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COMMENTARY ON THE STATE ATTORNEY AMENDMENT BILL 2013

A. Introduction

1. The Cape Bar Council ("the CBC") welcomes the opportunity to comment on the State Attorney Amendment Bill (B52-2013) ("the Bill").

2. The Bill proposes amendments to the State Attorney Act 56 of 1957 ("the Act"), which falls under the executive authority of the Minister of Justice and Constitutional Development ("the Minister").

3. The commentary will focus on certain legislative aspects only.

B. The relationship between offices

4. The Act currently creates an office of the State Attorney in Pretoria (section 1(1)), with branches in the other major cities.

5. The Bill proposes to transform the central office and branches into offices of equal standing. The Minister will also be able to create additional offices (section 1). This is a material amendment and would enhance the status of the existing branches, which is supported.

C. Appointments and the personnel structure of the offices

6. Under the Act the Minister appoints a State Attorney at the office in Pretoria (section 2(1)(a)); as well as heads of branches and "*other such persons as may be necessary for the proper performance of the business of the said office or any branch thereof*" (section 2(1)(b)).

7. In terms of the Bill:

   7.1. The Minister will appoint a "*Solicitor-General*" ("the S-G"), who will be the executive head of all offices of the State Attorney (section2(1), read with

section 3A(1)(a)). As a transitional mechanism, the person holding the post of State Attorney under the Act will become the S-G (section 2(6)(a)).

7.2. The Minister, after consultation with the S-G, will also appoint state attorneys, who will be persons heading offices (section 2(3)(a)); as many attorneys as necessary (section 2(3)(b); and necessary support staff (section 2(3)(c)).

8. On this aspect, the following is noted:

8.1. It is a requirement (or objective jurisdictional fact) for the appointment of the S-G, state attorneys and attorneys in each office, that they must be "*fit and proper persons who are admitted and entitled to practice as attorneys in any division of the High Court*". This accords with the requirements of the Attorneys Act 53 of 1979 ("the Attorneys Act").

8.2. It is also notable that under section 57(3) of the Attorneys Act, the S-G will be a member of every regional society of attorneys, which highlights the importance of the fact that he or she must be a practicing attorney. The Bill does not however explicitly deal with the removal of the S-G, state attorneys or other attorneys in an office. We would suggest that it should be made clear that any appointment to one of these positions automatically terminates if the person loses the right and entitlement to practice as an attorney, whether temporarily (i.e. he or she is suspended from practice) or permanently (i.e. he or she is struck from the roll of practicing attorneys).

8.3. The appointment of the S-G, state attorneys, and attorneys is subject to the ordinary requirements of the public service, which is not problematic.

8.4. The remuneration of these professional staff is not dealt with, other than the recordal that they may be remunerated (section 2(8)). We would suggest that consideration should be given to a provision that specifies that the levels of remuneration for professional staff in state attorneys'

offices are not based on the ordinary public service scales, and will instead be determined by the Minister, in or after consultation with the S-G. We are mindful that all legally qualified persons in the public service is currently regulated by the Occupation Specific Dispensation for Legally Qualified Persons in the Public Service (OSD), a collective agreement which regulates the remuneration and career progression of attorneys and advocates in public service. Whether the OSD will continue to apply or whether it will be exempted from application in terms of the Bill is not clear.

8.5. It may raise practical difficulties for the Minister to bear the primary responsibility for the appointment of all professional and support staff in state attorney offices. This is avoided to some extent by the fact that the Minister may delegate his or her powers to the S-G (section 2(4)). The concern would however remain that all appointments – even of support staff – would have to be dealt with centrally and at a high level. We would suggest that the Minister and the S-G should retain the power to determine the numbers of professional and support staff necessary in an office, but that state attorneys (i.e. the heads of offices) should be primarily responsible for the appointment of particular people to available positions in their office.

8.6. The Minister makes an appointment "*after consultation*" with the S-G. This in effect means that the Minister must consult with the S-G, but that he or she need not reach any agreement with the S-G. To the extent that the Minister retains a broad responsibility for making appointments, we would suggest that such appointments be made on the recommendation of the S-G, or *in* consultation with the S-G rather than *after* consultation with the S-G.

8.7. An S-G will be appointed for a term of 5 years, which may be extended by the Minister for "*any further period*" (section 2(2)). We would suggest that any extension of an appointment in such a senior and important position should be subjected to rigorous performance scrutiny and that upon any

appointment or extension of appointment the Minister and the S-G must conclude a performance management agreement for the S-G.

D. Ministerial Control

9. Under the Act the office of the State Attorney in Pretoria is "*under the control*" of the Minister (section 1(1)).

10. Under the Bill the Minister establishes offices, and the S-G is subject to the "*control, direction and supervision of the Minister*" (section 2(1); and the Minister may require that the S-G, state attorneys, attorneys and support staff to perform additional functions (sections 2(7) and 3A(2)(b)).

11. In our view this Ministerial control is overbroad:

    11.1. In particular matters, the state attorney offices will represent particular clients – who may be other Ministers or provincial MECs (in their capacity as the executive heads of their departments), or officials. Ministerial control should not be permitted to interfere in any attorneys' primary responsibility to his or her client, which would include the protection of confidentiality and providing proper advice.

    11.2. Ministerial control should also not interfere in the rights of client departments to assess when a matter should be initiated or defended, or whether to appoint counsel.

12. This aspect may become particularly important in intergovernmental disputes, in which it is notionally possible that different offices will, for instance, represent competing spheres of government or organs of states. It would compromise the judicial process if a member of the national executive could, in such cases, exert direction and supervision of the attorneys involved in a matter.

13. In our strong view the Minister's control should extend to the <u>administration</u> of the office of the S-G and state attorneys' offices throughout the country. It

should not, however, extend to powers of direction and supervision of matters handled by the S-G or state attorneys' offices. This position must be made clear in the Bill.

14. Section 2(7) of the Bill includes a cross-reference to persons "*appointed in terms of subsection (3) or deemed to have been appointed in terms of subsection 6*", and provides that these persons may be required to perform additional functions determined by the Minister. The cross-reference should, we suggest, be limited to persons "*appointed in terms of subsection (3) or deemed to have been appointed in terms of subsection 6(b)*". Section 6(a) relates to the S-G. The requirement that this person must perform additional functions determined by the Minister is specifically covered in section 3A(2)(b) of the Bill.

E. The Regulatory Scheme under the Act

15. In terms of the Act, the Minister may promulgate regulations (section 9). This power is retained under the Bill.

16. In addition, the Bill also provides for:

16.1. A "*policy*", determined by the Minister in consultation with the S-G. The Bill requires in peremptory terms that such a policy must be determined, and further requires that it must be "*observed*" by all persons appointed in the offices of the State Attorney (section 3(4)); and

16.2. "*Directives and standards*", issued by the S-G to implement the policy ("the directives"). The Bill again requires that such directives must be issued, and directs that they must be observed (section 3A(1)(c)).

17. Our courts have recognised that it is often valuable to have policy documents guiding the exercise of discretionary powers or complex processes.[1] Such policies cannot, however, be applied inflexibly, and have to be distinguished from "*legally binding enactments*" and do "*not create obligations of law*".[2]

18. The Bill appears to require that policy documents and directives must be observed – which would indicate that they are to be treated as binding. This would, in our view, amount to an attempt to raise the dictates of the policy and the directives into a form of subordinate legislation.

19. We would suggest that it be made clear that the policy and the directives must be considered, but that the attorney involved retains a discretionary power to act differently in a particular case. This is important as each potential case is different, and it is neither desirable nor advisable to attempt a uniform policy of equal application in all cases.

20. Furthermore, the subject matter of the policy will deal with significant matters: including the co-ordination and management of all litigation involving the state; briefing of advocates; outsourcing work; initiating, defending and opposing matters; and the use of ADR techniques. The policy would have to be sufficiently flexible in order to ensure that the attorney acts in the best interests of, and on the instructions of, a client department or authorised official – and is not unduly constrained by the strictures of a policy or directives. In this regard we draw attention to the following:

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[1] *MEC for Agriculture, Conservation, Environment & Land Affairs v Sasol Oil (Pty) Ltd* 2006 (5) SA 483 (SCA) at para 19, in which the Court accepted that "*the adoption of policy guidelines by state organs to assist decision-makers in the exercise of their discretionary powers has long been accepted as legally permissible and eminently sensible.*" The Court however continued in that case that "*once it is established that the policy is compatible with the enabling legislation ... the only limitation to its application in a particular case is that it must not be applied rigidly and inflexibly, and that those affected by it should be aware of it*" (emphasis added). In that case (at para 20), the decision-maker expressly stated that a distance requirement (between petrol stations) in a policy document was not rigidly applied and the decision-makers remained "*open-minded*".

[2] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) para 7; *Minister of Education v Harris* 2001 (4) SA 1297 (CC) paras 9-10; *SASOL* above, at para 21; *National Lotteries Board and Others v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at para 9.

20.1. It should be the decision of the client whether a matter should be instituted or opposed, or whether to pursue mediation or arbitration in a particular case. The policy, and the directives, should not be allowed to trump the client's choices.

20.2. So too, the client should not be deprived, by a national policy, of a choice whether to appoint counsel or particular counsel.

20.3. This issue may become particularly important in cases in which different sphere of government, or organs of state, are involved in litigation against each other. The policy's requirements co-ordination and management of litigation cannot place additional obstacles in the path of state litigants.

21. To the extent that the Minister requires the power to determine notional standards in respect of some issues to be covered in the envisaged policy, we would suggest that the Bill should instead require that these aspects be dealt with in regulations. The Minister's discretion in promulgating such regulations should also be properly guided.

22. It follows further that the policy and the directives should be sufficiently flexible, which could be achieved by requiring that an attorney must "*have regard to*" or "*take account of*" these documents – without being obliged to follow their terms.

23. We did not comment on the Legal Practice Bill given that it is in draft form and still subject to the parliamentary process. The LPB could have implications on the State Attorney Amendment Bill.

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