

The Public Defenders

Annual Review

2019 – 2020

The Hon. Mark Speakman MP
Attorney General
52 Martin Place
SYDNEY NSW 2000

Dear Attorney General,

2019 – 2020 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 2020 for tabling in Parliament.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Belinda Rigg', with a small question mark above the first letter 'B'. The signature is fluid and cursive.

Belinda Rigg SC
Senior Public Defender

Table of Contents

Foreword	1
The Role of Public Defenders	2
Organisational Structure and Duties of Public Defenders	2
Appointment of Public Defenders	3
Highlights of the year	4
The “Rolling List Court” (RLC) program	5
Early Appropriate Guilty Pleas (EAGP).....	5
Super Call-Overs in the District Court.....	5
Annual Statistics for matters completed 2019-20	6
Service Level Agreements.....	7
Funding and Accountability.....	8
Continuing Professional Education	9
The <i>Bugmy</i> Bar Book	10
Significant Cases.....	11
Law Reform.....	15
Government Information (Public Access) Act 2009 (GIPAA).....	18
Organisation Chart as at 30 June 2020	19
Public Defenders 2019-20	20

Foreword

We were very fortunate this year to welcome five new Public Defenders who filled existing vacancies that occurred at the end of 2019. They bring with them varied experience and exceptional talent, with two coming to us from positions as Crown Prosecutors, and others with a mixed criminal and commercial background or strong experience in regional and legal aid work.

These additional appointments enabled this office to locate more Public Defenders in regional areas of high need, including Albury, Coffs Harbour and Dubbo, and provide a Public Defender to appear at Campbelltown and Penrith District Courts.

However, the full impact of Covid-19 occurred soon after these positions were filled, creating a very different introduction to that which would usually occur. Our normally very busy chambers became suddenly empty with all but a small number of support staff keeping the office open. The early days of working at home and virtual court appearances were somewhat challenging, especially for our regional Public Defenders. I am very proud of how everyone stepped up and soon we had things in place to enable us to remain fully functional with a shift to picking up more appellate work. We were also able to very quickly pull together an invaluable resource on our website for practitioners, linking practical and legal advice to help them navigate the constantly changing environment in the early days of the lockdown.

The greater use of virtual courts proved to be a benefit in shorter matters. However, it also demonstrated the importance of conducting more complex matters in person and the real and intangible benefits of being in court with direct access to clients, witnesses, experts and colleagues, as well as meaningful face to face communication with judicial officers. Ongoing discussion within the profession of the viable use of similar technology for more simple and administrative appearances is beneficial.

It was vital during the period of social isolation to increase our communication as a floor and to continue to offer collegiate support, which is such an important part of maintaining the well-being of everyone and integral to this office. Regular phone calls, emails and the weekly Friday afternoon meetings helped keep everyone connected. Again, I am grateful to everyone for their resilience and their efforts to support their colleagues.

A handwritten signature in black ink, appearing to read 'Belinda Rigg', with a stylized flourish extending from the end.

Belinda Rigg SC
Senior Public Defender

The Role of Public Defenders

Public Defenders are barristers who appear for legally assisted persons who have been charged with serious criminal offences. A legally assisted person is someone who has been granted legal aid by Legal Aid NSW, the Aboriginal Legal Service NSW/ACT or another community legal service.

Public Defenders are appointed as independent statutory officers by the Governor of NSW under the [Public Defenders Act 1995](#) ("the Act").

Organisational Structure and Duties of Public Defenders

The Senior Public Defender

The Senior Public Defender is responsible to the Attorney General for the proper exercise of the functions set out in section 8(1) of the Act which 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 Legal Aid NSW (LACNSW), the Aboriginal Legal Service NSW/ACT (ALS) and other community legal centres (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 management and legal policy responsibilities.

Belinda Rigg SC was appointed as Senior Public Defender on 29 May 2019.

Deputy Senior Public Defenders

The Act provides that the Governor may appoint one or more Deputy Senior Public Defenders. There are currently three Deputy Senior Public Defenders; Janet Manuell SC, Richard Wilson SC and Michael King, who is responsible for regional Public Defenders.

The functions of a Deputy Senior Public Defender include assisting the Senior Public Defender as part of the executive management team, in addition to conducting their own trial and appellate practices.

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 legislation proceedings and related matters.

The Senior Public Defender may establish written guidelines on the exercise of the above functions of the Public Defenders, however this does not derogate “from the authority of a Public Defender in respect of the conduct of any proceedings” (section 6 (4)). This means that Public Defenders act independently of any external influence in how they conduct their cases.

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 as an Acting Public Defender.

Public Defenders appointed for a seven-year term must have their performance reviewed under the *Guidelines for the Appointment of Public Defenders* by a review committee at the conclusion of each seven-year period. They may be appointed for a further seven years if recommended by the review committee. The Senior Public Defender and Deputy Senior Public Defenders are appointed for renewable terms of seven years.

There are now 29 Public Defender positions for the whole of NSW. Four of these positions were initially funded as part of the criminal justice reforms to clear the longstanding District Court trial backlog. This funding ceased at the end of this financial year.

Two Public Defender positions are fully funded by Legal Aid NSW on an ongoing basis as set out in the annual service level agreement available on our [website](#).

As barristers, Public Defenders are bound by the *Legal Profession Uniform Conduct (Barristers) Rules 2015* and related legislation and are therefore subject to the same disciplinary regime for professional conduct as other counsel.

Highlights of the year

- Completed 984 court matters despite the challenges of Covid -19
- Established a comprehensive practice and legal information guide, "[Covid - 19 Resources for Criminal Lawyers](#)", on our website
- Recruited five new Public Defenders which enabled the provision of additional Public Defenders to regional courts at Albury, Coffs Harbour, Dubbo and expanded services in the Sydney west area at Campbelltown.
- Provided ongoing support to the [Bugmy Bar Book project](#)
- Provided submissions to over 15 law reform criminal justice reviews and participated in over 25 departmental and external committees
- Restructured administrative support staff positions to provide additional para-legal support to Public Defenders
- Provided placements for two Indigenous law graduates to complete their practical legal training.
- Conducted two appeals in the High Court

The “Rolling List Court” (RLC) program

The aim of this program is to resolve trial 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 NSW District Court.

This initiative was developed in collaboration with the Chief Judge of the NSW District Court, the Office of the Director of Public Prosecution (ODPP), Legal Aid NSW and Public Defenders. It commenced as a pilot program in 2015 at the Downing Centre District Court.

Since then it has proved to be an extremely valuable adjunct in reducing court time by early resolution of trials and reducing hearing times in many cases. The introduction of the Early Appropriate Guilty Plea (EAGP) legislation has had some impact on the number of matters now referred to this program as both work on similar models. Due to the impact of Covid-19, fewer matters were completed under this program with a total of 24 cases referred to the court.

Early Appropriate Guilty Pleas (EAGP)

The EAGP legislation took effect on 18 April 2018. This new legislative scheme effectively changed committals for all indictable matters by introducing a system of statutory caps for discounts to be applied to sentences for early pleas of guilty. The aim, amongst other things, was to encourage charge negotiation at an earlier stage of the proceedings at the Local Court with the aim of reducing last minute pleas of guilty at the time of trial.

We accepted **604 requests** for EAGP matters, with approximately **50% of matters originally listed for trial being finalised as pleas of guilty before trial.**

Super Call-Overs in the District Court

The scheduling of super call-overs in the NSW District Criminal Courts is one of the strategies employed by NSW justice agencies to help reduce the District Court trial backlog. The aim of the super call-overs is to target unresolved trials listed at designated courts with the aim of encouraging appropriate guilty pleas by defendants on the advice of defence counsel and in negotiation with Crown Prosecutors and the ODPP.

Public Defenders assisted with seven super call-overs held in the District Courts at Albury, Campbelltown, Parramatta, Sydney (Commonwealth and State matters) Port Macquarie and Wollongong. **Public Defenders were able to resolve between 23-80% of matters briefed, with higher success rates mostly achieved at regional courts.**

Annual Statistics for matters completed 2019-20

	STATE	C'WEALTH	TOTAL
Children's Court	11	1	12
Coroner's Court	1	0	1
Local Court	214	8	222
Drug Court	0	0	0
District Court	367	25	392
State Parole Authority	0	0	0
Supreme Court	93	7	100
Mental Health Review Tribunal	0	0	0
Court of Criminal Appeal Advices	120	66	186
Court of Appeal Advices	0	0	0
High Court Advices	9	1	10
Court of Criminal Appeal Hearings	48	10	58
Court of Appeal Hearings	1	0	1
High Court Appeals	2	0	2
GRAND TOTAL	984		

One quarter of the reporting year was affected by the Covid-19 restrictions on various court operations, including trials. This has resulted in fewer matters being completed this year.

Public Defenders are often briefed in lengthy and complex trials to help contain the cost of such matters. The allocation of a Public Defender to these trials will have an impact on the total number of matters completed in the year as they are not available to do other trials. Preparation time is also extensive given the voluminous briefs provided in such matters.

Comparison of matters completed over consecutive financial years are therefore not necessarily indicative of increasing or decreasing workloads or productivity and any comparison of annual figures should be treated with caution.

Preparation time amounted to 2,961 days with an additional **2,701 conference hours** spent with solicitors, clients and witnesses. This year Public Defenders spent **1,375 days in court**, including virtual court appearances.

This year Public Defenders **accepted 1,266 requests** for assistance and **declined 2,055 requests**. Matters are declined for a number of reasons, including conflict of interest or more commonly, due to the unavailability of a Public Defender to accept the brief because of other work commitments.

The distribution of work (matters completed this year) across the various court jurisdictions is approximately as follows:

Jurisdiction	Percentage
District Court	40%
Court of Criminal Appeal	25%
Local Court	23%
Supreme Court	10%
High Court	less than 0.1%

There is a notable increase in completed matters in the local court with a 12 percent increase compared with last year. This reflects the additional work now conducted in this jurisdiction under the EAGP provisions, before committal of the matter to the District or Supreme court. The number of matters completed in the District court declined and may be attributed to the cancellation of trials due to Covid –19.

The ratio of matters heard in Sydney compared with regional and non-metropolitan courts is 55:45. However, when Commonwealth matters are excluded, the ratio is 50:50, which may be due to more Commonwealth matters being listed in Sydney.

The allocation of Public Defenders to more regional locations from February 2020 will also have an effect on the number of matters completed in regional NSW.

Other Assistance Provided

Public Defenders are an important point of contact for the legal profession. This year they provided **178 recorded instances of assistance** to the profession on legal, ethical and practice issues either by telephone or brief written advices.

Our website is a valuable research tool for the profession, students and the general public. Sentencing tables and other resources on the website are used by practitioners and the judiciary, who regularly comment on the usefulness of this resource.

Service Level Agreements

Formal arrangements for access to our services are contained in [service level agreements](#) (“SLAs”), which are negotiated annually with Legal Aid NSW and the ALS.

The SLAs provide 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 Legal Aid NSW and the ALS.

The types of matters where Public Defenders are briefed include:

- Supreme Court trials;
- District Court trials with priority given to long and/or complex matters;
- circuit work at nominated regional centres;
- appellate work in the High Court, Court of Criminal Appeal and Court of Appeal; and

- EAGP committal hearings involving serious criminal charges.

Public Defenders may also appear in coronial inquiries either at the request of Legal Aid NSW, the ALS or the Crown Solicitor's Office.

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.

Public Defenders are located at Albury (1), Coffs Harbour (1) Dubbo (1), Orange (1), Lismore (1), Newcastle (2), Tamworth (1), Port Macquarie (1), Wollongong (1) and Wagga Wagga (2). One Public Defender has been allocated to cover Campbelltown District Court and we also maintain a presence at the Parramatta Justice Precinct.

Representation in regional and non-metropolitan court sittings now accounts for 50 per cent of our work (excluding Commonwealth matters which are mostly heard in Sydney).

About 85 per cent of the work briefed to Public Defenders comes directly from Legal Aid NSW lawyers, or from private lawyers who have obtained a grant of legal aid for their client. The remaining 15 per cent is briefed by the ALS or other community legal centres.

Funding and Accountability

Funding

The primary source of funding is the Department of Communities and Justice. The budget **for this financial year was \$11,427,000 which includes \$2.1 million allocated to the District Court backlog reduction strategy.**

The backlog funds were used to recruit four additional Public Defender positions, including on-costs.

Employee-related expenses continue to represent about 85 per cent of the budget.

Additional revenue is obtained under the SLAs from:

- **Legal Aid NSW**, which provided **\$943,462**. This amount funds two Public Defender positions and provides partial funding for one legal research officer.
- The **ALS**, which provided **\$177,000**.

(Full details of the Public Defenders' budget are available from the NSW Department of Communities and 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 parameters. Regular reports may also be provided on the progress of business plan initiatives, financial management and risk assessments.

Annual statistics are provided to Legal Aid NSW and the 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 support 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, human resources and financial matters.

Continuing Professional Education

Public Defenders are invited to speak at seminars and conferences conducted by Legal Aid NSW, the Aboriginal Legal Service, Young Lawyers, the NSW Bar Association and tertiary institutions.

We provide tutors for readers at the Bar, internships for law students undertaking external placement programs and practical legal training, as well as year 10 high school work experience opportunities. Public Defenders provide mentoring under various programs including the Lucy Mentoring Program, the NSW Bar Association's Aboriginal Mentoring Program and the Diverse Women Lawyers association.

Annual Conference

The annual conference took place on the weekend before the first Covid 19 lockdown. Given the uncertainty around large events at that time, fewer people attended. Those who could not attend were provided with access to audio recordings and written papers.

The conference was formally opened by the Attorney General, the Hon. Mark Speakman. A full copy of the program and conference papers can be located at our website www.publicdefenders.nsw.gov.au.

Under 5s Advocacy Program

This program provides practical advocacy training for barristers who have been admitted for up to five years. The second half of the program was held this year with seminars on "The Voir Dire", "Addresses" and "Cross-examination".

Aboriginal Law Graduates Program

This year we were able to fund the practical legal training (PLT) for two Aboriginal Law graduates – Jake Fing and Renee Emzin. This is a paid internship program which also helps fund the cost of compulsory PLT training and provides invaluable experience working with Public Defenders in a para-legal capacity.

We were able to extend the placements for both, with Renee taking up the role of the *Bugmy* Bar Book co-ordinator in addition to her ongoing para-legal support.

Renee Emzin made the following comments about the program:

In 2020 I was fortunate to be able to complete my PLT at the Public Defenders Chambers. Although this year was not what I (or anyone else expected) the experience that I was able to gain, the insight, the people I was able to meet and what I was able to participate in and contribute to, while at the Public Defenders, have been invaluable to both my professional and personal development.

I started in January and was able to hit the ground running attending court with a number of different PDs, while also assisting with case work and researching a chapter for the Bugmy Bar Book. In July, I was asked to take over as the coordinator of the Bugmy Bar Book, which presented new challenges and opportunities. I have been able to gain a greater understanding across areas of disadvantage and disparity in, as well as learning more about the administration side of the Bugmy Bar Book.

While being at the PDs I have learnt a lot, be it through the legal work, attending court or just by being able to meet and spend time and talk with everyone in the chambers. Going forward in my career, I know that my outlook on the criminal justice systems and the law more generally will be shaped by my time at the PDs.

The Bugmy Bar Book

This is a web-based resource for the profession which distils and collates authoritative research on various categories of disadvantage and the potential impact of those experiences on people coming into contact with the criminal justice system. This material can be used in court when presenting evidence on disadvantage for clients in sentencing proceedings, to establish the application of the *Bugmy v The Queen* (2013) 249 CLR 571 principles. A committee of widespread interests and expertise was convened to develop and manage this resource with input from the profession, academics, legal researchers and students who have all put in an enormous amount of work to establish and maintain it.

The *Bugmy* Bar Book has continued to grow and during 2020 seven chapters were published. These included, Lack of Employment & Training Opportunities / Long-Term Unemployment, Social Exclusion, Cultural Dispossession, Stolen Generations, Homelessness, Low Socio-Economic Status and COVID-19. Additionally, the Out of Home Care Chapter was the first to undergo the review process. The *Bugmy* Bar Book has also had increased Australia wide contributions and input on the chapters and case law.

This year the *Bugmy* Bar Book Committee commissioned a report in relation to the significance of culture to Aboriginal and Torres Strait Islander people and the significant benefits connecting to culture, family and community support and culturally appropriate treatment and care to rehabilitation and healing.

Public Defenders were given a grant of \$15,000 this year by the Australian Bar Association to fund the work of the *Bugmy* Bar Book Co-ordinator.

Significant Cases

***Attorney General of NSW v WB* [\[2020\] NSWCA 7](#)**

Extension order cannot be made with respect to a person who has ceased to be a forensic patient

The Attorney appealed the primary judge's refusal to make an interim extension order under the *Mental Health (Forensic Provisions) Act 1990* for extension of the respondent's status as a forensic patient. The primary judge made orders appointing a psychiatrist and a psychologist to examine the respondent and furnish reports. The primary judge's orders were made a day before the expiration of the respondent's limiting term. (At an urgent hearing on that day, the Court of Appeal granted an interim extension order for a sufficient period to permit the hearing of an appeal). The central issue was whether the power of a court to grant an extension order operates only for a person who is, at the time, a forensic patient. As the primary judge's orders were made a day before the limiting term expired, absent an interim extension order, there would have been no opportunity to obtain examinations by a psychiatrist and a psychologist and deploy the reports in support of the application for an extension order: at [24]. By majority, the Court upheld the appeal. The effect of relevant provisions is that an extension order cannot be made once a person has ceased to be a forensic patient. The primary judge thus erred in refusing to make an interim extension order.

***Bae v R* [\[2020\] NSWCCA 35](#)**

Utilitarian value of a plea of guilty in Commonwealth matters

The CCA clarified that the utilitarian value of a plea of guilty involves an objective assessment for the purpose of s16A(2)(g) *Crimes Act 1914 (Cth)* and is preferably quantified: at [55]; *R v Borkowski* (2009) 195 A Crim R 1; *Xiao v R* (2018) 96 NSWLR 1. Contrition involving facilitation of the course of justice may be taken into account under s 16A(2)(f) - it is a subjective factor involving enquiry as to the offender's attitude and assessment of contrition and is unquantified: at [55], [57]. Delay in entering a plea, due to understanding of the brief of evidence and strength of the prosecution case, is not relevant to utilitarian value. Those aspects may bear upon the subjective issue of facilitation of the course of justice in explaining why the appellant did not plead guilty earlier: at [58].

***Chuang v R; Chen v R* [\[2020\] NSWCCA 60](#)**

Utilitarian value of a plea of guilty in Commonwealth matters

The judge allowed a discount for "willingness to facilitate the interests of justice" and referred to s 16A(2)(g) *Crimes Act 1914*: at [62]. The CCA said it is unclear whether the judge was providing a discount for utilitarian value of the plea (s 16A(2)(g); *Xiao*) or for the facilitation of the administration of justice, which is a different concept: at [5]; [69]. Considerations arising from the distinction between the offender's state of mind revealed by a plea and objective benefits to the administration of justice include (at [15]-[19]): (i) a strong prosecution case may diminish weight given to 'willingness to facilitate the administration of justice' because it may reveal acceptance of the inevitable, but will generally not diminish utilitarian value; (iii) it should not be assumed a strong prosecution

case diminishes willingness to facilitate the administration of justice. The court should state if it is satisfied that the plea was motivated by inevitability of conviction, or that no finding can be made; (iii) contrition and remorse may provide a finding of good rehabilitation prospects which is a mitigating factor. Remorse may be demonstrated by willingness to save the victim giving evidence - but also be described as willingness to facilitate the administration of justice. Multiplication of labels for essentially similar considerations may lead to double counting suggesting the need to avoid discounting for such factors, absent statutory authority.

***Bradley v Senior Constable Chilby* [\[2020\] NSWSC 145](#)**

Prosecution disclosure in summary matters

Adamson J comprehensively discussed the case law on disclosure obligations of police prosecutors prosecuting summary offences and enforcement of the duty where breach is alleged pre-trial: at [46]ff.

The plaintiff, charged with assault occasioning actual bodily harm, asserted self-defence. He issued a subpoena to police for production of documents - including fact sheets regarding prosecutions of the complainant - which were not produced. Allowing the appeal, the Court held the magistrate erred in refusing the plaintiff's application for a stay of proceedings until documents were produced. The magistrate misapprehended the nature and extent as a matter of law of the duty of disclosure in finding the subpoena was a "classic fishing expedition" not in the interests of justice as it would bring the criminal justice system to a halt. The magistrate's finding that the accused *could* have a "fair" hearing without access to such documents was legally unreasonable: at [68]. The Court made orders for a temporary stay until the prosecution's duty of disclosure is complied with or otherwise remit the matter to the Local Court to be heard by another magistrate.

***CO v DPP* [\[2020\] NSWSC 1123](#)**

Background Reports required in children matters

The Court allowed the plaintiff's appeal on the ground the magistrate sentenced the plaintiff for Children's Court matters committed when he was 17 to an aggregate control order without a background report pursuant to s 25(2) of the *Children (Criminal Proceedings) Act* 1987. Section 25(2) provides a court shall not sentence a person to imprisonment or a control order if the person was a child when the offence was committed and under 21 when charged unless a background report has been tendered in evidence, provided to the parties, and taken into account by the court. Section 25(2) is mandatory and failure to obtain a background report will render the sentence invalid: at [28]-[29]; *CTM v R* [2007] NSWCCA 131. The Court set aside the control orders and remitted the matter to the Children's Court.

***Greaves v R* [\[2020\] NSWCCA 140](#)**

Parity

The CCA held the judge erred by finding the parity principle did not apply where the applicant was sentenced in the District Court and two co-offenders had already been sentenced in the Local Court because they had been dealt with summarily. Sentencing principles remain the same in the Local and District Courts. The jurisdictional limit of the

Local Court was not a factor, having regard to the sentences imposed. In any event, the Magistrate was required to determine sentence having regard to the maximum penalty for each offence, not jurisdictional limit. The jurisdictional limit only becomes relevant if the assessment leads to a sentence greater than the limit: at [66].

***Hoskins v R* [\[2020\] NSWCCA 18](#)**

Remorse and contrition as mitigating factor

Section 21A(3)(k) *Crimes (Sentencing Procedure) Act 1999* provides a 'plea of guilty' is a mitigating factor to be taken into account in determining sentence.

The judge allowed a discount for the utilitarian value of the applicant's early guilty plea but stated he would not otherwise take the plea of guilty into account under s 21A(3)(k) as to do so would be to double count.

The CCA allowed the appeal. The judge erred in his approach to the guilty plea and s 21A(3)(k). A plea may provide evidence of remorse and contrition and to take account of that factor does not involve any double counting: at [8]. It is true if the judge were not asked to consider remorse, that error might be immaterial. However, it would be a startling proposition that remorse could be disregarded where the applicant surrendered promptly to police, made a full statement, entered an early plea, and tendered a psychological report stating he "expressed genuine remorse" and "fully accepted responsibility": at [9], [13].

***Kliendienst v R* [\[2020\] NSWCCA 98](#)**

Failure to refer to *Bugmy* where factual basis for raising *Bugmy* principles even though not raised by counsel

The CCA held that the sentencing judge erred in failing to consider *Bugmy* where there was uncontested evidence of a factual basis for raising *Bugmy* principles - that the applicant had a deprived up-bringing and expert evidence concerning anger management difficulties - even though the applicant's counsel at sentence did not expressly put any *Bugmy* submission that moral culpability could thereby be "substantially reduced": at [60]-[62]; *Bugmy* (2013) 249 CLR 571.

The fact that the applicant's counsel did not expressly raise the *Bugmy* approach does not mean that there was no error in the judge's failure to consider it given the uncontested material before the Court: at [67]. The *Zreika* principles - that the appeal court will not lightly entertain arguments not put at first instance - do not mean this Court will never entertain a ground of appeal contending failure to have regard to a mitigating factor that was not specifically addressed at sentence: at [65]; *Griffin v R* [2018] NSWCCA 259.

***Swan v The Queen* [\[2020\] HCA 11](#)**

Murder - causation

The appellant was convicted of murder. The appellant's assault caused serious injury to the victim who suffered severe deterioration in quality of life. Eight months after the assault, the victim suffered a fractured femur requiring surgery. A decision was made not to undergo possible life-saving surgery. The victim died from consequences of the fracture shortly thereafter. An appeal against conviction was dismissed by the CCA.

The High Court dismissed the appellant's appeal. The Crown at trial put three possible pathways of causation. It was open to the jury to convict on the third pathway by concluding (i) surgery was available and would reasonably have been expected to save the victim's life; (ii) the victim or his son made a decision that surgery not be undertaken, and (iii) that decision was motivated by the victim's low quality of life due to the assault: at [36]ff. It was sufficient, on the trial judge's direction, that the effects of the assault substantially or significantly contributed to the decision which, in turn, on the third causation pathway, prevented the surgery that was reasonably expected to save the victim's life: at [46]; *Royall* (1991) 172 CLR 378.

Weber v R [2020] NSWCCA 103

Assistance to authorities by Commonwealth offender – whether usefulness of assistance relevant

On re-sentence, the CCA allowed a discount for the applicant's assistance to authorities pursuant to s 16A(2)(h) *Crimes Act* 1914 (CTH) where there was no evidence that the assistance had in fact been of use to police. The applicant had spontaneously named persons involved in the offence to police without even knowing a discount would be available: at [65]-[66].

The CCA said s 16A(2)(h) simply mandates that the court take into account "*the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or other offences*". Cf. s 23 *Crimes (Sentencing Procedure) Act* 1999 which mandates that when reducing penalties for assistance by a State offender, the court *must have regard to the significance and usefulness of the assistance*: at [66].

If a federal offender has co-operated with authorities, s/he is entitled by s 16A(2)(h) to have that factor taken into account. The absence of evidence establishing the usefulness of the co-operation does not mean there should be no discount at all, although it may be less than otherwise: at [67].

Yildiz v R [2020] NSWCCA 69

Error in applying Guideline Judgment in Henry without assessing relative youth of offender

The CCA held the sentencing judge erred in finding 'youth' was already a factor in the *Henry* armed robbery Guideline Judgment and not a further mitigating factor: at [6], [48]; *Henry* (1999) 46 NSWLR 346. The mere fact *Henry* takes into account that the sentence is being imposed on a "'young offender' with no or little criminal history", does not mean 'youth' is an irrelevant factor on sentence: at [48]. Otherwise, all young persons would be treated identically, rather than an appropriate assessment being conducted, bearing in mind the degree of immaturity associated with the offending: at [70].

Law Reform

An important function of Public Defenders under the Act is the provision of advice to the Attorney General and the Department of Communities and Justice 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, NSW Sentencing Council and Parliamentary Committees of Inquiry. In addition, a number of Public Defenders participate in law reform committees and advisory groups.

Submissions made during the year include:

- *Age of criminal responsibility* - Council of Attorneys-General (CAG) Working Group
- *Bill to be introduced for Mandatory Disease Testing scheme*
- Comments on Issues Paper: Indictable Process Review
- *Confessional evidence and privilege* - Policy, Reform and Legislation, Department of Communities and Justice
- *Consent in relation to sexual offences* – NSW Law Reform Commission
- *Consultation Paper on Diversion in the summary jurisdiction: Mental Health Forensic Provisions Bill* - Policy & Reform, Department of Communities and Justice
- *Covid-19 Retention Issues* - Criminal Justice Transformation Board Covid-19 Sub-Committee, Department of Communities and Justice
- *Covid-19 Service Delivery Improvement Opportunities Through COVID-19* - Criminal Justice Transformation Board Covid-19 Sub-Committee, Department of Communities and Justice
- *Covid-19 – Urgent proposed amendments to the Criminal Procedure Act 1986 and related Acts*
- *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019* - Policy & Reform, Department of Communities and Justice
- *Criminal Procedure Act, s.293 - Sexual experience of complainant* - Attorney-General NSW; Policy, Reform and Legislation, Department of Communities and Justice
- *Criminal acts of third parties in relation to unborn children* - Policy, Reform and Legislation, Department of Communities and Justice
- *Crimes Amendment (Special Care Offences) Act 2020* - Policy, Reform and Legislation, Department of Communities and Justice

- *(Crimes) Act 2020 and Stronger Communities Legislation Amendment (Miscellaneous) Act 2020* - Policy & Reform, Department of Communities and Justice
- *Defences and Partial Defences (Mental Health and Forensic Provisions Bill)*
- *Evidence Amendment (Tendency and Coincidence) Act 2020* - Council of Attorneys-General (CAG); Policy, Reform and Legislation, Department of Communities and Justice
- *Justice miscellaneous amendments (for the Stronger Communities Legislation Amendment)*
- *Justice Miscellaneous amendments regarding Apprehended Domestic Violence Orders* - Policy & Reform, Department of Communities and Justice
- *Provisional sentencing regime for child offenders (Pt 4 Div. 2A Crimes (Sentencing Procedure) Act)* - Policy, Reform and Legislation, Department of Communities and Justice
- *Review of Young Offenders Act 1997* - Policy, Reform and Legislation, Department of Communities and Justice
- *Second Justice Portfolio Miscellaneous Amendment Bill (No 2) 2019* - Policy & Reform, Department of Communities and Justice
- *Statutory Review of the Crimes (Serious Crime Prevention Orders) Act 2016* - Policy, Reform and Legislation, Department of Communities and Justice

Committees

NSW Bar Association

Public Defenders work closely with the NSW Bar Association at many different levels with a number of Public Defenders being members of the following committees:

- Criminal Law Committee
- First Nations Committee
- Indigenous Barristers Strategy Working Party and the Indigenous Barrister's Trust
- Joint Working Party on Over-representation of Indigenous People in the Criminal Justice System
- Professional Conduct Committees
- Legal Aid Committee
- The Law Council of Australia National Criminal Law Committee as a nominee of the NSW Bar Association

Justice and other Committees

- Crime and Justice Reform Committee
- Criminal Business Committee
- Criminal Justice Transformation Board
- Child Sexual Assault Evidence Pilot Committee
- Child Sexual Assault Judicial Reforms and Monitoring Implementation Group
- District Court Backlog Senior Officers Group
- District Court Criminal Listing Committee
- EAGP Reform Committee
- JUST Connect eBrief Committee
- Legal Aid NSW Specialist Barristers and Solicitors Panels, including the Children's Criminal Law panel
- Legal Practitioners Consultative Group
- Mental Health Reforms
- Royal Commission into Institutional Responses to Child Sexual Abuse Criminal Justice Working Group
- Standing Inter-agency Advisory Committee on Court Security
- The Sentencing Council
- The *Bugmy* Evidence Project – a joint project of Norton Rose Fulbright and the ALS
- Walama Court Working Group (previously the District Court Working Group)
- Western NSW Community Legal Centre Committee

Government Information (Public Access) Act 2009 (GIPAA)

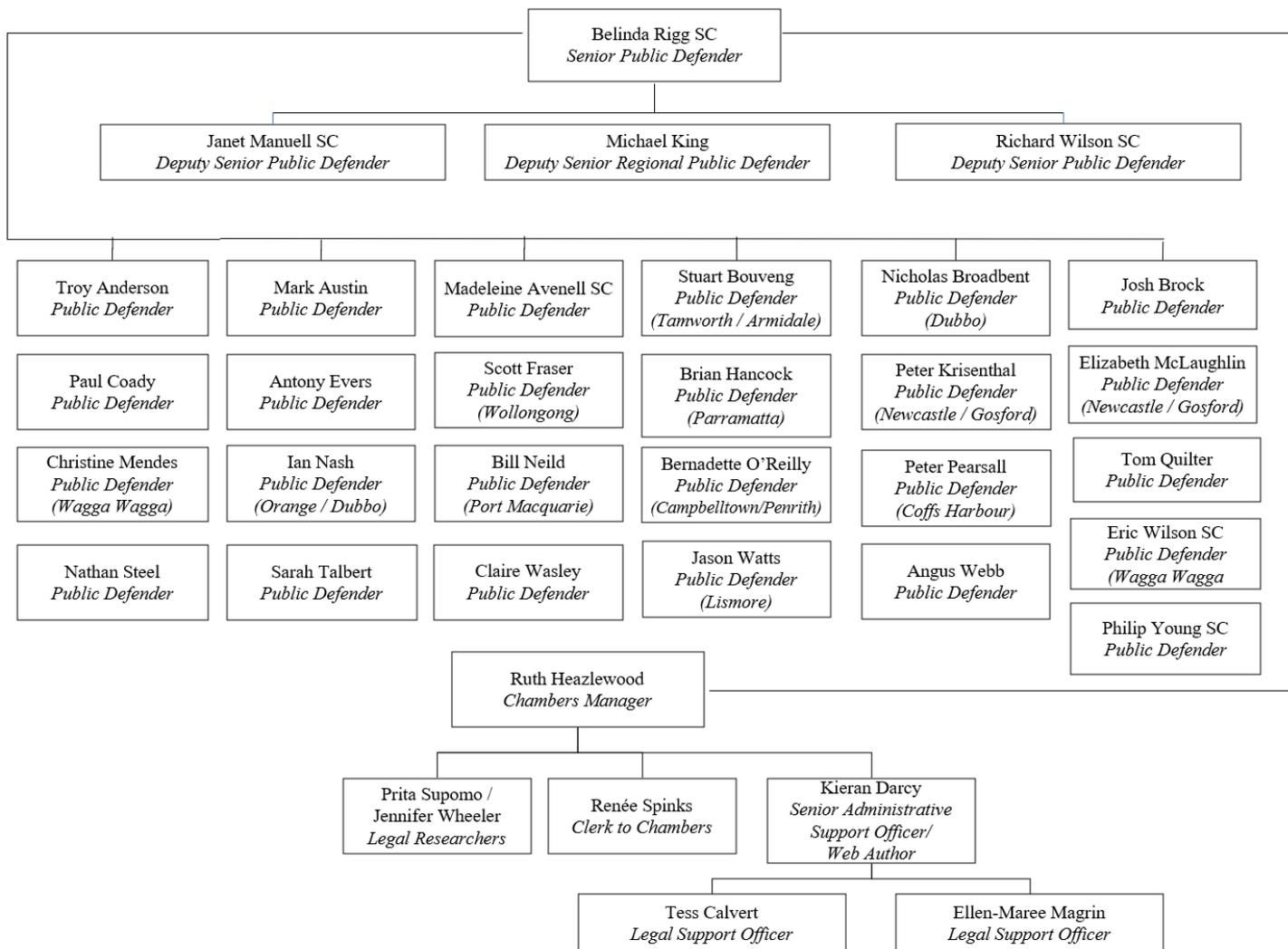
Public Defenders meet the requirements of the GIPA Act to provide open access to information for the public where possible and without charge. Our website provides access to the following documents:

- 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.

Organisation Chart as at 30 June 2020



Public Defenders 2019-20

Senior Public Defender (SPD)		
Belinda Rigg SC	appointed 7 year term	29.05.2019
Deputy Senior Public Defenders (DSPD)		
Michael King	acting fixed-term appointment* appointed DSPD 7 year term	30.08.2010 30.08.2011 14.05.2018
Janet Manuell SC	acting fixed-term appointment* re-appointed 7 year term appointed DSPD 7 year term	06.02.2007 13.06.2008 24.06.2015
Richard Wilson SC	acting fixed-term appointment* appointed DSPD 7 year term	23.01.2012 23.01.2013 14.05.2018
Public Defenders		
Troy Anderson	acting fixed-term appointment*	15.05.2017 15.05.2018
Mark Austin	permanently appointed	05.06.1995
Madeleine Avenell	acting fixed-term appointment*	29.01.2018 29.01.2019
Stuart Bouveng	acting fixed term appointment*	15.08.2016 15.08.2017
Nicholas Broadbent	acting	28.01.2019
(Trevor) Josh Brock	acting fixed-term appointment*	21.01.2019 21.01.2020
Paul Coady	acting fixed-term appointment*	29.01.2018 29.01.2019
Antony Evers	acting fixed-term appointment*	14.07.2014 29.03.2017
Scott Fraser	acting fixed-term appointment*	21.01.2019 23.01.2020
Brian Hancock	acting fixed-term appointment* re-appointed 7 year term	29.08.2005 29.10.2009 29.10.2016
Peter Krisenthal	acting fixed-term appointment*	14.07.2014 09.09.2015
Elizabeth McLaughlin	acting fixed-term appointment*	29.01.2019 29.01.2020
Christine Mendes	acting	17.01.2019
Ian Nash	acting fixed-term appointment* re-appointed 7 year term	23.01.2012 23.01.2013 23.01.2020
Bill Neild	acting fixed-term appointment*	05.09.2016 05.09.2017
Bernadette O'Reilly	acting	28.01.2019
Peter Pearsall	permanently appointed	06.12.2001
Tom Quilter	acting fixed-term appointment*	08.05.2017 08.05.2018
Nathan Steel	acting	02.10.2018
Sarah Talbert	acting	17.02.2019
Claire Wasley	acting	28.01.2019
Jason Watts	acting fixed-term appointment*	03.06.2013 27.05.2014
Angus Webb	acting permanently appointed	15.07.1996 27.01.1998
Eric Wilson SC	acting permanently appointed	27.01.1998 09.08.2001
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

Email

pd-admin@justice.nsw.gov.au

Website

www.publicdefenders.nsw.gov.au

Chambers Manager

Ruth Heazlewood

Clerk to Chambers

Renee Spinks

Hours

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