

THE PUBLIC DEFENDERS
ANNUAL REVIEW
2013 – 2014

The Public Defenders

The Hon. Brad Hazzard MP
Attorney General and Minister for Justice
52 Martin Place
SYDNEY NSW 2000

16 December 2014

Dear Attorney

2013 – 2014 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 2014 for tabling in Parliament.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Mark Ierace', written in a cursive style.

Mark Ierace SC
Senior Public Defender

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Foreword

Foreword to our Annual Report 2013-14

The biggest challenge this year has been the significant increase in District Court trials throughout the state. This trend commenced in about May 2012 and has continued since then. This has placed pressure on all criminal justice agencies at a time when further resources are limited, requiring an innovative approach within existing resources.

In co-operation with the District Court, Legal Aid NSW, the Aboriginal Legal Service, private solicitors and the NSW DPP, we participated in special call-overs at some regional locations where the back-log was of particular concern; Port Macquarie, Tamworth, Armidale and Wagga. Four Public Defenders were assigned to these call-overs, and achieved considerable savings in court time by identifying early pleas of guilty and a refinement of charges, where appropriate.

Our two Deputy Senior Public Defenders departed Chambers during the year. John Stratton SC returned to the private Bar in August 2013 and Dina Yehia SC, who had been appointed Deputy Senior Public Defender in May 2013 (our first female Deputy Senior Public Defender), was appointed to the District Court Bench in May 2014. We wish John and Dina every success in their new roles. Chris Bruce SC was appointed an Acting Deputy Senior Public Defender, pending the permanent filling of the two positions.

Another way in which we have sought to use our resources to assist in the smooth functioning of the criminal courts is by training young criminal law practitioners. Public Defender Craig Smith developed an advocacy course for private barristers who have been at the Bar for less than five years, and who practise primarily in criminal law. The scheme involved 26 barristers who were split into two groups. Each group attended six two-hour intensive workshops presented by a different Public Defender or a judicial officer. Some places were also reserved for Legal Aid and Aboriginal Legal Service solicitor advocates. The feedback was so positive that the series will become an annual program.

There is no doubt that the next few years will be at least as challenging as this year to all agencies in the Criminal Justice System; we will continue to use our resources creatively and efficiently to meet these challenges.



Mark Ierace SC
Senior Public Defender

The Role of Public Defenders

Public Defenders are barristers appointed as independent statutory officers by the Governor of NSW 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 following a probationary period of 12 months and may be reappointed after that term expires. The Senior Public Defender and Deputy Senior Public Defenders are appointed for renewable terms of seven years.

The principal duty of a Public Defender is to represent persons charged with serious criminal offences who have been granted legal assistance (generally referred to as 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 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 for professional conduct as other counsel. The head of Chambers is the Senior Public Defender.

Functions of the Senior Public Defender

The Senior Public Defender, Mark Ierace SC, 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, ALS and CLCs on the provision of legal assistance to legally assisted persons; and
- advising the Attorney General on law reform.

Three Deputy Senior Public Defenders, John Stratton SC, Dina Yehia SC and Chris Bruce SC, assisted the Senior Public Defender in his duties in this reporting period. John Stratton SC resigned in August 2013 and this position was not filled for the balance of the year. Dina Yehia SC was appointed Judge of the District Court on 5th May 2014. Ms Yehia’s position was filled on an acting basis by Chris Bruce SC.

Functions of Public Defenders

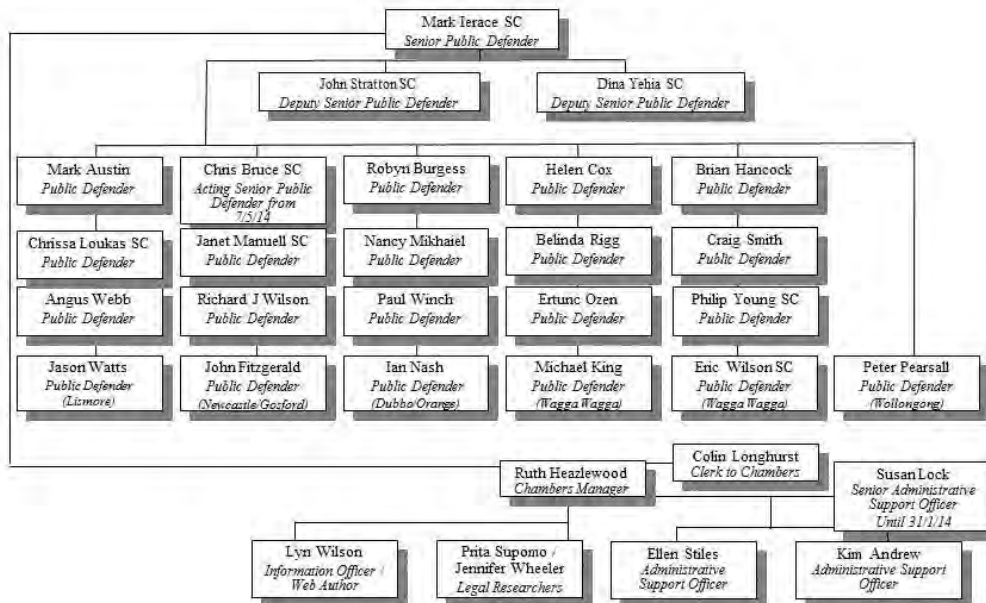
The functions of a Public Defender are set out at Section 10 of the Act and include:

- 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.

Organisational Chart as at 30 June 2014



Service Level Agreements

Public Defenders represent legally assisted people as defined by the Act. About 84 per cent of this year's work was briefed by the LAC, either directly or by private solicitors acting under a grant of legal aid. Matters referred by the ALS account for 16 per cent of Public Defenders' work. 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, lengthy 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 and help 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 57:43 this year.

Regional Public Defenders appear predominantly in the District Court 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 service level agreements.

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 cost effective use of legal aid resources.

One initiative this year was the implementation of special call-overs at Port Macquarie, Wagga Wagga, Tamworth and Armidale District courts where the Chief Judge of the District Court had identified a backlog in the disposition of trial matters. The Public Defenders worked with the court officers, Crown Prosecutors, LAC, ALS and private solicitors to identify and resolve matters listed at these call-overs to successfully reduce the backlogs.

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 is a member of the Sentencing Council, the Supreme Court Media Consultation Committee, the Department's Criminal Justice Strategy Board and other departmental committees. 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.

Funding and Accountability

Funding

The primary source of funding is the Department of Justice Department. The Public Defenders' **budget for this financial year was \$8,266,307** 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 SLAs from:

- The LAC, which provided \$837,430. This amount funds two Public Defender positions and provides partial funding for one legal research officer.
- An additional grant of \$472,233 was made by LAC for the provision of an acting Public Defender for Port Macquarie District Court for a period of 14 months. This funding will carry over to the 2014-15 financial year.
- The ALS, which provided \$170,000.

Fees from the Public Defenders annual criminal law conference, the “Under 5’s Practical Advocacy Course” and for private use of our video conferencing facility help offset some operational costs.

Public Defenders ended this year within budget.

(Full details of the Public Defenders’ budget are available from the Department of Justice.)

Accountability

The Public Defenders are accountable to the Attorney General and his Department through the provision of 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. Annual statistics are provided to the LAC and ALS as required under the service level agreements.

Although Public Defenders are not public servants the office has adopted the administrative policies and procedures of the Department. Administrative staff are public servants and therefore bound by both the *Government Sector Employment Act 2013* and *Public Finance and Audit Act 1983*.

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

Business Plan

The Business Plan for 2013/14 focussed on two initiatives:

- Providing an online booking system for solicitors requesting Public Defender services
- Establishing a portal for use by Public Defenders to improve timeliness and ease of access to information

The **online booking system** will create considerable efficiencies in the processing of requests for Public Defenders. The online form will enable practitioners to make a request for a Public Defender at any time and the use of “drop-down” menus will make it much easier to complete the form quickly and accurately. The online form will also improve the response time by this office for these requests.

Work continued this year on designing the form and establishing the necessary technical support. It is expected the online booking system will commence in December 2014 with a staged implementation process commencing with Legal Aid NSW solicitors, the Aboriginal Legal Service followed by the private profession.

The **portal project** was delayed as the online booking system had greater priority.

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 827 requests** for assistance and **declined 1,489 requests**. Public Defenders hold 8 -15 briefs on average at any given time, depending on the nature of their practice.

Matters are declined for a number of reasons, including conflict of interest and unavailability of a Public Defender.

Success in the High Court

Dina Yehia SC, Deputy Senior Public Defender, was successful in arguing the High Court case of ***Bugmy v The Queen*** and acted in ***Honeysett v The Queen*** up to the point of special leave being granted, before having to withdraw to take up her appointment as judge of the District Court. A summary of the cases is set out below:

In ***Bugmy v The Queen*** [2013] HCA 37, the High Court considered the extent to which an Aboriginal offender's background of social deprivation should factor as a principle in sentencing, and whether the effects of such a background diminish over time.

On appeal from the NSW Court of Criminal Appeal, the appellant argued that the CCA erred in their application of the relevant principles to be considered when sentencing Aboriginal offenders. Further, they advanced a ground that the unique circumstances experienced by all Aboriginal offenders are relevant to the moral culpability of a particular offender.

Whilst the court held that the broader circumstances of deprivation experienced by Aboriginal offenders cannot be taken to reduce the moral culpability of an individual offence, the unique circumstances of an individual offender nevertheless remain an important factor, particularly those circumstances that arose by virtue of that offender's Aboriginality.

Further, although the courts may not take judicial notice of the systemic background of socio-economic deprivation uniquely experienced by indigenous offenders, the profound impact of such a background does not diminish over time, and remains an important consideration to be given full weight when determining an appropriate sentence in each instance. This principle applies irrespective of the identity of the individual offender, or their membership to a particular cultural/ethnic group.

The appeal was allowed, with the order of the CCA regarding the offence be set aside and the Director's appeal remitted to that court.

In ***Honeysett v The Queen*** [2014] HCA 29, the High Court examined the extent to which opinion evidence adduced by the Crown fell within the category of "specialised knowledge" under section 79(1) of the *Evidence Act*.

At trial, the prosecution adduced evidence concerning the anatomical similarity of the accused and CCTV images of an offender. Both the trial judge and the NSW Court of Criminal Appeal held such evidence to meet the substantive requirements of section

79(1), as the evidence was an opinion based on the specialised knowledge derived from that person's training, study, or experience.

The High Court held that whilst the opinion-maker did possess expertise in human anatomy, his opinion regarding the identification of similarity was not wholly or substantially based on this knowledge but, rather, on his own subjective impression of what he perceived upon viewing the CCTV images.

The appeal was allowed, with the conviction of the appellant quashed and a new trial ordered.

Determining Priorities by Service Level Agreements

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 approximately as follows:

- District Court, 45%;
- Supreme Court, 18%;
- High Court and Court of Criminal Appeal, 22%; and
- Local, Coroner's and Children's Courts, 10%.

Preparation time amounted to 2,946 days with an additional **2,766 conference hours** spent with solicitors, clients and witnesses. This year Public Defenders spent **1,607 days in court**.

Representation in regional and non-metropolitan court sittings accounts for approximately 43 per cent of our work. Seven Public Defenders are located at Orange/Dubbo (1), Lismore (1), Newcastle (2), Wollongong/Campbelltown (1) and Wagga Wagga (2). One Public Defender is located at the Parramatta Justice Precinct.

Public Defenders located in Sydney also spend many weeks attending regional District and Supreme Court sitting with regular attendance at Bega, Queanbeyan and Tamworth courts.

Matters Completed 2012 – 2013		
Jurisdiction	State	Commonwealth
High Court advices & appeals	6	1
Court of Criminal Appeal advices & appeals	157	7
Court of Appeal	1	0
Supreme Court trial & sentence matters	140	1
District Court trial & sentence matters	346	4
Local Court committals & related matters	64	2
Mental Health Review Tribunal	1	0
Coroner's Court	3	0
Children's Court	8	0
SNPP (" <i>Muldrock</i> " matters)	30	N/A
Total	756	15
Total matters	771	
Other assistance (non-court)	401	

Other Assistance Provided

Public Defenders are an important resource for the legal profession. This year they provided **401 instances of assistance** to the profession on legal, ethical and practice issues either by telephone or brief written advices.

Our 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. Public Defenders are routinely invited to 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:

- Attorney General's review of the new strangulation offence.
- NSW Law Reform Commission reference on criminal appeals.
- NSW Law Reform Commission review of sentencing.

- NSW Law Reform Commission on the reference on encouraging appropriate early pleas in indictable proceedings.
- Victorian Parliament Report – Betrayal of Trust.
- Attorney General’s review of family impact statements in homicide cases.
- Attorney General’s review of the Jury Act 1977.
- Participation in the working group arising from the Legislative Council Select Committee review of the partial defence of provocation.
- Sentencing Council review of standard non-parole periods.
- Submission to Criminal Law Review on the Crimes Amendment (Provocation) Bill 2013.
- Provision of evidence before the Joint Select Committee on Sentencing of Child Sexual Assault Offenders.

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

Aboriginal Graduate 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. The Department provided funding of \$50,740 this year.

The initial aim of the program was to provide financial and mentoring assistance to Aboriginal law graduates wishing to 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 (PLT) component necessary for admission to practise as a solicitor. Under this program, Public Defenders may pay the course fees and salary for successful applicants, usually for a period of up to six months.

This year we provided a placement for one law graduate, Peta MacGillivray, who commenced her employment in early June 2014 with the aim of completing her PLT studies in October 2014. Peta was an exceptional student and has demonstrated a strong commitment to social justice throughout her placement.

Continuing Professional Education

Practical advocacy course

This year we introduced a practical advocacy course for junior barristers with five years or less experience at the Bar. Twenty six junior barristers completed the course which was conducted over six months with one topic presented to two groups each month.

The course was presented by Mark Ierace SC, Craig Smith, Ertunc Ozen and Belinda Rigg, all from Public Defenders chambers. Two sessions were presented by Judge Yehia SC and Judge Zahra SC of the District Court, both former Public Defenders.

The topics covered were:

- Cognitive impairment – advocacy issues.
- Qualifying and cross-examination of ad hoc experts.
- Cross-examination on a *voire dire* on reasonable suspicion.
- Cross-examination of a complainant in a sexual assault trial.
- Advocacy – the jury perspective.
- Opening and closing addresses.

Feedback from the course was extremely positive and it is hoped that a similar course will be conducted next year.

Annual Conference

The Public Defenders Annual Criminal Law Conference continues to build on its success. This year we exceeded full capacity for the venue and continue to receive very positive feedback for this event. Although primarily intended for NSW criminal lawyers, the conference continues to attract delegates from interstate due to its reputation for providing high quality speakers.

The opening address was by former Attorney General and Minister for Justice, the Hon. Greg Smith SC MP, who spoke on developments in criminal law and policy. Full details of the speakers and conference papers are available on our website.

Our contribution to training

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. We also provide regular speakers for the Enough is Enough, a victims of crime support group and assist with the training program for support workers organised by Victims and Witnesses of Crime Court Support Inc.

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.

We also provide tutors for readers at the Bar, internships for law students undertaking external placement programs and practical legal training as well as year 10 work experience opportunities. These placements are highly prized and we receive many applications from law students wishing to work with Public Defenders.

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 precludes access to clients' information.

Movements and Appointments as at the time of publication

		Appointed
Senior Public Defender (SPD)		
Mark Ierace SC	SPD	16.07.2007
Deputy Senior Public Defenders (DSPD)		
John Stratton SC	originally appointed DSPD Resigned	10.03.1997 28.07.2005 05.08.2013
Dina Yehia SC	acting permanently appointed DSPD Appointed to the District Court bench	28.07.1999 08.05.2003 25.10.2012 05.05.2014
Public Defenders		
Mark Austin	permanently appointed	05.06.1995
John Booth	acting permanently appointed (currently part-time and on extended leave)	07.01.1998 09.08.2001
Chris Bruce SC	permanently appointed	26.04.1988
Robyn Burgess	acting (part-time) permanently appointed (currently part-time)	13.12.2000 10.11.2005
Helen Cox	permanently appointed (currently part-time)	17.07.1995
John Fitzgerald	acting fixed term appointment*	25.01.2010 25.01.2011
Brian Hancock	acting fixed term appointment*	29.08.2005 29.10.2009
Michael King	acting fixed term appointment*	30.08.2010 30.08.2011
Chrissa Loukas SC	permanently appointed	17.07.1995
Janet Manuell SC	acting fixed term appointment*	06.02.2007 13.06.2008
Nancy Mikhael	acting fixed term appointment*	12.05.2008 12.05.2009
Ian Nash	acting fixed term appointment*	23.01.2012 23.01.2013
Ertunc Ozen	acting fixed term appointment*	27.05.2013 03.06.2014
Peter Pearsall	permanently appointed	06.12.2001
Belinda Rigg	acting permanently appointed (currently part-time)	27.01.2004 13.07.2006
Craig Smith	acting fixed term appointment*	13.06.2006 13.06.2008
Jason Watts	acting fixed term appointment*	03.06.2013 27.05.2014
Angus Webb	permanently appointed	15.07.1996
Eric Wilson SC	acting permanently appointed	27.01.1998 09.08.2001
Richard Wilson	acting fixed term appointment*	23.01.2012 23.01.2013
Paul Winch	permanently appointed	21.10.1999
Philip Young SC	permanently appointed	24.07.2002

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

Contact Details

The Public Defenders are located at

Public Defenders Chambers
23/1 Oxford Street
DARLINGHURST NSW 2010

DX 11545
SYDNEY DOWNTOWN

Telephone

(02) 9268 3111

Facsimile

(02) 9268 3168

Website

www.publicdefenders.justice.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