100 YEARS OF THE PUBLIC DEFENDER IN QUEENSLAND

Early days

Prior to 1907 the provision of legal aid in criminal cases was dependent on the Bar's duty to volunteer to represent an accused without fee or, in serious cases, such as capital offences or manslaughter, the Crown would appoint counsel to defend an accused where the accused was without means.

Bruce McPherson in his work "*The Supreme Court of Queensland 1859 – 1960*" noted,

> "The first move to a more formal procedure for providing public legal defence came when the *Judiciary Act* 1903 (Cth), provided in s 69(3) that a person committed for trial for an indictable offence against Commonwealth law might apply to the judge to appoint counsel for his defence. In the case of offences against State law, the *Poor Prisoners Defence Act* 1907 made similar provision, and extended it to committal proceedings. Both statutes required the judge to be satisfied that the appointment was 'in the interests of justice'. … Upon the establishment of the Court of Criminal Appeal in 1913 a comparable provision was included in s 671C of the *Code* to cater for the case of appeals."

McPherson also noted that there had been pressure on the Parliament for the appointment of a permanent Public Defender for some time. That step was taken by regulation 41 of the *Public Curator Act* 1915 which gave power to the Minister and later the Under Secretary, Department of Justice to render aid in legal proceedings to any poor person named in such approval. Further regulations authorised the Governor-in-Council to appoint a Public Defender to act on behalf of accused persons.

The first Public Defender

There is some confusion in the literature as to who was the first Public Defender appointed. McPherson notes in his work that in 1917 the first Public Defender was appointed. He records that this was Mr W L D Salkeld of counsel, a Queensland graduate of the University of Melbourne. In Ross Johnston's work "*History of the Queensland Bar*", the author noted that William Llewellyn Davies Salkeld joined the Department of Justice in 1916 and became the Public Defender in the newly created

Public Curator's Office and as such appeared as counsel. However that work also noted that William Flood Webb in 1916 became Official Solicitor and the Public Defender of accused persons attached to the Public Curator's Office.

It is apparent from the Public Curator's legal aid file that the first Public Defender was in fact William Flood Webb. On that file there is a letter dated 1 February 1916 from the Crown Solicitor to the Public Curator indicating that the official solicitor was to instruct counsel in the defence of a number of poor prisoners in cases before the District Court in Brisbane. The response, dated 17 February 1916, was signed W F Webb as Official Solicitor. It indicated that a number of counsel had been briefed for the District Court sittings and seven persons had been dealt with. Three of those people had been convicted, three were acquitted, and one pleaded guilty to lesser charges. The file contains further reports throughout 1916.

A letter dated 30 March 1916 to the Public Curator and signed by Webb as Public Defender indicated that he had personally defended three poor prisoners before the sittings of the District Court in Brisbane before Jamieson DCJ. In relation to one woman charged with stealing he noted,

> "This prisoner insisted on her innocence, although the evidence against her was overwhelming. She was convicted and sentenced to imprisonment with hard labour for 18 months – suspended upon her entering into a bond to pay the prosecutrix the sum of £6.12.6."

His reports continued throughout that year and would indicate that he was the state's first Public Defender.

Sir William Flood Webb (as he later became) was admitted to the Bar in 1913. Johnston's work indicates that by 1914 Webb had become chief legal assistant in the Crown Solicitor's office and, as noted, in 1916 became Official Solicitor and the Public Defender. In 1917, at the age of 30 years, he became Crown Solicitor. In 1922 he was appointed Solicitor-General and in 1925 was appointed to the Supreme Court. He was also the President of the Industrial Court. In 1940 he was appointed Chief Justice. In 1946 he was appointed to the High Court. He sat on the High Court from 1946 until 1958. In 1946 Webb was appointed as Australia's representative on the International

Military Tribunal for the Far East. He was President of that Tribunal for the trial of Japanese personnel accused of war crimes. He died in 1972.

Johnston describes Webb thus,

> "Both as Crown Law officer and judge, Webb was the model of polite, courteous behaviour; he was patient and understanding; he did not easily ruffle, but would sit coolly, unconcernedly through the heated argument, smiling gently, his brown eyes alert and at the end of the proceedings, give a calmed reasoned answer to the problem, an answer free from the temperamental, emotional involvement of the parties concerned."

William Llewellyn Davies Salkeld

Ross Johnston's work also contains a summary of the career of W L D Salkeld. Salkeld was appointed Public Defender in 1917. Johnston noted that Salkeld was from Ipswich Grammar School and had won a scholarship to the University of Melbourne. He graduated with the degrees BA, LLM and was admitted to the Bar in 1906. His applications for admission in Queensland in 1904 was rejected because his qualifications were the Victorian degrees, without admission there, and the court held that those qualification on their own were not sufficient to allow his immediate admission in Queensland. He would have to submit himself to the Queensland Bar Board final examinations. He had to fulfil the court's requirements. After private practice for ten years he joined the state public service and was employed as Public Defender until his death. He died in office in 1943. Johnston notes,

> "He was a profound scholar but not a very capable barrister. Also in court he had the unhappy knack of annoying judges by very painstakingly working through more or less a set formula of questions regardless of whether they helped or hindered his case. He would use the questions and make submissions in cases where his silence would have been better, and judges would tend to pick on his irrelevant arguments and thereby fluster him all the more."

He was of course Public Defender for an extended period of time. The Public Curator file contains annual reports to the Under Secretary Justice in terms of the fees expended in relation to the defence of poor prisoners. It contains a list of cases for each year, the counsel and solicitors retained and the fees paid. It contains the annual apportionment

of salaries and other expenses applicable to the defence of poor prisoners by the Public Defender. For example in relation to the calendar year 1917-1918 offences ranged from stealing and horse stealing to murder and wilful murder. There were nine prisoners who faced trial in relation to offences of murder or wilful murder.

On 14 December 1918, in response to an enquiry from the Law Department, Melbourne as to the duties of the Public Defender, a response signed on behalf of the Public Defender indicated,

> "There is an officer called the Public Defender in this state. He is attached to the Public Curator's Office and holds, in conjunction with that position, the office of official solicitor to the Public Curator. The only legislation in Queensland other than the *Poor Prisoners Defence Act* 1907 is contained in s 114(1)(k) of the *Public Curator Act* 1915 which empowers the making of regulations for providing legal aid for poor prisoners, and regulation 40 of the regulations under that Act is the only regulation appertaining to the matter.
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> …
>
> The duties of the Public Defender are:
>
> (1) To give legal advice to the general public on any matters whatsoever that they choose to consult him personally or to write to him about.
>
> (2) To arrange for the defence of poor prisoners who can show that they are without means and have a defence. In all cases in which such prisoners have been committed for trial to either the Supreme or District Courts outside counsel are briefed by the Public Defender to defend such prisoners and it is his duty to take the place of a solicitor instructing counsel.
>
> (3) To appear for any poor prisoner in any litigious matter and in which the Minister directs the rendering of legal aid."

The memorandum noted that for those duties coupled with the work done as official solicitor to the Public Curator, the Public Defender was paid a salary of £400 per annum.

The annual reports rendered to the Under Secretary indicated a gradual increase in the number of prisoners represented under the system over the years.

In 1920, correspondence indicates that arrangements were made to place counsel on a retainer basis in the northern district based in Townsville for £220.10. The retainer was to conduct not more than 30 public defences in any year. The person appointed to that position in Townsville was Mr J P Quinn of counsel. Mr Quinn continued to represent public defence matters in northern centres for a large number of years.

In the early 1920's correspondence took place aimed at persuading the Sheriff of Queensland to supply copies of jury lists free of charge to the Public Defender. The file actually contains a jury list from 1921. The qualifications and employment of jurors is instructive: broom manufacturer, drayman, stonemason, ironmonger, tram employee, motor proprietor and wine seller.

In 1922 the Under Secretary, Department of Justice raised a query as to the amount of work performed by Mr Salkeld as Public Defender and a cost comparison if the work had been performed by "outside legal men". The response indicated that in the financial year to June 1921 public defence had been approved in 99 cases of which Mr Salkeld had defended 58. He appeared in Brisbane, Bundaberg, Toowoomba, Roma, Mackay, Rockhampton, Gympie and Warwick. The Public Curator noted,

> "If it is desired to exactly make a comparison between doing the work by Mr Salkeld or by outside legal men, then, in addition to the persons represented at trials must be added the number of criminal appeal cases that he appeared in (five)."

The issue seems to have died with that response.

On 29 June 1923 the acting Premier wrote to enquire how long the position of Public Defender had been in existence in Queensland and as to the number of cases he had been called upon to conduct and also whether the institution of Public Defender was regarded as having been a success. That enquiry was in the context of a Royal Commission in Queensland into the question of law reform. In a reply dated 11 July 1923 the Public Curator wrote,

> "The office of Public Defender has been in existence since the early part of 1916. The duties of the Public Defender are to conduct the defence of poor

> persons, and in addition, when his time is not occupied in court, he gives legal advice to persons who may require it.
>
> The number of cases defended by the Public Defender last year was 84 and in addition he appeared in 12 appeals to the Criminal Appeal Court and also in one appeal to the High Court.
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> The office of Public Defender undoubtedly fulfils a useful public purpose at a moderate cost."

In 1925 correspondence indicated that consideration was being given to extending legal aid to poor persons in civil as distinct from criminal matters. That correspondence noted that the advice role of the Public Defender had been extensively used by the public and was believed to have 'assisted considerably towards allaying many troublesome doubts'.

The note from the Public Defender continued,

> "The question of extending the privilege so as to make it go further and include the conducting of civil cases for and on behalf of poor persons is no doubt a big one, but the day must come when something more definite will have to be done in this direction."

That response is dated 1 October 1925. The annual reports continue. Counsel briefed in public defence matters included H R Townley, T M Barry, W H Dever, A Mansfield, J P Quinn and T E Entriken.

Correspondence dated 21 June 1934 indicated that applications for leave to appeal to the High Court for four persons had been refused. The counsel briefed in the matter were Mr P K Copley MLA, Mr W T King MLA, Mr T C O'Hagan and Mr A L Bennett. Correspondence in 1937 indicated that counsel in Townsville were to be briefed in rotation in relation to public defence matters. Those counsel were T M Barry, K R Townley, R W Scanlan and R Cormack. In 1938 they were joined by H G Godsall.

In 1941 correspondence sets out the number of persons assisted in relation to public defence trials and appeals. Those figures were,

To 30 June 1934	80
To 30 June 1935	67
To 30 June 1936	67
To 30 June 1937	41
To 30 June 1938	51
To 30 June 1939	46
To 30 June 1940	50

In relation to 1941, correspondence indicated that Mr Salkeld had represented 22 persons whilst 19 were represented by outside counsel. Those counsel included R Cormack, E J D Stanley, C G Wanstall, K R Townley, R W Skerman and M V Fogarty.

In 1942 correspondence indicated that the position of Public Defender had not been filled after the death of Mr Salkeld. He died on 22 July 1942.

The 1940's and 1950's

The new Public Defender appointed in 1943 was William Edmund Ryan. Ross Johnston's work indicates that he joined the public service in 1921, was admitted to the Bar in 1928 and was Public Defender for a while. In 1954 he became Solicitor-General and one year later was involved in the Royal Commission into the Collinsville Mines Disaster.

The Public Curator file indicates that he was Public Defender from 1943 to 1946. His deputy was Wallace Robert Armour McAlpine. Mr McAlpine was appointed Public Defender in 1946. Ross Johnston notes that McAlpine rose to become Public Curator through the civil servant ranks. He took a BA degree at the University of Queensland and was admitted to the Bar in 1936.

The file indicates that in 1947 the Public Defender appeared or funded 64 trials and five appeals. Thirty of the trials took place in country centres.

In 1948 further debate arose about whether the Public Defender should act in matrimonial matters where one of the parties was a prisoner. That debate bore no fruit.

Counsel briefed in 1948 included W F Lee, P K Copley, V A J Byrne, D Casey, N J Moynihan, N F McGroarty and J A Douglas.

By letter dated 30 June 1950 the Public Defender sought permission from the Comptroller of Prisons that Robert Hinds Bavinton be given permission to interview prisoners in Queensland on his behalf.

The expenditure on public defence in 1951 was £361.5.7. This related to the expenses of briefing counsel and solicitors in relation to public defence matters. Counsel briefed in 1950 included D Casey, J G Kneipp, K W Ryan, J A Douglas, B M McLoughlin, V Fogarty, R L Pirani, T D McCawley and K Spanner.

In 1952 Maurie Nolan was appointed assistant Public Defender.

On 22 January 1953 the Public Curator responded to an enquiry from the Department of Social Services, Canberra as to the provision of legal aid. It noted that "legal aid for the defence of an accused who has been committed for trial on an indictable offence before the Supreme Court is granted if the applicant is without means adequate to provide a defence for himself and if a grant of assistance is desirable in the interests of justice. The Public Defender, a government official, represents the accused at the trial if it takes place in Brisbane or private practitioners if in country areas." In relation to appeals the correspondence indicated, "criminal appeals are conducted by the Public Defender instructed by the Official Solicitor to the Public Curator and this has been the practice for many years. There have been a few occasions in the past where an applicant in a criminal appeal to the High Court of Australia has been represented by a person other than the Public Defender, but there have been special circumstances in such cases."

On 6 August 1953 it was recommended that counsel's fees for a brief on trial be lifted from ten guineas to 15 guineas. Solicitors fees would be increased from five guineas to eight guineas and to 12 guineas if they appeared alone. The refresher for counsel would be ten guineas. Correspondence from the Public Curator indicated that for many years past it had been impossible for legal defence matters to be carried out by officers

of the department in areas other than Brisbane. A shortage of staff was the main problem and it was noted that the engaging of local solicitors or counsel would be less expensive.

A letter dated 4 November 1953 to the Public Solicitor, Sydney set out the way in which the public defence scheme worked. It noted that the *Poor Prisoners Defence Act* 1907 covered only cases of persons committed for trial for indictable offences. It did not provide for any legal aid to a person dealt with summarily in a lower court or pleading guilty in the lower court who was committed for sentence to the Supreme Court. It noted,

> "The usual practice adopted in providing such defence is for the accused to make written application to the stipendiary magistrate (formerly known as police magistrate), who committed him for trial, for legal aid to be granted to him. The magistrate will then request that a police report be furnished to him as to the financial circumstances of the accused. If he is satisfied that the two conditions mentioned above (that such person is without adequate means to provide defence for himself and it is desirable in the interests of justice that such appointment should be made), the magistrate then certifies as provided in the section quoted and the application is then considered by the Honourable the Attorney-General, who decides whether or not such defence is to be provided.
>
> If a defence is approved, instructions to arrange such a defence are given to the Public Defender, who is appointed by the Governor-in-Council to render legal aid in legal proceedings against accused persons. The Public Defender must be a barrister or solicitor of the Supreme Court of Queensland. His appointment is authorised by regulation 41 made under the provisions of the *Public Curator Act* 1915-1947. The Public Defender is attached to the Public Curator's Office and is an officer of the public service of Queensland.
>
> Sittings of the Supreme Court in its criminal jurisdiction are held in Brisbane and at other centres in Queensland. It is usual for the Public Defender to appear on behalf of accused persons to whom legal aid has been granted in all trials which are to take place in Brisbane. It is the duty of the Public Defender to make arrangements for proper representation of accused persons in trials which are heard outside Brisbane. Barristers have chambers in Brisbane, Rockhampton and Townsville, but outside of those three cities there are no barristers practising. Consequently it is usual for a solicitor practising in the town in which the trial is to take place to be requested to undertake the defence of the accused person and, if possible, for him to instruct a counsel to appear on the trial. A solicitor is entitled to a fee of £8.8 and counsel a fee of £15.15 for appearing in public defence matters. If the trial extends over a day, counsel is entitled to an additional fee of £10.10 and the solicitor to an additional fee of £5.5 for the second and each subsequent day of the trial.

…

> In some cases where a person charged with an indictable offence has pleaded guilty in the lower court and has been committed to sentence to the Supreme Court the Honourable the Attorney-General has directed the Public Defender to provide legal assistance for such person. The authority to do this is derived from regulation 40 made under the provisions of the *Public Curator Acts* 1915-1947.
>
> Provision is also made for legal assistance to be granted to a person appealing or seeking leave to appeal to the Court of Criminal Appeal (Queensland) or to the High Court of Australia. … Legal assistance is usually rendered to a person appealing or seeking leave to appeal to the Court of Criminal Appeal or to the High court of Australia, if it is considered that some point of law arises, or that there is a possibility of some miscarriage of justice having taken place at the trial.
>
> Since the Court of Criminal Appeal sits only in Brisbane, the Public Defender usually appears in that court on behalf of an appellant or applicant for leave to appeal for whom legal assistance has been approved. Arrangements for representation in the High Court of Australia for such a person would depend on where the matter is heard.
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> Whenever the Public Defender appears on behalf of an accused person or appellant, he is instructed by the official solicitor to the Public Curator."

Correspondence in 1952 indicated that the usual practice in relation to briefing counsel at the Bar was that that counsel should have had 12 months experience before being briefed in a criminal matter. Counsel briefed during the early 1950's included K P Spanner, C D Sheahan, Raymund Smith, J P Shanahan, W J Cuthbert, F G Brennan, J P Kimmins, D K Derrington, J A Douglas, J G Kneipp, W F Lee and O J North.

On 7 August 1959 the Attorney-General of Australia, Mr G E Barwick wrote to the Public Curator rejecting a suggestion of the setting up of a Commonwealth legal service bureau to give advice and legal assistance to any person in receipt of a Commonwealth pension on the basis that there were various legal aid schemes throughout Australia to provide that service. The Public Defender service of providing legal advice was quoted as one of those schemes.

In 1960 counsel briefed in public defence matters included J G Kneipp, D K Derrington, E G Broad, P J Shanahan, N P Power, D G Sturgess and B W Ambrose.

In 1960 the Public Defender Mr McAlpine was appointed as Public Curator. His deputy Mr Maurie Nolan was appointed as Public Defender.

Maurie Nolan

Maurie Nolan as Public Defender achieved a reputation as an excellent advocate and was very well respected. He is still spoken about in the highest terms by those who worked with him. Jeff Spender has said elsewhere in relation to the University of Queensland graduating class of 1951 that Maurie Nolan was probably the best Public Defender that Queensland had had. Mr Nolan argued many of the big cases of the time and argued all the points. He was a deeply religious man and a confirmed bachelor. He died some years ago in the surf on the Gold Coast where he had retired from the position of Public Curator.

A review of the Queensland Reports between 1961 and 1967 indicates the impact that Mr Nolan had. He appeared in numerous appeals before the Court of Criminal Appeal and in criminal trials. Many were notable cases of lasting significance. They include:

- *R v Thompson* [1961] Qd R 503 (cross-examination of an accused as to previous convictions)
- *R v Dwyer and Marsh* [1962] Qd R 84 (meaning of owner in stealing offence)
- *R v Rolph* [1962] Qd R 262 (directions on diminished responsibility)
- *R v Miller* [1962] Qd R 594 (competency of spouse to give evidence and criminal negligence)
- *R v Knutson* [1963] Qd R 157 (accident and reasonable foreseeability)
- *R v Korwin-Drozynski* [1963] Qd R 362 (rebuttal evidence and character evidence)
- *R v Ward* [1963] Qd R 56 (admissibility of evidence of previous convictions)
- *R v Reilly* [1963] Qd R 6 (sentence appeal with regard to imprisonment of a child)
- *R v Johnson* [1964] Qd R 1 (wilful murder and the defence of provocation)
- *R v Hilderbrandt* [1964] Qd R 43 (territorial limits of Queensland Criminal Code where offence committed during a flight)
- *R v Hansen* [1964] Qd R 404 (meaning of s23 and criminal negligence)

- *R v Mason* [1964] Qd R 604 (alternative verdicts)
- *R v O'Malley* [1964] Qd R 226 (provocation in relation to a charge of assault)
- *R v Pearson* [1964] Qd R 471 (previous inconsistent statements)
- *R v Ashcroft* [1965] Qd R 81 (comments by a psychiatrist as to the character of the accused)
- *R v Callope* [1965] Qd R 456 (provocation with respect to murder and its meaning at common law)
- *R v Danes & Taylor* [1965] Qd R 338 (joinder of accused)
- *R v Gittins* [1965] Qd R 361 (sentence of an habitual criminal)
- *R v Kitley* [1965] Qd R 190 (meaning of the term habitual criminal)
- *R v King* [1965] Qd R 78 (whether s18 *Criminal Law Amendment Act 1945* applied to a convicted child)
- *R v Richards and Ors* [1965] Qd R 354 (distress and corroboration)
- *R v Saunders* [1965] Qd R 409 (confession by an aboriginal and fresh complaint)
- *R v Dabelstein* [1966] Qd R 411 (manslaughter and criminal negligence)
- *R v Brechenridge* [1966] Qd R 189 (sentence for rape)
- *R v Burnell* [1966] Qd R 348 (meaning of wilfully in arson)
- *R v Crump* [1966] Qd R 340 (wilful murder and intoxication)
- *R v Dick* [1966] Qd R 301 (wilful murder and diminished responsibility)
- *R v Hagan* [1966] Qd R 219 (voir dire on confessions and the onus of proof)
- *R v Anderson* [1967] Qd R 599 (cumulative sentences)
- *R v Muratovic* [1967] Qd R 15 (self-defence against an unprovoked assault)
- *R v O'Halloran* [1967] Qd R 1 (wilful murder, accident and criminal negligence)
- *R v Phillips and Lawrence* [1967] Qd R 237 (joinder and complicity)
- *R v Rose* [1967] Qd R 237 (provocation and intoxication)
- *R v Sims and Anderson* [1967] Qd R 432 (evidence and motive)

Correspondence in 1961 indicated that the number of cases in which the Public Defender appeared was increasing dramatically. Mr Nolan noted that the work of the Public Defender was taking all of his time and that he was able to give little time to the general Public Curator work. He argued that there was the need to create a formal

position of assistant Public Defender. He also noted that there had been a significant increase in the number of persons who received free legal advice from the Public Defender. In 1947 there had been 2,844 whilst in 1960/61 there had been 4,932. He quoted figures which indicated the increase in the case work load.

Year	**Private counsel**	**Total**
1951-52	18	40
1956-57	43	62
1957-58	46	80
1958-59	44	83
1959-60	52	106
1960-61	62	145
July 1961- December 1961	27	111

Year	**Appeals**
1951-52	3
1956-57	6
1957-58	3
1958-59	4
1959-60	14
1960-61	15
July 1961 – December 1961	5

The memorandum indicated that the establishment and operation of the District Court had been a factor adding to the difficulty, as both the Supreme and District Courts sat at the same time. On 12 July 1962 the position of assistant Public Defender was created and filled by Mr K Lynch.

Over the succeeding years the number of persons represented by the Public Defender increased steadily. During the early 1960's counsel briefed in public defence matters included J Greenwood, L Wyvill, F G Connolly, J P Shanahan, B W Ambrose, C W Pincus, D K Derrington, A J Boulton, M V Fogarty, J G Crowley, E G Broard, C F McLoughlin, J W B Helman, J Aboud, G L Davies, W J Carter, A J McCracken, V M

Mylne, D G Sturgess, D J Killen. In 1963 the legal aid costs was £24,710 of which £7,237 went to private solicitors and counsel. In 1964 the legal assistants to the Public Defender included J Hair, Dennis Doherty and Vince Maume. In 1966 counsel included N J MacGroarty, A G Demack, W A Howell and F McGuire and the budget rose to $52,450. At that time Mr Nolan was still Public Defender and the assistant Public Defender was D P Drummond. New counsel appeared in the lists of those briefed. They included M R Moriarty, A J Healy, T R Lindermayer, C J Bennett and K Cullinane. An assistant Public Defender in 1965-1966 was Ken McKenzie.

By letter dated 10 July 1967 it was indicated that the Public Defender and his staff were to be installed in a new office on 1 October 1967. The function of providing free legal advice would remain with the Public Curator.

The Public Defender's Branch

In 1967 the Queensland Government proposed an expansion of the office of the Public Defender to meet the increasing demand for legal representation in such cases. That proposal was the subject of a detailed examination by the Bar Association of Queensland. The Committee made a report and recommendations as to how a suitable legal aid scheme might operate. The Report was summarised in The Australian Bar Gazette in 1967 ([1967] 2 (2) Aust Bar Gazette 6).

In summary the Bar Association vigorously opposed the extension of advocacy work to be performed by barristers as part of a government department. The Report noted that the independence of the Bar was a substantial safeguard of personal liberty and that that safeguard should not be diminished "by calling upon officers of a Department of Government which is charged with the duty of prosecuting to provide defences for those being prosecuted." The report went on "…the Bar cannot accept as consistent with the principles of British Justice any system of legal aid in criminal matters which has the effect of leaving a portion of criminal defence work to be performed by officers in the Crown Service."

The Report noted that the need for criminal legal aid in Queensland had increased remarkably in the 1960's. The Report accepted the need for criminal legal aid for those

unable to afford legal representation and proposed a system where the advocacy work would be performed by the private Bar. The Report saw no difficulty however that the solicitor's work of preparing a criminal trial should be undertaken by an expanded staff of a solicitor for Public Defence. It noted, "A staff of persons specifically constituted to make these enquiries and expeditiously to prepare matters for trial may well be more economic." It went on to recommend that "no person subject to the provisions of the Public Service Act ought to be required or asked to act as counsel for an accused person." The concern expressed was that those so engaged should be utterly independent of executive interference. This could be achieved by retaining counsel from the Bar on a permanent basis. The number of such counsel should be substantially limited so that those persons should not undertake more than fifty percent of criminal legal aid work.

The Report commented on the persons appointed to the role of Public Defender, "In performing these duties, the present Public Defender has, as some of his predecessors had, exhibited sterling qualities of character and capacity. But his personality has in a very real sense tendered to obscure the dangers inherent in a system which appears to be wrong in principle and which has elsewhere been discovered to be dangerous once it grows beyond the control of an individual person."

The final recommendation was,

> "That there be appointed a Solicitor for Public Defence with adequate staff. That the Public Defender's Office be not increased by the appointment of Public Service Counsel for the representation of accused persons. That the present positions of Public Defender and Assistant Public Defender ought to be either –
>
> (a) Replaced by the delivery of annual retainers to persons who will practice outside the Crown Service; or
> (b) Be allowed to lapse upon the promotion or retirement of the present incumbents."

The Government did not follow those recommendations.

On 12 January 1967 the Executive Council directed the separate establishment of the Public Defender under the title Public Defender's Branch, Chief Office, Department of Justice. It continued to operate under the regulations to the *Public Curator Act*. The

first Public Defender under that arrangement was Mr Nolan. Staff assisting him at that stage were Mr Doug Drummond, Mr Jim Barbeler and Mr Kerry Copley. The number of cases granted public defence continued to grow. Mr Nolan was appointed Public Curator and Mr Robert Hinds Bavinton was appointed Public Defender in 1969.

Public Defence Act 1974

Legislation creating a separate Public Defender's Office was introduced into Parliament in 1974. The *Public Defence Act* 1974 (assented to 2 April 1974) said in its preamble that it was an Act to consolidate and amend the law with respect to the provision of legal aid in criminal matters and certain other proceedings to persons of limited means and resources and for purposes connected therewith. It repealed provisions in the *Poor Prisoners Defence Act* 1907, the *Criminal Code* and the *Legal Assistance Act* which touched upon legal aid. The Minister for Justice on 14 March 1974 said in proposing the Bill,

> "I propose a consolidation of all legislation relating to public defence and to provide the establishment of the Public Defenders' Branch. I prophecy that this branch will be the biggest social service that this government, or any state government, is likely to provide in years to come."

Section 6 of the 1974 Act provided for the functions of the Public Defender. They were:

> "6. Functions of Public Defender.
>
> (1) The Public Defender shall, subject to this Act, render to any person legal aid in connection with –
>
> (a) criminal proceedings before any court or tribunal except a Magistrates Court and a Children's Court exercising jurisdiction other than that conferred by s 29 of the *Children's Services Act* 1965 – 1973;
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> (b) committal proceedings before justices where that person is charged with an indictable offence punishable upon conviction by imprisonment for a term exceeding 14 years;
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> (c) such other proceedings, not being civil proceedings, as the Minister directs.

(2) The Public Defender shall perform such other duties, whether or not of a legal nature, as the Minister directs.

(3) For the purpose of discharging his functions under the Act, the Public Defender may brief and instruct any practising barrister or solicitor."

The Minister for Justice continued in his introduction of the Bill,

> "The extension of legal aid to persons committed for sentence stems from two main sources, the principle of which is that the interests of justice must be served. The Lord Chief Justice of England has, on a number of occasions, stated that in jury trials there will seldom be a case in which the interests of justice do not require the accused to be represented – even when he pleads guilty. The other source is from a practical point of view. Many defendants under the present system know they cannot get legal assistance unless they plead not guilty. Having done so and been assigned legal assistance, and after a great deal of work has gone into preparing the defence, the defendants on appearance for trial pleads guilty. The right to legal assistance then, in this area, will reduce considerably the amount of unnecessary work being done in the circumstances I have outlined."

The work of the office and the officers employed increased dramatically under the leadership of Bob Bavinton. In 1956-57 public defence was approved in 64 cases and in respect of six appeals; in 1965-66 public defence was approved in 262 cases and for 22 appeals. In the 1977-78 year, public defence was approved for 1,718 persons on 3,713 charges. During that year representation was provided in 142 appeals before the Court of Criminal Appeal, three High Court appeals, two Full Court appeals and two appeals to the District Court. (Source W O'Connor, *Legal Assistance in Queensland in Criminal Matters and the Operation of the Office of the Public Defender in this State, Legal Aid Seminar*, 28 July 1979).

In 1977, the Assistant Public Defender's were J Copley, A Healy, L White, J Clair, N Woodgate and N Andrews was the Official Solicitor.

Throughout its history, the Public Defender's office has often been called upon to make submissions in relation to law reform proposals. The number of these submissions has also increased dramatically over the years. In the 1970's however Bob Bavinton was called upon to give evidence before a Royal Commission into a very contentious matter.

The Lucas Inquiry

On 26 January 1977 the Public Defender, Mr R H Bavinton was called to give evidence by counsel assisting the Committee of Inquiry into Enforcement of Criminal Law in Queensland (the Lucas Inquiry). Mr Bavinton in his evidence indicated that he had acted as Public Defender for various periods between 1952 and 1958 and had been appointed Public Defender in 1969. He placed statistical evidence before the inquiry in relation to cases dealt with by his office over a period of six months. That information was compiled by an Assistant Public Defender, Mr J Jerrard. An analysis of those cases was conducted in relation to the pleas entered when compared with the interviewing method of investigating police. The statistics clearly indicated pleas of not guilty being entered and trials conducted where unsigned police notebooks were used by investigating officers as recording alleged confessions. Mr Bavinton made a number of recommendations to the Commission in relation to police practice. Those included warning suspects of their rights, reducing all interrogations to writing to stop reliance on unsigned notebooks and the use of recording devices to record confessions. He submitted that where there was no contemporaneous written typed record of the conversation and no procedure to ensure that the confession had been read over by a suspect, and that process taped, that evidence of a confession should be prima facie inadmissible. He estimated the cost of trials where challenges were made to police evidence was in excess of $1 million per year.

Part of the inquiry also considered a submission by the police that they be provided powers of detention. Mr Bavinton said,

> "What some witnesses have sought by way of recommendation from this inquiry is a state in which a member of the police force may demand my name and address and arrest me on refusal to supply it; may demand and take from me my fingerprints, and a sample of my hair, my handwriting, my blood and my body; may burst without warrant and with force into my home; may imprison me to question me; and need not advise me of such few rights as may remain to me.
>
> Seven and one half centuries ago such powers were denied to the executive forces of the country which is the source of our legal tradition.

> I have given evidence of a survey by my officers and have commented on the suggestions of other witnesses. This evidence has referred to challenges to the evidence of police witnesses, most often where it was the word of an official only. It has referred to men imprisoned on charges later withdrawn, and to requests for powers of imprisonment on suspicion. These powers were denied to King John and the concurrent liberties were promised to his people in the year 1215. It would be a strange solution to the problem of challenges to police honesty in 60 percent of all trials, to abolish the rules which attempt to control questioning and to supply a power of detention in its place."

The recommendations and the language itself now has the flavour of history to it. The recommendations of the Lucas Inquiry were of course not followed. It was only many years later, after the Fitzgerald Inquiry, that concerted efforts were made to implement many of the recommendations made by the Public Defender in early 1977. His words concerning personal liberty have also forecast the future in terms of the development of increasing police powers, detention for questioning and the taking of samples. Of course, he would be gratified to know that those powers are balanced by the statutory responsibilities in the *Police Powers and Responsibilities Act*.

In the 1970's private counsel briefed by the Public Defender including J Spender, M Moriarty, H Botting, B Hoath, D Muller, D Breen, W Cuthbert, J Barbeler and M Boulton.

The 1970's and 1980's

Bob Bavinton retired as Public Defender in 1977. He died in 2001 after a very full life. He was a Baptist lay preacher as well as having many other interests. After his retirement he was a representative for many years on the Ethics Committee attached to the Royal Children's Hospital, Brisbane.

In 1977 Mr Royce Miller QC was appointed Public Defender. He had been a Prosecutor for many years prior to that date. He held the position for some 18 months before returning to become Chief Crown Prosecutor. He was later appointed a District Court judge and then the state's second Director of Prosecutions.

In 1978 Mr W J O'Connor, also a Crown Prosecutor, was appointed as Public Defender. He oversaw continued growth in that office including dramatic increases in

the workload. He oversaw a movement in premises from 370 George Street to the newly constructed MLC Centre. At the end of his tenure in 1983 the office had grown to some 90 people. After his retirement he spent many years as a member of the Legal Aid Review Committee. He died in 2014.

He also authorised the involvement of the Public Defender's Office in the preparation of the Alwyn Peter manslaughter case. That case drew attention to the related blights of alcohol abuse and violence on remote aboriginal communities. The impact of that attention is a moot point as those blights continue today.

In 1983 Mr A J Healy QC was appointed Public Defender. He had for many years been an assistant Public Defender. In 1987 he was appointed to the District Court. Judge Healy also had a distinguished career as a counsel in public defence matters with many appearances before the Court of Criminal Appeal.

In 1987 Mrs B L Newton was appointed Public Defender. She was the first woman to be appointed to the position. She had been the first female lawyer to be appointed to the Public Defender's office. The first female paralegal was Margaret McMurdo, who commenced 3 weeks before Mrs Newton in 1976. Mrs McMurdo resigned as assistant Public Defender in 1989 to go to the private bar and then to the Bench. Mrs Newton was involved closely in the development of the listing system for criminal matters in both the Supreme and District Courts. The major components of that listing system survive today. She retired from the position in 1991 due to ill health.

I was appointed acting Public Defender in 1991 and was eventually appointed Assistant Director, Public Defender in the new body brought about by the merger of the Legal Aid Office and the Public Defender's Office. The Act introduced to bring about that merger specifically retained the title Public Defender in view of its long history in Queensland.

The Public Defender in relation to the newly created Legal Aid Office, Queensland was in charge of the Criminal Law Division of that office. The position had responsibility for the preparation of all in-house matters prepared by staff throughout the Legal Aid Office, Queensland both in Brisbane and in a number of regional areas. Over time the

position of Public Defender evolved into the head of the in-house counsel section of the Legal Aid Office. That is still the case.

In 1999 Mr Brian Devereaux was appointed Public Defender. In 2009 he was appointed to the District Court.

In 2011 John Allen QC was appointed Public Defender. He is the thirteenth person to have been appointed to that role.

The Public Defender's Office has a long history of development of professional officers within its ranks and of close connections with the private profession. It relied heavily on the use of law clerks and prided itself in their training and development. The office has always had a considerable reputation for the standard of in-house preparation. That standard continues in Legal Aid Queensland. Over the years the Public Defender has appeared in the majority of major criminal trials in both the Supreme and District Courts, the majority of criminal appeals to the Court of Criminal Appeal and Court of Appeal, the majority of appeals to the High Court and in relation to various other matters including most matters before the Mental Health Tribunal now the Mental Health Court. As indicated in the lists in this paper, many members of the private bar have commenced their careers appearing in matters prepared by the Public Defender or as in-house lawyers in that office. Many current members of the criminal bar received their training in the Public Defender's Office. There was also a system in place for many years where officers from the Crown Solicitor's Office Prosecution Branch would be seconded to the Public Defender's Office for the purpose of obtaining experience in defending matters.

In 1989-90, 5,293 persons on 27,772 charges were granted public defence. The fees paid to the private profession in that year were $3.7 million. That single innovation made in 1916 had grown into an organisation which provided a service that society must now expect in relation to the way it treats persons charged with serious criminal offences. It is fundamental that such persons are properly represented and the system itself ensures that every accused is afforded a trial according to law.

Professor Ronald Sackville said in his 1975 report entitled "*The Australian Government Commission of Inquiry: Law and Poverty Services: Legal Aid in Australia*",

> "… It would seem that the Queensland Public Defender service provides probably the most freely available assistance in criminal cases of any service in Australia … the Public Defender believes that the use of experienced clerks, who are handpicked for enthusiasm and initiative, has been highly successful, and that the standard of their instructions is generally superior to that of many private practitioners."

I would expect that the current Public Defender continues to believe that.

The cases

As indicated, the Public Trustee file contains the lists of all cases in which public defence was granted from 1916 to 1967. Presumably files within the Justice Department indicate the names of all cases granted public defence up until the merger with the Legal Aid Office in 1991. If you look through the criminal matters in the Queensland Reports more often than not the solicitor of record is the Public Defender. In the majority of the major criminal trials since 1916 the Public Defender either represented the accused or funded the accused's representation.

The first reported case involving the Public Defender appears in 1917. *R v Buckmaster* [1917] St R Qd 30 was an appeal against sentence for throwing a corrosive fluid with intent to do grievous bodily harm. The fluid thrown was sulphuric acid. Buckmaster was sentenced to 15 years imprisonment. His appeal was dismissed with the comment by the Court of Criminal Appeal,

> "The worst offence of its kind that could be committed."

That was probably a portent of the type of cases the Public Defender would handle in the years ahead.

Since its constitutional validity was determined by the High Court (*Fardon v Attorney-General (Qld)* (2004) 223 CLR 575) the criminal practitioners of LAQ have borne the brunt ever growing Supreme Court caseload resulting from applications by the

Attorney-General under the ***Dangerous Prisoners (Sexual Offenders) Act 2003*** for continuing detention and supervision orders of prisoners nearing completion of their prison sentences for serious sexual offences. In addition to the ever growing number of prisoners the subject of initial applications, the case load has grown exponentially with hearings of annual reviews of detention orders and alleged contraventions of supervision orders. For example, the case citations for one LAQ client who is yet to secure release from detention, with Supreme Court supervision orders overturned twice on appeal:

- *Attorney-General for the State of Queensland v Lawrence* [2008] QSC 230
- *A-G v Lawrence* [2009] QCA 136, [2010] 1 Qd R 505
- *Attorney-General for the State of Queensland v Lawrence* [2011] QSC 291
- *Attorney-General for the State of Queensland v Lawrence* [2011] QCA 301
- *A-G (Qld) v Lawrence* [2011] QCA 347
- *Attorney-General for the State of Queensland v Lawrence* [2012] QSC 386
- *Attorney-General (Qld) v Lawrence* [2013] QCA 364, [2014] 2 Qd R 504
- *Attorney-General (Qld) v Lawrence* [2014] QSC 77
- *Attorney-General (Qld) v Lawrence* [2014] QCA 103
- *Attorney-General (Qld) v Lawrence* [2014] QCA 220
- *Attorney-General (Qld) v Lawrence* [2016] QSC 58

The parameters of the legislation have been tested on appeal:

- *Attorney-General v Phineasa* [2012] QCA 184; [2013] 1 Qd R 305; (2012) 221 A Crim R 200
- *Dodge v Attorney-General (Qld)* [2012] QCA 280; (2012) 226 A Crim R 31
- *Attorney-General (Qld) v Kanaveilomani* [2013] QCA 404; [2015] 2 Qd R 509

In *Attorney-General (Qld) v Lawrence* [2013] QCA 364, [2014] 2 Qd R 504, on application by the legally-aided prisoner, the Court of Appeal struck down as constitutionally invalid according to the Kable principle legislation which purported to give the executive government power to further detain a prisoner despite the Supreme Court ordering their release upon a supervision order.

The criminal law practice of LAQ has continued to play an essential role in the work of the Court of Appeal. In addition to representation of appellants against conviction and sentence, LAQ solicitors and counsel have continued to act for respondents in the majority of Attorney-General's appeals against sentence pursuant to s 669A(1) of the Criminal Code; see, e.g. in recent years:

- *R v RAO & BCR & BCS; Ex parte Attorney-General* (Qld) [2014] QCA 7
- *R v Ryan; Ex parte Attorney-General (Qld)* [2014] QCA 68
- *R v Bolton; Ex parte Attorney-General (Qld)* [2014] QCA 128
- *R v MCB; Ex parte Attorney-General (Qld)* [2014] QCA 151
- *R v Levy & Drobny; Ex parte Attorney-General (Qld)* [2014] QCA 205
- *R v Beattie; Ex parte Attorney-General (Qld)* [2014] QCA 206
- *R v Castle; Ex parte Attorney-General (Qld)* [2014] QCA 276
- *R v Goodwin; Ex parte Attorney-General (Qld)* [2014] QCA 345
- *R v SCI; Ex parte Attorney-General (Qld)* [2015] QCA 39
- *R v Goulding and Ors; Ex parte Attorney-General (Qld)* [2016] QCA 65
- *R v Schenk; Ex parte Attorney-General (Qld)* [2016] QCA 131

LAQ solicitors and counsel have continued to act for respondents in the majority of Attorney-General's references of points of law pursuant to s 669A(2) of the Criminal Code; see, e.g. in recent years:

- *R v Naylor; Ex parte Attorney-General* [2012] QCA 116; [2013] 1 Qd R 368
- *R v Lovell; Ex parte Attorney-General* (Qld) [2015] QCA 136
- *R v Dillon; Ex parte Attorney-General* [2015] QCA 155; [2016] 1 Qd R 56

LAQ solicitors and counsel have appeared in all sittings of the Mental Health Court and have earned a solid reputation in this specialist jurisdiction.

Many of the most notable trials over the last 40 years involved representation by the Public Defender. Most often that involved in-house preparation. A short but not exhaustive list would include:

- *R v Kaporonovski*

- *R v Stuart and Finch* (the Whiskey A Go-Go)
- *R v Carstens* ("Cutty Sark" murders)
- *R v Wardrop*
- *R v Harper, Wylie & Payne* (The Weckett murders)
- The Sillery plane hijacking
- The Trinity Beach murder
- The Russell Island conspiracy
- The Deidre Kennedy murder
- *R v Saunders* (conspiracy to murder)
- The Sian Kingi murder
- *R v Benz* (hearsay)
- The so called "vampire" murder
- *R v Lowe* (parity of sentence)
- *R v Long* (murder)
- *R v Fukusato and others* (million dollar fraud)
- *R v Dexter* (the Wattle Group)
- *R v Previte* (murder)
- *R v Clarke* (murder)
- *R v Williams, Knight and Robertson* (murder)
- *R v Hussain* (murder and attempted murder)
- *R v Roughan* (murder)
- *R v T* (manslaughter by a mentally ill defendant)
- *R v Christensen & Others* (money laundering)
- *R v Fraser* (murder)
- *R v Fitzherbert* (murder)
- *R v Anderson, Anderson & Anderson* (fraud)

Of course all are not very palatable cases. It is a measure of the professionalism of the Public Defender and the staff of that office over the years that such cases were handled professionally and with competence.

A final quote, Moynihan J (as he then was) said in the Court of Criminal Appeal in 1990,

> "There is a misconception that cutting funds to the Pubic Defender does not have much effect. In fact, the reverse is true and a cut in funds to the Public Defender could result in fifty times the amount saved having then to be spent on the courts, which are very expensive to run. The fact that the Public Defender's office sometimes represents people with poor cases saves costs by avoiding the chaos caused by an unrepresented accused."

The prophesy of the Minister for Justice in 1974 that the Public Defender's Branch would be the biggest social service that that government or any state government was likely to provide in years to come may now seem somewhat grandiose. However, it cannot be denied that the office of Public Defender has had a major impact on the development of the criminal law in Queensland or that, for approaching 100 years, it has provided competent and professional representation to citizens accused of serious criminal offences. Such an office, and the way in which it is performed, is a measure of the justice with which we treat our citizens who are most vulnerable and in jeopardy.

Michael Shanahan

11 November 2016

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