Kirby AC CMG who addressed the audience on ethics. Full details of the speakers and conference papers are available on our website.

Public Defenders are highly sought after to speak at seminars and conferences conducted by the LAC, ALS, Young Lawyers, the NSW Bar Association, College of Law and other tertiary institutions. This year Public Defenders spoke at 82 conferences, talks, seminars and similar events, often in their own time. We provide regular speakers for the Enough is Enough victims of crime support group and assist with the training program for support workers organised by Victims and Witnesses of Crime Court Support Inc.

Public Defenders play an important role in providing tutors for criminal readers at the NSW Bar, as well as providing instructors for the Bar Association's Readers course, and tutors for the Australian Advocacy Institute.

Public Defenders continue to support law students with their external placement programs and practical legal training by offering volunteer opportunities throughout the year. We regularly provide work experience placements for students each semester from the University of Sydney, University of New South Wales, the University of Wollongong and Macquarie University. These placements are highly prized and we receive many applications from students wishing to work with Public Defenders. We also provide work experience placements for year 10 high school students.

Public Defenders provide an annual prize for a best performing student across all postgraduate students at the UNSW Law Faculty.

Government Information (Public Access) Act 2009 (GIPAA)

Public Defenders meet the requirements of the GIPA Act to provide open access to information for the public where possible and without charge. Our website provides access to the following documents;

- Annual reports.
- Service level agreements.
- Relevant legislation.
- Guidelines for Appointment of Public Defenders.
- Legal research materials.
- Information on internships.
- Papers prepared by Public Defenders.
- Conference papers.

Legal professional privilege generally precludes access to clients' information

Movements and Appointments as at the time of publication

		Appointed
Senior Public Defender (SPD)		
Mark Ierace SC	SPD	16.07.07
Deputy Senior Public Defenders (DSPD)		
John Stratton SC	DSPD originally appointed	28.07.05 10.03.97
Richard Button SC	DSPD permanently appointed Appointed as Judge of NSW Supreme Court	21.10.10 06.05.91 12.06.12
Public Defenders		
Mark Austin	permanently appointed	05.06.95
John Booth	acting permanently appointed	07.01.98 09.08.01
Chris Bruce SC	permanently appointed	26.04.88
Robyn Burgess	acting (part-time) permanently appointed (currently part-time)	13.12.00 10.11.05
Helen Cox	permanently appointed (currently part-time)	17.07.95
John Fitzgerald	acting permanently appointed	25.01.10 25.01.11
Brian Hancock	acting fixed term appointment*	29.08.05 29.10.09
Ron Hoenig	permanently appointed	06.10.87
Michael King	acting permanently appointed	30.08.10 30.08.11
Chrissa Loukas	permanently appointed	17.07.95
Janet Manuell SC	acting fixed term appointment*	06.02.07 13.06.08
Nancy Mikhaiel	acting fixed term appointment*	12.05.08 12.05.09
Ian Nash	acting	23.01.12
Peter Pearsall	permanently appointed	06.12.01
Belinda Rigg	acting permanently appointed (currently on maternity leave)	27.01.04 13.07.06
Craig Smith	acting fixed term appointment*	13.06.06 13.06.08
Angus Webb	permanently appointed	15.07.96
Gary Corr	secondment (from Crown Prosecutors)	01.01.09 30.06.12
Eric Wilson SC	acting permanently appointed seconded to Crown Prosecutors	27.01.98 09.08.01 01.07.10 30.06.12
Richard Wilson	acting	23.01.12
Paul Winch	permanently appointed	21.10.99
Dina Yehia SC	acting permanently appointed	28.07.99 08.05.03
Philip Young SC	permanently appointed	24.07.02

* Appointment for fixed term of 7 years renewable under 2007 amendments to the Act.

Contact Details

The Public Defenders are located at

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DARLINGHURST NSW 2010

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SYDNEY DOWNTOWN

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(02) 9268 3168

Website

www.publicdefenders.nsw.gov.au

Chambers Manager

Ruth Heazlewood

Clerk to Chambers

Colin Longhurst

Hours

Monday to Friday between the hours of 8.30am and 5.00pm