

THE PUBLIC DEFENDERS
ANNUAL REVIEW
2014 – 2015

The Public Defenders

The Hon. Gabrielle Upton MP
Attorney General
Level 18/52 Martin Place
SYDNEY NSW 2000

16 December 2015

Dear Attorney

2014 – 2015 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 2015 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

Public Defenders play a vital role in the representation of disadvantaged people in the criminal courts of NSW. An equally important contribution is our input into policy and law reform issues within the criminal justice system. *The Public Defenders Act 1995* provides that the Senior Public Defender may advise the Attorney General on law reform issues relevant to the practise of criminal law – a function that is taken very seriously by this office.

In this regard, we occupy a unique position to observe the daily workings of the justice system and provide advice and guidance on both practical and legislative solutions. We are ever mindful of the need to use our resources efficiently whilst ensuring that the fair dispensing of justice in any given case is never compromised. We also work closely with Legal Aid NSW and the Aboriginal Legal Service NSW/ACT to deliver our services in areas of highest need.

This year in particular has been one of innovation and collaboration with many other partner agencies including the judiciary, the abovementioned legal aid agencies, the Office of the NSW Director of Public Prosecutions, the Bar Association and Department of Justice working groups. An Acting Public Defender was appointed for two years to Port Macquarie, funded by Legal Aid and has worked in close co-operation with their new office.

This report mentions, amongst other issues, our input into helping to address the pressing problem of delays in the disposition of District Court trials, including the development of the “Rolling List Court” pilot program, which commenced in April at the Downing Centre District Court. This program is being evaluated by BOCSAR. Early indications suggest it is meeting one of its key objectives of resolving trials in an appropriate way at the earliest opportunity, thereby reducing overall court time and expense. The program also encourages pro-active counsel-based case management, so that issues in dispute are identified early and trials shortened.

We have contributed to enhancing the advocacy skills of junior barristers by continuing our series of intensive workshops for them, presented by members of the judiciary and Public Defenders. This year we also initiated an interagency consideration of how advocacy skills and practices might be improved more generally at the private Bar and by solicitors practising in criminal law. In so doing, we are mindful of the direct benefits to Legal Aid and the potential for significant indirect cross-Departmental savings which would be occasioned by earlier pleas, shorter and more focussed trials and fewer appeals.

Public Defenders were delighted that Craig Smith and Belinda Rigg received silk, in recognition of their excellence by their peers. We also celebrated the appointments of Craig and Kara Shead, formerly a Crown Prosecutor, as Deputy Senior Public Defenders.

Finally, I want to note the hard work of the Public Defenders over the year, particularly our regionally-based Public Defenders, four of whom practise effectively as sole practitioners, without the benefit of collegiate Chambers support. Our fine reputation is due to each individual Public Defender maintaining our values on a daily basis.

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 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.

Organisational Structure and Duties of Public Defenders

The Senior Public Defender

The Senior Public Defender, Mark Ierace SC, is responsible to the Attorney General for the proper 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.

The Senior Public Defender also conducts a Supreme Court trial and appellate practice in addition to his management and legal policy responsibilities.

Deputy Senior Public Defenders

The Act provides that the Governor may appoint one or more Deputy Senior Public Defenders. There are two Deputy Senior Public Defender positions. These are currently occupied by Craig Smith SC and Kara Shead. The functions of a Deputy Senior Public Defender include assisting the Senior Public Defender as required in addition to the conduct of trial and appellate practices.

The Senior and Deputy Senior Public Defenders are the senior management team for chambers and generally work together on policy and law reform matters and higher level administrative matters involving Public Defenders.

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.

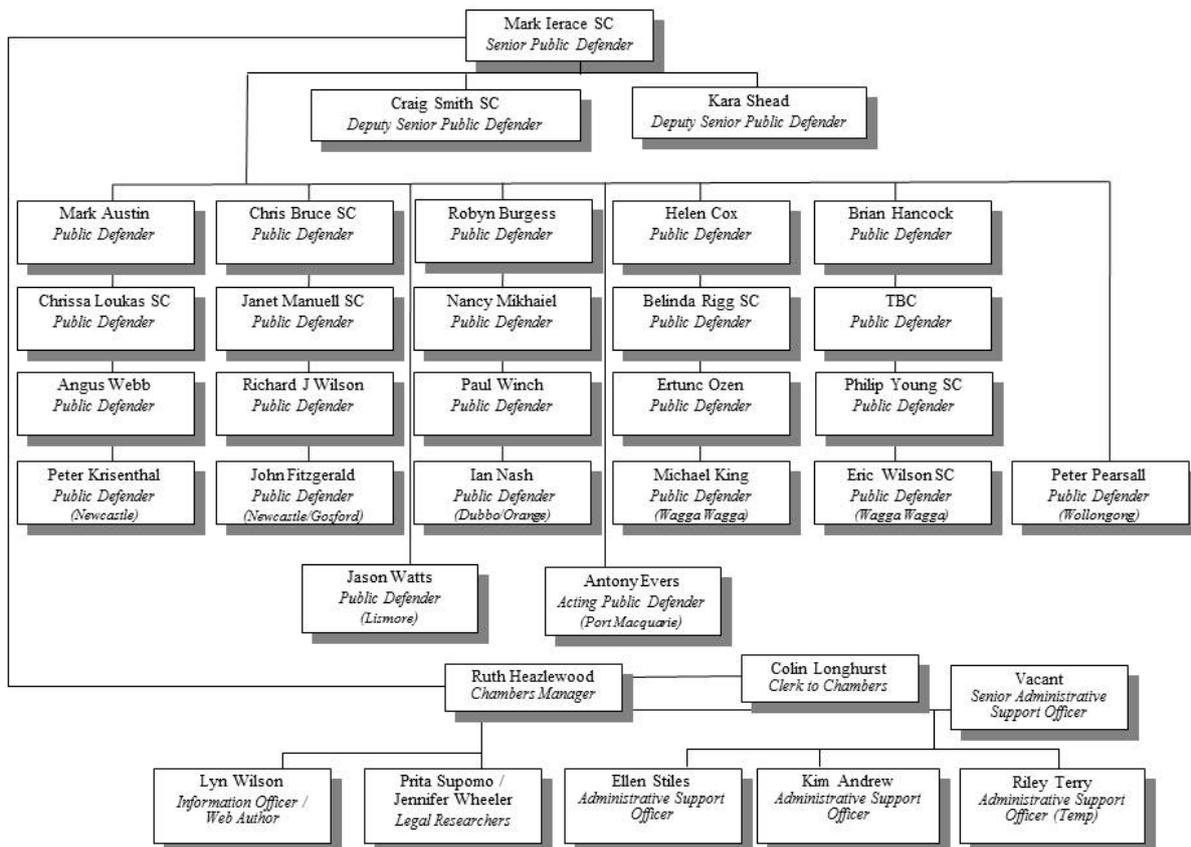
The Senior Public Defender may establish written guidelines on the exercise of the above functions by the Public Defenders.

Appointment of Public Defenders

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.

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. Two of these positions are fully funded by the LAC on an ongoing basis as set out in our service level agreement. An additional acting Public Defender has been funded by LAC to provide representation at Port Macquarie and Taree District Court.

Organisational Chart as at June 2015



Legal Representation

Public Defenders represent legally assisted people defined by the Act as “a person who is a legally assisted person within the meaning of the Legal Aid Commission Act 1979 or who is receiving legal assistance through a community legal centre”.

The definition of community legal centre includes an “Aboriginal legal service or other community legal centre within the meaning of section 48H of *the Legal Profession Act 1987*.”

About 85 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 15 per cent of Public Defenders’ work.

This year Public Defenders **accepted 1,008 requests** for assistance and **declined 1,712 requests**. Matters are declined for a number of reasons, including conflict of interest and more commonly due to the unavailability of a Public Defender.

Success in the High Court

CMB v Attorney-General for New South Wales (2015) 317 ALR 308; (2015) 89 ALJR 407

CMB is an important decision for two significant aspects of the criminal law in New South Wales. Firstly, in relation to the residual discretion in Crown Appeals and secondly, in relation to the issue of the disclosure of unknown guilt.

The High Court allowed the appeal and remitted the matter to the CCA for determination. The first ground on residual discretion and Crown Appeals was upheld unanimously and the second ground on disclosure of unknown guilt was upheld by majority.

On the residual discretion ground the High Court found that the CCA erred in imposing an onus on CMB to establish that the residual discretion should be exercised in his favour. The High Court held that in a Crown appeal against sentence the Crown is required to surmount two hurdles: firstly, it must identify an appellable error in the sentencing judge’s discretionary decision; and secondly it must negate any reason why the residual discretion of the CCA not to interfere should be exercised.

On the issue of the disclosure of unknown guilt the High Court found that the CCA took an erroneous approach to the question of whether the sentences were unreasonably disproportionate. The High Court clarified the law with respect to s.23 ***Crimes (Sentencing Procedure) Act*** 1999 (NSW).

The “Rolling List Court” pilot program

The aim of this program is to resolve matters by early case management thus reducing the time taken from committal to finalisation and ultimately addressing some of the factors leading to the current backlog of cases in the District Court.

This initiative was developed in collaboration with the Chief Judge of the District Court, the ODPP, LAC and Public Defenders. It is based on the successful model in place in certain regional courts with a local Public Defender and Crown Prosecutors. They are typically briefed earlier than in the metropolitan courts and the ongoing working

relationships between them and their respective instructing solicitors from the local Legal Aid offices and ODPP leads to a more efficient disposition of matters. The close and daily interaction of these personnel builds a level of professional trust and communication which enables issues in a trial or sentence matter to be identified at an earlier stage, thus saving time and expense, particularly if the matter can be resolved before trial by an early plea of guilty or appropriate charge modification.

The pilot program began in the Sydney District Court (the Downing Centre) in April 2015, with two Public Defenders and two Crown Prosecutors, instructed by a specific team of Legal Aid and ODPP solicitors. A Judge was allocated to the Rolling List Court, when required. The criteria for referral of a trial to the Rolling List Court is that it is an in-house legal aid matter with an estimate of no more than two weeks, no co-accused, no fitness issues and that it is a state prosecution.

As the program progressed, Campbelltown, Parramatta and Penrith District Courts were added to the court catchment area.

The Bureau of Crime, Statistics and Research (BOCSAR) will evaluate the program at the end of 12 months but even at this early stage in the pilot the results are promising.

Service Level Agreements

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, in the District, Supreme and higher appellate courts. 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 52:48 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).

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 may 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 this year) across the various court jurisdictions is approximately as follows:

- District Court, 51%;
- Supreme Court, 11%;
- High Court and Court of Criminal Appeal, 27%; and
- Local, Coroner's and Children's Courts, 11%.

Preparation time amounted to 3,149 days with an additional **2,918 conference hours** spent with solicitors, clients and witnesses. This year Public Defenders spent **1,516 days in court**.

Representation in regional and non-metropolitan court sittings accounts for approximately 48 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 and an acting Public Defender provided representation at Port Macquarie and Taree District Courts.

Public Defenders also provide representation at other circuit sittings of regional District courts and Supreme Court sittings as needed.

Annual Statistics for matters completed 2014 -15

	STATE	C'WEALTH	TOTAL
Children's Court	10	0	10
Coroner's Court	2	0	2
Local Court	68	0	68
Drug Court	4	0	4
District Court	405	11	416
State Parole Authority	0	0	0
Supreme Court	77	1	78
Mental Health Review Tribunal	1	0	1
CCA Advices	127	5	132
Court of Appeal Advices	1	0	1
High Court Advices	8	0	8
CCA Appeals	59	1	60
Court of Appeal Appeals	3	0	3
High Court Appeals	5	0	5
GRAND TOTAL			788

An additional five matters affected by the decision in *Muldock v The Queen* on standard non-parole periods were completed, with the bulk of these cases dealt with in the two previous years.

Other Assistance Provided

Public Defenders are an important resource for the legal profession. This year they provided **347 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.

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.

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:

- NSW Sentencing Council
- Department's Criminal Justice Strategy Board
- District Court Criminal Business Sub-committee
- Legal Aid Crime and Grants Sub-committee
- District Court Back-log Committee
- Department of Corrective Services Legal Users Group

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 other committees including;

- The NSW Bar Association's Criminal Law Committee; Indigenous Barristers Strategy Working Party; Professional Conduct Committee and Health and Well-being Committee
- Crime and Justice Reform Committee
- Royal Commission into Institutional Responses to Child Sexual Abuse Criminal Justice Working Group

- Child Sexual Assault Taskforce - special measures in child sexual assault proceedings
- Child Sexual Assault Judicial Reforms and Monitoring Implementation Group
- DAGJ Forensic Procedures Working Group
- District Court Criminal Listing Committee
- LAC Specialist Barristers and Solicitors Panels
- The NSW Bar Council
- Western NSW Community Legal Centre Committee

Kara Shead, Deputy Senior Public Defender participated by request in a filmed advocacy performance in a jury study project undertaken for the Royal Commission into Institutional Responses to Child Sexual Abuse.

Review of Advocacy Standards

The Public Defenders initiated a broad discussion between agencies with a direct involvement in the District Court criminal work with a view to improving advocacy skills and knowledge. To this end, an advocacy committee was established comprising the Bar Association, the Law Society, LAC, the District Court, Public Defenders and some key individuals experienced in advocacy training. This advocacy committee took note of initiatives undertaken in Victoria, with similar objectives, by the Victorian Bar Council and Legal Aid Victoria. This work will continue into the following financial year with promising signs of a significant policy commitment by relevant agencies.

Funding and Accountability

Funding

The primary source of funding is the Department of Justice. The Public Defenders' **budget for this financial year was \$8,967,881** 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 \$802,424. 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 12 months.
- The ALS, which provided \$177,000.

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.

(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 her Department through the provision of reports on agreed performance indicators which are based on the number of completed briefs within defined jurisdictions. Regular reports may also be provided on the progress of business plan initiatives, financial management and risk assessments.

Public Defenders were audited this year as part of the Department's internal audit timetable. The results were very good with the auditor noting only three minor matters requiring attention with a risk rating of "moderate" for one and "low" for the others. It was noted that of the three recommendations, two matters were beyond the control of this office.

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 2014/15 focussed on two initiatives:

- Expanding our practical advocacy course to include regional locations
- Providing a Public Defender for Port Macquarie and Taree District Courts to help reduce the backlog of cases listed for trial.

The success of the Sydney based practical advocacy course for barristers under 5 years' standing led to the idea of providing a similar one day course for criminal lawyers in regional areas. Although we were not able to run such a course within this financial year we have organised a practical advocacy seminar for Newcastle to take place in September 2015.

NSW LAC provided funding for an acting Public Defender position for Port Macquarie and this position was filled in July 2014. The Acting Public Defender has been very successful in resolving many matters, often before trial and has completed approximately 70 matters this year. LAC has agreed to continue funding for next financial year.

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, the NSW Sentencing Council and Parliamentary Committees of Inquiry. In addition, a number of Public Defenders participate in law reform committees and advisory groups.

Written submissions made during the year include the following:

- Response to NSW Windeyer Review of offences applying to vehicle fatalities on private land
- NSW Attorney General's request for submissions on a proposal to allow the replacement of a criminal trial judge
- Submission on the NSW Law Reform Commission Report 138: *People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences*.
- Response to NSW Department of Justice "Review of Terrorism (Police Powers) Act 2002"
- Submission to NSW Bar Association on the proposed adoption of the Uniform Conduct Rules
- Comments on the NSW Government's draft response to the "Recommendations of the JSC Report on the sentencing of Child Sex Offenders"
- Response to the draft report to the Royal Commission on "Sentencing for Child Sexual Abuse in Institutional Contexts"
- *Hatzistergos Review of the Bail Act 2013*
- Response to the Wood Review of the operation of s.102 *Crimes (Appeal and Review) Act 2001*
- Response to the Legislative Council Standing Committee on Law and Justice's Report on the *Family Response to the Murders in Bowraville*.

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, Chantelle Porter, who commenced in early February 2015 with the aim of completing her PLT studies in September 2015. Chantelle has been a very valuable member of the rolling list court team and willingly took on any tasks in addition to these duties.

Continuing Professional Education

Practical Advocacy Course

Last year we introduced a practical advocacy course for junior barristers with five years or less experience at the Bar. The course was so successful that we were able to run it again this year with very positive feedback from all the participants.

The course was presented by Judge Yehia SC, Judge Flannery SC, and Public Defenders - Craig Smith SC, Chrissa Loukas SC, Kara Shead and Michael King.

The topics covered were:

- Techniques in evidence-in-chief
- Practical advocacy – the jury
- Cross-examination
- Tendency notices and evidence – practical matters
- Severity appeals to the Court of Criminal Appeal.
- Sentence and legal argument –practical advocacy

The course has been so well received that we have responded to requests to run it in regional locations with our first regional day of practical advocacy to be held in Newcastle in September 2015.

Annual Conference

The Public Defenders Annual Criminal Law Conference is a drawcard event on the continuing professional development calendar for many criminal law practitioners from within NSW and interstate. The opening address was by the former Attorney General and Minister for Justice, the Hon. Brad Hazzard MP with presentations by the Hon Reg Blanch AM QC, The Hon Justice Anna Katzmann, the Hon Justice Lucy McCallum, The Hon Terry Buddin SC and Julian Burnside AO QC, amongst others. Full details of the program and speakers are located on our website.

Our Contribution to Training

Public Defenders are invited to speak at seminars and conferences conducted by Legal Aid NSW, the ALS, Young Lawyers, the NSW Bar Association, the College of Law and other tertiary institutions. We also provide regular speakers for 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.

Craig Smith SC, Deputy Senior 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. He also initiated the "Under 5s Practical Advocacy Course" run by this office.

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.

Visit by Judiciary of the People's Republic of China

This year we hosted a meeting with a number of members of the judiciary of China who were visiting Australia on a study tour arranged with the Australian Human Rights Commission and spoke to them about the role and work of Public Defenders in our justice system and specific legal issues, including the admissibility of confessional evidence.

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.

We have had no requests made under GIPAA this year.

Movements and Appointments as at the time of publication

		Appointed
Senior Public Defender (SPD)		
Mark Ierace SC	appointed 7 year term re-appointed 7 year term	16.07.2007 14.07.2014
Deputy Senior Public Defenders (DSPD)		
Craig Smith SC	acting fixed term appointment appointed DSPD 7 year term	13.06.2006 13.06.2008 18.09.2014
Kara Shead	appointed DSPD 7 year term	09.02.2015
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
Antony Evers	acting	14.07.2014
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
Peter Krisenthal	acting	14.07.2014
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 SC	acting permanently appointed (currently part-time)	27.01.2004 13.07.2006
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

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Chambers Manager

Ruth Heazlewood

Clerk to Chambers

Colin Longhurst

Hours

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