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P a p e r s

International Legal Aid Group

John Nicholson S.C.
The Public Defenders of
New South Wales

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The Public Defenders have been serving the public of NSW for 60 years. The institution of Public Defenders in NSW is possibly unique in the common law world. The Public Defenders have a proud tradition of defending the poor and disadvantaged and of providing a centre of excellence in criminal law and procedure. We enter the 21st Century recognised by our criminal courts and our client providers as an elite band of criminal law barristers. Although we have not always been so, at the moment we are strong and growing in strength in our advocacy skills.

Independence

The first Public Defender was appointed in 1941. In 1969 the Government of the day decided that Public Defenders should be, and be seen to be, independent of the executive arm of Government. The Minister of Justice of the day, the Hon. J. McCaw, said in his Second Reading speech to the **Public Defenders Act 1969**:

“It seemed to the government that public defenders ought to be removed from the jurisdiction of the Public Service Board and placed in the same position as counsel for the Crown - Crown Prosecutors - in criminal cases, so that there need be no reserve on the part of those whom they represent and there need be no appearance or the possibility of direction from the Crown itself, directly or through any arm of executive government. This is the essential reason that has prompted the bringing of the Bill for the consideration of parliament, and I am sure that no Honourable Members would differ from the principle that the Bill espouses in this regard.”

The **Public Defenders Act 1969** was enacted to achieve this end.

The 1969 Act has since been replaced. Today the Public Defenders' appointments and functions are regulated by the **Public Defenders Act 1995**. Public Defenders are appointed by the Governor of NSW on the recommendation of the Attorney-General after approval by Cabinet. Appointment as a permanent Public Defender is for life¹. Acting Public Defenders are usually appointed for a year², but their appointment is renewable. Senior Public Defenders must have at least 7 years standing as a legal practitioner to be eligible for appointment, 5 years for Deputy Senior, and a qualified legal practitioner for appointment as a Public Defender or

¹ Schedule 1 Clause 3(3), Public Defenders Act 1995

² s.7(3) Public Defenders Act 1995

acting Public Defender³. All Defenders currently appointed had at least 5 years standing before appointment. Public Defenders' salaries are determined by the Statutory and other Officers Remuneration Tribunal. Currently Public Defenders and Crown Prosecutors are paid the same salary - \$145,000p.a. plus generous superannuation and sick leave benefits. Annual leave is comprised of a long break at Christmas-New Year of 5 weeks, and a short break of 3 weeks which must be taken between May and July in each year. There is no right of private practice⁴.

Presently there are 18 permanently appointed Public Defenders and 7 acting Public Defenders. Two of the Public Defenders are part-time, while they do not job share strictly speaking, their two positions equate to one Public Defender position. Seven of the Public Defenders are female appointees. Not surprisingly there is always strong competition for Acting Public Defender positions, because they are frequently a stepping stone to permanent appointment, when a permanent position becomes vacant.

Accountability

Barristers by profession conduct their practices individually. Each accepts briefs from various solicitors on behalf of clients. It is to the courts, the profession, each solicitor and the client, that the barrister is accountable. This gives barristers a rare independence. Public Defenders being individually appointed statutory officers, have retained this independence common to all members of the Bar. This ensures that the defence of an accused, even though on government funded legal aid, is free from external influence.

Public Defenders conduct their practices as members of a "floor" of barristers. They provide each other with the same collegiate support and sharing of information and resources as do members of Chambers at the private Bar. Their work is allocated and their movements monitored by a Clerk of Chambers and regular Floor Meetings are held under the chairmanship of the Senior Public Defender. They are bound by the Rules of the Bar pursuant to the **Legal Profession Act 1987** and are subject to the professional conduct disciplinary system established under that Act that applies to all barristers.

Public Defenders depart from their counterparts at the private Bar only by being salaried statutory officers, and by the limitations placed upon the jurisdiction of their practice by the **Public Defenders Act 1995**. Their productivity is, therefore motivated, apart from their duty to their instructing solicitors and clients, by the discharge of their duty to maintain a full diary in circumstances where demand constantly outstrips possible supply.

Accountability for meeting this duty is effected by the completion, at the conclusion of each matter, of a "brief completion sheet" which notes the activity undertaken in relation to each brief, including reading and preparation time, pre-trial applications, conferences and appearances. The statistical analysis of the information contained on these sheets is available to the

³ Schedule 1 Clause 2, Public Defenders Act 1995

⁴ Schedule 1 Clause 6, Public Defenders Act 1995

Senior Public Defender to allow a comparative analysis of the work of each Public Defender. A form of the analysis, censoring only the names of the individual defenders is made available to all Defenders so that each may compare his/her performance against that of colleagues. The Senior Public Defender is required to report annually to Parliament on the functioning of the Public Defenders⁵, including the Defenders' productivity levels.

Functions

The principal function of the Public Defenders is to accept from legal aid bodies, clients accused of indictable crimes (that if defended would be heard in a superior court before a jury)⁶. The principal supplier of legal aid in NSW is the Legal Aid Commission of NSW [LAC]. It provides funding for 80% of the Public Defenders clients. LAC funded clients may come to the Public Defenders direct from the LAC, or indirectly from private firms of solicitors. While the LAC provides legal aid funding for a variety of jurisdictional needs including Local Court criminal (summary) matters, family law, civil litigation, immigration matters, the Public Defenders are principally interested in LAC clients with indictable criminal matters. All LAC clients are means tested by the LAC.

The other major funder of our clients is the Aboriginal and Torres Strait Islander Commission [ATSIC]. The Public Defenders are retained by ATSIC to appear on behalf of indigenous persons accused of indictable crime in NSW. While there is no doubting that most indigenous clients are unable to resource a criminal trial, there is no formal means testing of indigenous clients who are supplied by the six Aboriginal Legal Services that cover NSW.

Guideline Judgements

A more recent function of the Senior Public Defender has been to participate in Guideline (Sentencing) Judgement cases as a contradictor⁷. The Attorney General may request a Guideline Judgement in respect of sentencing offenders. Guideline judgements to date have covered culpable driving causing death or serious bodily injury⁸; armed robbery⁹; break enter and steal¹⁰; the discount, if any, for pleading guilty¹¹; and knowingly concerned with the importation of drugs into Australia¹². When the Attorney General requests a Guideline Judgement, the Senior Public Defender is given a right of appearance¹³. One of the Guideline Judgements (knowing concerned with drug importation) was given as a result of a request by the Commonwealth Director of Public Prosecutions. There was no application by the NSW state Attorney General in respect of this guideline. The first of the Guideline

⁵ s. 17 Public Defenders Act 1995

⁶ s. 10 (1) Public Defenders Act 1995

⁷ s. 38 Crimes (Sentencing Procedure) Act 1999

⁸ Jurisic (1988) 101 A Crim R. 259

⁹ Henry (1999) 106 A Crim R. 149

¹⁰ R v Ponfield NSW CCA [435] 15-12-1999

¹¹ R v Thomson (2000) 49 NSWLR 383

¹² Wong & Leung (1999) 108 A Crim R. 531 Special Leave has been granted by the High Court to appeal. The appeal is still pending.

¹³ See f.n. 7 ante.

Judgements (culpable driving sentences) came about by the courts own motion.

However, since these two early guideline judgements, the contribution by the Public Defenders in the remaining three guideline judgements has had recognised value to the Court. They are great cases to be involved in, because they require an overview. The Senior Public Defender worked closely with university academics in preparing his submissions and as a result became firmly convinced there is a value in utilising academics more in daily practice.

Workload

Public Defenders compete with barristers from the private bar for clients in the criminal jurisdictions. The overwhelming appearance work of Public Defenders is before the NSW Supreme Court or District Court doing criminal trials and guilty pleas. Last year the average case load of each Public Defender was 41 cases. That might comprise several trials lasting somewhere between 2-3 days and 2 weeks (although 3 of the Defenders are currently involved in a 3 month murder trial), a number of guilty pleas, and perhaps 6 or 7 appeals before the Court of Criminal Appeal.

There are four Public Defenders stationed in rural NSW. The remainder are either exclusively based in Sydney, or have a mixed circuit-metropolitan practice. The vast majority of our rural and regional appearances are in the District Court when it is sitting in various country centres. The District Court sits permanently in Newcastle and Lismore (as well as four metropolitan centres). Defenders are permanently stationed in both these country centres. Most of our ALS work is done in regional centres. A regional District Court sitting varies from one to three weeks. The Court list is invariably a running list. It is common, indeed usual, for the Public Defender appearing in a regional District Court to have the bulk of the trial work in the running list. The ALS also briefs Defenders to appear in the District Court Appeals (from Local Court convictions and sentences).

Most Public Defenders include murder trials within their practice. The Deputy Senior Public Defender's practice is 90% murder trials. Most Defenders do two or three murder trials per annum, some chose to do more than this. It is not uncommon where a Defender accepts a murder brief, for that Defender either to oversee, or to participate in the Committal (preliminary) hearing conducted in the Local Court.

The Court of Criminal Appeal [CCA] is the highest criminal appellate court in NSW. The CCA practice as entertained by the Public Defenders is unusual. The LAC requires on each CCA brief, a merit advice. It is only in cases where "merit" is found, that the LAC will extend legal aid to the client to argue the appeal. Such an advice has the potential for a conflict of interest between the LAC and the client. Through the "merit" system, those appeals having "no reasonable prospects of success" are filtered out. Once filtered out, the overwhelming bulk of those CCA appeal are abandoned by the clients who first sought them. Thus, the Defender giving a "merit" advice, is conscious

that he/she may be determining the client's appeal adversely to that client. It is not unknown for one of those appeals declared to have "no merit" to be successfully argued before the CCA. Defenders are also conscious of that fact - and the embarrassment to their professional standing, should such an event occur in respect of one of their "merit" advices. Last year, Defenders appeared in 113 appeals, [5 Special Leave Applications before the High Court, 96 CCA Sentence Appeals, 1 Conviction appeal, and 11 Crown Appeals).

Standards of Excellence

Public Defenders are proud of their role as leaders of the profession in the practice of criminal law. Standards have improved in recent years. There is a continued movement of many Public Defenders into more diverse Supreme Court and Court of Criminal Appeal work resulting in an expansion of forensic and advocacy skills within the Chambers. The positive comments received by the Senior Public Defender from members of the Judiciary and senior members of the private bar throughout the year indicate there is a growing quality to Public Defender representation. Another indication of this growing enthusiasm, perhaps the most telling, is the number of instructing solicitors from private firms and ALSs who contact the Chambers Clerk at the earliest possible date so as to ensure that the services of a Public Defender are secured for a legally aided matter.

Informal and ad hoc advice and assistance is provided by Public Defenders to members of the profession in relation to matters of criminal law and procedure. This is a significant feature of our work. We publish, on our website, case notes and papers given by Public Defenders on criminal law and procedure issues. These case notes are not only of interest to the profession, but to those prisoners with access to the internet. Public Defenders are frequently invited to present papers at conferences and seminars.

We have developed and disseminated summaries of cases from the CCA under the title of "Short Notes". These concise summaries of both reported and unreported criminal cases began in 1997, with hard copy being circulated within Chambers for the use of Defenders. After the "Short Notes" came to the attention of the LAC, the Public Defenders began to receive requests from members of the private profession and the judiciary for the notes. The "Short Notes are now regularly provided in electronic and hard copy form and on our website.

The Public Defenders have been hosts to visiting international legal professionals, and hopefully, more of this will occur as the world continues to come to our doorstep. My particular interest as Senior Public Defender, has been to build links with the academics. The academics see the Big Picture - where we, in our daily practice, dealing with case after case, have little time for the global view. More of us need to question what the Criminal Justice System is all about. It is only when we gain a realistic outlook of what the criminal justice system is, that we can evaluate the proper disposition of the fate of those the criminal justice system determines as "guilty". We

practitioners tend to evaluate sentence disposition by reference to Court of Criminal Appeal decisions, where some other disposition may be of more relevance.

Conclusion

The very nature of a legal aid provider is that its eye must be on the group, rather than the individual. As most practitioners rush from case to case, client to client, the group needs, apart from adequate funding, are very difficult to see. Legal aid providers really need to focus on the bigger picture. What is the role of the criminal justice system in a modern society, where only one crime in 20 is detected, where the overwhelming bulk of offenders charged are young, male, single and unemployed. In our country add to that description a sizeable number of indigenous persons. Given the huge inefficiency in the criminal detection and charging process, what social purposes are currently being served by the administration of criminal justice in our countries. Are there better ways of achieving that social purpose. Indeed, perhaps there is an even better social purpose that could be achieved using the same resources.

Too few of us in administering legal aid are raising our concerns above the distribution of scarce funds to too many clients. It may be a case of taking the lead from the Aboriginal Legal Services of the past here in Australia, and I suspect in Canada, who were prepared to allocate some of their legal aid budgets for big ticket items, such as land rights.