

# Public Defenders Act 1995 No 28

[1995-28]



New South Wales

## Status Information

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Authorisation

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New South Wales

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# Public Defenders Act 1995 No 28



New South Wales

An Act to provide for the appointment and functions of Public Defenders; and for other purposes.

## Part 1 Preliminary

### 1 Name of Act

This Act is the *Public Defenders Act 1995*.

### 2 Commencement

This Act commences on a day or days to be appointed by proclamation.

### 3 Definitions

In this Act:

**community legal centre** means an Aboriginal legal service or other community legal service within the meaning of the *Legal Profession Uniform Law (NSW)*.

**exercise** a function includes perform a duty.

**function** includes a power, authority or duty.

**legally assisted person** means a person who is a legally assisted person within the meaning of the *Legal Aid Commission Act 1979* or who is receiving legal assistance through a community legal centre.

**part-time Public Defender** means a Public Defender exercising his or her functions as a Public Defender on a part-time basis, as provided by an agreement referred to in section 6 (2A).

## Part 2 Appointment of Public Defenders

### 3A Guidelines for appointments

The Attorney General may issue guidelines as to the process for the selection of a person to be proposed for appointment (including reappointment) to any office under this Part.

The guidelines are not mandatory and a failure to comply with them does not affect the validity of an appointment.

#### **4 Appointment of Senior Public Defender**

- (1) The Governor may appoint a Senior Public Defender.
- (2) The Senior Public Defender has such functions as are conferred or imposed on the Senior Public Defender by or under this or any other Act.
- (3) The Senior Public Defender is responsible to the Attorney General for the due exercise of the Senior Public Defender's functions, but nothing in this subsection affects or derogates from the authority of the Senior Public Defender in respect of the conduct of any proceedings.
- (4) Schedule 1 has effect in relation to the Senior Public Defender.

#### **5 Appointment of Deputy Senior Public Defenders**

- (1) The Governor may appoint one or more Deputy Senior Public Defenders.
- (2) A Deputy Senior Public Defender has such functions as are conferred or imposed on Deputy Senior Public Defenders by or under this or any other Act.
- (3) A Deputy Senior Public Defender is responsible to the Senior Public Defender for the due exercise of the Deputy Senior Public Defender's functions, but nothing in this subsection affects or derogates from the authority of a Deputy Senior Public Defender in respect of the conduct of any proceedings.
- (4) Schedule 1 has effect in relation to a Deputy Senior Public Defender.

#### **6 Appointment of Public Defenders**

- (1) The Governor may appoint such number of Public Defenders as the Governor thinks necessary.
- (2) A Public Defender has such functions as are conferred or imposed on Public Defenders by or under this or any other Act.
- (2A) A Public Defender may, by agreement in writing entered into with the Senior Public Defender, exercise his or her functions as a Public Defender on a part-time basis.
- (3) A Public Defender is responsible to the Senior Public Defender for the due exercise of the Public Defender's functions, but nothing in this subsection affects or derogates from the authority of a Public Defender in respect of the conduct of any proceedings.
- (4) Schedule 1 has effect in relation to a Public Defender.

## **7 Acting appointments**

- (1) The Attorney General may appoint a person who is eligible for appointment as such to act in the office of Senior Public Defender, Deputy Senior Public Defender or Public Defender.
- (2) The Attorney General:
  - (a) may, subject to this section, determine the terms and conditions of appointment, including remuneration and allowances, of a person acting in the office of Senior Public Defender, Deputy Senior Public Defender or Public Defender, and
  - (b) may terminate such an appointment at any time.
- (3) A person may not act or be appointed to act under this section for a period of more than 12 months at a time.
- (4) While a person is acting in the office of Senior Public Defender, Deputy Senior Public Defender or Public Defender, the person has all the functions of that office and is taken to be the holder of that office.
- (5) A person may be appointed to act in an office under this section (and may act in that office) even if the person is of or above the age at which a holder of the office would vacate the office.

## **Part 3 Functions of Public Defenders**

### **8 Functions of Senior Public Defender**

- (1) The functions of the Senior Public Defender include the following:
  - (a) to make arrangements and give directions for the disposition of the work of Public Defenders and so to ensure the effective and efficient conduct of that work,
  - (b) to provide advice and assistance to, and to monitor the work and activities of, Public Defenders,
  - (c) to consult with the Legal Aid Commission and with community legal centres about, and to enter into arrangements with the Legal Aid Commission and community legal centres for, the provision of legal assistance to legally assisted persons,
  - (d) to advise the Attorney General, whether on the request of the Attorney General or otherwise, on matters relating to the reform of the law relevant to the work and activities of Public Defenders.
- (2) The Senior Public Defender also has all the functions of a Public Defender.

## **9 Functions of Deputy Senior Public Defenders**

- (1) The functions of a Deputy Senior Public Defender include that of assisting the Senior Public Defender, as the Senior Public Defender requires.
- (2) A Deputy Senior Public Defender also has all the functions of a Public Defender.

## **10 Functions of Public Defenders**

- (1) The functions of a Public Defender include the following:
  - (a) to advise and appear in criminal proceedings, and other proceedings in the nature of criminal proceedings, on behalf of legally assisted persons,
  - (b) to advise on matters referred to the Public Defender by the Senior Public Defender,
  - (c) to carry out such other related functions as may be specified by the Attorney General after consultation with the Senior Public Defender.
- (2) The reference in subsection (1) (a) to proceedings in the nature of criminal proceedings extends to:
  - (a) committals, trials, appeals and ancillary proceedings (such as bail applications), and
  - (b) proceedings that are brought against a person for the purpose of obtaining an order for the detention of the person in prison, in a hospital for the detention of mentally incapacitated persons or in any other place of detention, and
  - (c) proceedings that are brought by a person for the purpose of securing the person's release from detention in prison, in a hospital for the detention of mentally incapacitated persons or in any other place of detention.

## **11 Guidelines**

- (1) The Senior Public Defender may, by order in writing, establish guidelines with respect to the exercise of the Public Defenders' functions under this Act.
- (2) Guidelines may not be established in relation to particular cases.
- (3) A Public Defender is subject to any guidelines in force under this section.

## **12 Recovery of costs from community legal centres**

The Senior Public Defender may, after consultation with the Legal Aid Commission, enter into arrangements with community legal centres for the recovery of costs associated with the provision by Public Defenders of legal assistance to persons who are referred to Public Defenders by community legal centres.

## **Part 4 Miscellaneous**

### **13 Staff**

Persons may be employed in the Public Service under the *Government Sector Employment Act 2013* to enable the Senior Public Defender to exercise his or her functions.

**Note—**

Section 59 of the *Government Sector Employment Act 2013* provides that the persons so employed (or whose services the Senior Public Defender makes use of) may be referred to as officers or employees, or members of staff, of the Senior Public Defender. Section 47A of the *Constitution Act 1902* precludes the Senior Public Defender from employing staff.

### **14 Delegation**

The Senior Public Defender may delegate to:

- (a) a Deputy Senior Public Defender, or
- (b) a Public Defender,

the exercise of any of the Senior Public Defender's functions (other than this power of delegation).

### **15 Attorney General may arrange secondments**

The Attorney General may make arrangements with the Senior Public Defender for the secondment of Public Defenders to act as Crown Prosecutors or to assist in the conduct of inquiries or investigations under the *Royal Commissions Act 1923* or the *Independent Commission Against Corruption Act 1988* or other such inquiries or investigations.

### **16 Protection from liability**

A matter or thing done or omitted by the Senior Public Defender, a Deputy Senior Public Defender or a Public Defender does not subject the Senior Public Defender, Deputy Senior Public Defender or Public Defender to any action, liability, claim or demand, if the matter or thing was done or omitted in good faith for the purposes of executing this or any other Act.

### **17 Annual report**

- (1) As soon as practicable after 30 June, but on or before 31 December, in each year, the Senior Public Defender must prepare and forward to the Attorney General a report of the work and activities of Public Defenders for the 12 months ending on 30 June in that year.
- (2) The Attorney General must lay the report or cause it to be laid before both Houses of Parliament as soon as practicable after receiving the report.



- (3) If a House of Parliament is not sitting when the Attorney General seeks to lay the report before it, the Attorney General is to cause a copy of the report to be presented to the Clerk of that House of Parliament.
- (4) A report presented under subsection (3):
- (a) is, on presentation and for all purposes, taken to have been laid before the House, and
  - (b) may be printed by authority of the Clerk of the House, and
  - (c) if so printed, is taken to be a document published by or under the authority of the House, and
  - (d) is to be recorded:
    - (i) in the case of the Legislative Council—in the Minutes of the Proceedings of the Legislative Council, and
    - (ii) in the case of the Legislative Assembly—in the Votes and Proceedings of the Legislative Assembly,on the first sitting day of the House after receipt of the copy of the report by the Clerk.

## **18 External review committee**

- (1) The Attorney General may establish an external review committee to monitor the work and activities of Public Defenders.
- (2) The constitution, procedure and functions of the committee are to be as prescribed by the regulations.

## **19 Regulations**

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

## **20 Repeal of [Public Defenders Act 1969](#)**

The [Public Defenders Act 1969](#) is repealed.

## **21 (Repealed)**

## **22 Savings, transitional and other provisions**

Schedule 3 has effect.

## 23 Review of Act

- (1) The Attorney General is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

## Schedule 1 Provisions relating to Public Defenders

(Sections 4, 5 and 6)

### 1 Definitions

In this Schedule:

**Officer** means the Senior Public Defender, a Deputy Senior Public Defender or a Public Defender.

**public servant** means a person employed in the Public Service or a member of staff of a statutory body.

**Senior Officer** means the Senior Public Defender or a Deputy Senior Public Defender.

**statutory body** means any body constituted by or under an Act that is declared by proclamation to be a statutory body for the purposes of this Schedule.

### 2 Eligibility for appointment

- (1) A person must be an Australian lawyer of at least 7 years' standing to be eligible for appointment as the Senior Public Defender.
- (2) A person must be an Australian lawyer of at least 5 years' standing to be eligible for appointment as a Deputy Senior Public Defender.
- (3) A person must be an Australian lawyer to be eligible for appointment as a Public Defender.

### 3 Term of office

An Officer is to be appointed by the Governor for a term of 7 years or for such shorter term as may be necessary to ensure that the person's term of office extends to (but not beyond) the date on which the person reaches the age of 72 years. An Officer is eligible (if otherwise qualified) for reappointment.

#### **4 Remuneration and leave**

- (1) An Officer is entitled to be paid:
  - (a) remuneration in accordance with the *Statutory and Other Offices Remuneration Act 1975*, and
  - (b) such travelling and subsistence allowances as the Attorney General may from time to time determine in respect of the Officer.
- (2) The leave that may be granted to an Officer is to be as the Attorney General may from time to time determine in respect of the Officer.

#### **5 Vacation of office**

- (1) An Officer vacates office if the person:
  - (a) dies, or
  - (b) resigns the office by instrument in writing addressed to the Governor, or
  - (c) reaches the age of 72 years, or
  - (d) ceases to be an Australian lawyer, or
  - (e) is removed from office by the Governor under subclause (2), (3) or (4).
- (2) An Officer who fails, without reasonable excuse, to comply with clause 6 is to be removed from office by the Governor.
- (3) The Governor may remove an Officer from office for incapacity, incompetence, misbehaviour or unsatisfactory performance.
- (4) The Governor may also remove an Officer from office if the Officer:
  - (a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or
  - (b) becomes a mentally incapacitated person, or
  - (c) absents himself or herself from duty for 14 days (whether or not wholly or partly consecutive) in any period of 12 months, except on leave granted by the Attorney General or unless the absence is occasioned by illness or other unavoidable cause, or
  - (d) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more, or
  - (e) is convicted elsewhere than in New South Wales of an offence that if committed in

New South Wales would be an offence so punishable.

- (5) Anything done or purporting to have been done by the Officer after the Officer reaches the age of 72 years is nevertheless as valid as if the Officer had not reached that age.

#### **5A Suspension from duty pending decision in relation to misconduct**

- (1) If of the opinion that there may be grounds for an Officer's removal from office, the Senior Public Defender may suspend the Officer from duty pending a decision being made as to whether or not he or she should be so removed.
- (2) If the Senior Public Defender so directs, any salary payable to the Officer in relation to the period during which he or she is under suspension is to be withheld.
- (3) If the Officer is removed from office, any salary so withheld is forfeited to the State unless the Senior Public Defender otherwise directs.
- (4) A suspension imposed under this clause may be removed by the Senior Public Defender at any time.

#### **6 Other work**

- (1) An Officer must not, without the consent of the Attorney General or (except in the case of the Senior Public Defender) the Senior Public Defender:
  - (a) engage in the practice of law (whether within or outside New South Wales) outside the duties of his or her office, or
  - (b) engage in paid employment outside the duties of his or her office.
- (2) An Officer must not contravene or fail to comply with any conditions attached to any such consent.

#### **7 Government Sector Employment Act 2013**

The office of an Officer is a statutory office and the [Government Sector Employment Act 2013](#) (including Part 6) does not apply to that office.

#### **8 Rights of certain former public servants**

- (1) This clause applies to an Officer who, immediately before being appointed as an Officer, was:
  - (a) a public servant, or
  - (b) a person in respect of whom provision was made by any Act for the retention of any rights accrued or accruing to the person as a public servant.
- (2) Subject to the terms of his or her appointment as an Officer, an Officer:

(a) retains any rights accruing to the Officer as a public servant, and

(b) is entitled to receive any deferred or extended leave,

as if he or she had continued to be a public servant during his or her term of office as an Officer.

(3) An Officer's service as an Officer is taken to be service as a public servant for the purposes of any law under which any rights of the kind referred to in subclause (2) (a) accrued or were accruing or by which any entitlement referred to in subclause (2) (b) is conferred.

## **9 Entitlement to reappointment to former employment in certain cases**

(1) A person who:

(a) ceases to be an Officer by resignation or who completes a term of office as an Officer and is not reappointed, and

(b) was, immediately before being appointed as an Officer:

(i) a person employed in the Public Service, the Teaching Service or the NSW Health Service, or

(ii) a member of staff of a statutory body,

is entitled to be employed in the Public Service, the Teaching Service or the NSW Health Service or as a member of staff of that statutory body, as the case requires, at a work level and salary not lower than the level at which the person was employed immediately before being appointed as an Officer.

(2) Where subclause (1) does not apply to a person who:

(a) was, immediately before being appointed to a full-time office constituted by an Act, an employee or member of staff referred to in subclause (1) (b), and

(b) is after that appointment appointed as an Officer,

the person is to have such rights, if any, to appointment as such an employee or member of staff, in the event of ceasing to be an Officer, as are specified in the instrument of appointment as an Officer or as are agreed on by the person and by or on behalf of the Government.

## **Schedule 2 (Repealed)**

## Schedule 3 Savings, transitional and other provisions

(Section 22)

### Part 1 Preliminary

#### 1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

this Act

*Courts Legislation Amendment Act 2005*

*Courts Legislation Amendment Act 2006*, to the extent that it amends this Act

*Crown Law Officers Legislation Amendment (Retirement Age) Act 2011*

- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later day.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

### Part 2 Provisions consequent on the enactment of this Act

#### 2 Definitions

In this Part:

**former Act** means the *Public Defenders Act 1969*.

**public servant** means an officer or employee of the Public Service or an employee of a statutory body.

**statutory body** means any body constituted by or under an Act that is declared by proclamation to be a statutory body for the purposes of this Part.

#### 3 Saving of existing appointments

- (1) Any person who, immediately before the commencement of this subclause, was a

Public Defender under the former Act (including both the Senior Public Defender and the Deputy Senior Public Defender) is taken to have been appointed under this Act as a Public Defender on the same conditions as to remuneration and allowances (subject to subclauses (2) and (3)) as those on which the person held office as Public Defender immediately before that commencement.

- (2) The person who, immediately before the commencement of this subclause, was the Senior Public Defender (Martin Langford SIDES, Q.C.) is taken to have been appointed under this Act, for a period of 7 years beginning on the commencement of this subclause, as the Senior Public Defender on the same conditions as to remuneration and allowances as those on which the person held office as Senior Public Defender immediately before that commencement.
- (3) The person who, immediately before the commencement of this subclause, was the Deputy Senior Public Defender (Michael Anthony GREEN, Q.C.) is taken to have been appointed under this Act, for a period of 5 years beginning on the commencement of this subclause, as a Deputy Senior Public Defender on the same conditions as to remuneration and allowances as those on which the person held office as Deputy Senior Public Defender immediately before that commencement.

#### **4 Preservation of rights of certain former public servants**

- (1) This clause applies to a Public Defender appointed under the former Act who, immediately before being so appointed, was:
  - (a) a public servant, or
  - (b) a person in respect of whom provision was made by any Act for the retention of any rights accrued or accruing to the person as a public servant.
- (2) A person who ceases to be a Public Defender by resignation is entitled to be appointed to some position in the Public Service or in the relevant statutory body, as the case requires, not lower in classification and salary than that which the person held immediately before being appointed as a Public Defender under the former Act.

#### **5 Preservation of rights of other former public servants**

- (1) This clause applies to a Public Defender appointed under the former Act who, immediately before being so appointed, was the holder of a full-time office constituted by an Act and who, immediately before being appointed to that office, was:
  - (a) a public servant, or
  - (b) a person in respect of whom provision was made by any Act for the retention of any rights accrued or accruing to the person as a public servant.
- (2) A person who ceases to be a Public Defender has such rights, if any, to appointment to a position in the Public Service or in the relevant statutory body, as the case

requires, as were set out in the terms of his or her appointment as a Public Defender under the former Act or as are agreed on by the person and by or on behalf of the Government.

### **Part 3 Provision consequent on enactment of [Courts Legislation Amendment Act 2006](#)**

#### **6 Part-time Public Defender**

- (1) Section 6 (2A) applies to a Public Defender appointed before the commencement of that subsection.
- (2) Until a relevant determination is made and takes effect under the [Statutory and Other Offices Remuneration Act 1975](#), a part-time Public Defender is entitled to be paid in accordance with the determination in force for the time being for Public Defenders, but on a pro rata basis (according to time spent in service), as calculated by the Attorney General.

### **Part 4 Provisions consequent on enactment of [Crown Law Officers Legislation Amendment \(Abolition of Life Tenure\) Act 2007](#)**

#### **7 Definitions**

In this Part:

**2007 amending Act** means the [Crown Law Officers Legislation Amendment \(Abolition of Life Tenure\) Act 2007](#).

**Senior Officer** has the same meaning as in Schedule 1.

#### **8 Transitional arrangements for existing Officers**

- (1) This clause applies to the following persons (**transitional office holders**):
  - (a) a Public Defender who held office as a Public Defender immediately before the commencement of the 2007 amending Act,
  - (b) a Senior Officer holding office immediately before the commencement of the 2007 amending Act who was a Public Defender or Crown Prosecutor immediately before being appointed as a Senior Officer,
  - (c) a Senior Officer appointed after the commencement of the 2007 amending Act who held office as a Public Defender or Crown Prosecutor since before that commencement and until the person's appointment as a Senior Officer.
- (2) A transitional office holder holds office as a Public Defender while continuing to be a transitional office holder and, subject to this Act, after ceasing to be a transitional office holder.



- (3) A person who holds office as a Public Defender pursuant to this clause holds that office until the Public Defender vacates the office under this Act as in force immediately before the commencement of the 2007 amending Act.
- (4) The amendments made to Schedule 1 by the 2007 amending Act do not apply to the office held by a person as a transitional office holder.

## 9 Right of reappointment of existing Public Defenders

- (1) A person who holds office as a Public Defender immediately before the commencement of the 2007 amending Act and who is subsequently appointed to a Crown law office is, on ceasing to hold the Crown law office as a result of resignation or completion of a term of office, entitled to be reappointed to the office of Public Defender.
- (2) This clause ceases to apply to a person if the person does not take up that reappointment within 3 months of ceasing to hold the Crown law office unless, within that 3-month period, the person is reappointed to that Crown law office or appointed to another Crown law office.
- (3) Clause 3 of Schedule 1 (as substituted by the 2007 amending Act) and clause 5 (1) (b1) of Schedule 1 (as inserted by the 2007 amending Act) do not apply to the office of Public Defender to which a person is reappointed under this clause, and a person continues to hold that office until the person vacates the office under this Act.
- (4) This clause is capable of operation in relation to the same person on more than one occasion.
- (5) In this clause, **Crown law office** means the office of Director of Public Prosecutions, Deputy Director of Public Prosecutions, Solicitor for Public Prosecutions, Crown Prosecutor, Senior Crown Prosecutor, Deputy Senior Crown Prosecutor, Senior Public Defender, Deputy Senior Public Defender or Solicitor General.

## Part 5 Provisions consequent on enactment of **Crown Law Officers Legislation Amendment (Retirement Age) Act 2011**

### 10 Application of amendments

- (1) A person who holds office as a Public Defender, Senior Public Defender or Deputy Senior Public Defender immediately before the commencement of the *Crown Law Officers Legislation Amendment (Retirement Age) Act 2011* and who was appointed for a specified term of office shorter than 7 years is taken to have been appointed for a term of 7 years.
- (2) Subclause (1) does not apply to the term of office of a person appointed to act in any such office.

- (3) The amendments made to this Act by the *Crown Law Officers Legislation Amendment (Retirement Age) Act 2011* do not affect any right preserved by this Schedule to hold office beyond a retiring age provided by this Act.