



27 January 2014

## SUMMARY AND ANALYSIS: STATE ATTORNEY AMENDMENT BILL [B52-2013]

### 1. INTRODUCTION

The office of the State Attorney in Pretoria and its 11 branches<sup>1</sup> provide attorney, conveyancing and notary services to the Executive, all state departments, state owned enterprises and other government bodies. According to the Department of Justice and Constitutional Development (the Justice Department) the legislation that established the office of the State Attorney, the State Attorney Act 56 of 1957, is outdated and 'does not address the modern day challenges of a complex entity delivering legal services to the state.'<sup>2</sup>

The amendments proposed by the State Attorney Amendment Bill seek to address these challenges by providing for the establishment of offices of the State Attorney and the appointment of a Solicitor-General (SG) as the Chief State Law Adviser responsible for co-ordinating and managing state litigation. The amendments emanate mainly from a 2012 Justice Department policy document – *the Policy Framework for the Transformation of State Legal Services*.

This paper:

- Briefly discusses the Policy Framework document to provide some context for the amendments.
- Provides a summary and analysis of the key clauses of the Bill.
- Includes a brief summary of the role and responsibilities of a Solicitor-General in selected comparative jurisdictions.

### 2. BACKGROUND

The Justice Department has acknowledged that state legal services are not in good health.<sup>3</sup> It has highlighted critical operational challenges, including:<sup>4</sup>

- Prescription of claims involving Government.
- Default judgments granted against Government.
- Instead of settling matters, attorneys and advocates proceed against instructions and consequently burden the state with unnecessary cost orders.
- Lack of an inter-governmental legal services mechanism resulting in poor co-ordination of state services. This has led to attorneys and advocates being instructed at national and provincial level without the involvement of the Office of the State Attorney.

<sup>1</sup> Bhisho/East London (EC); Bloemfontein(FS); Cape Town (WC); Durban (KZN); Johannesburg (GP); Kimberley (NC); Mafikeng (NW); Mthatha (EC); Polokwane (LP); Port Elizabeth (EC); Thohoyandou (LP)

<sup>2</sup> DoJ&CD Policy Framework for the transformation of State Legal Services p18

<sup>3</sup> Ibid p4

<sup>4</sup> Ibid p32



- Inconsistency in the determination of counsel fees by the different branches of the Office of the State Attorney due to the absence of guidelines to regulate tariffs.
- Failure to ensure equitable distribution of briefs among previously disadvantaged individual's (PDI's), especially women.
- Spiralling costs and over-reliance on private legal capacity.

In response Cabinet approved (on 11 November 2011) certain principles to begin to address some of these operational deficiencies.<sup>5</sup> These included the:

- Re-organisation of state legal services across national, provincial and local spheres;
- Development of a new legal framework to address the deficiencies of the 57 year old State Attorney Act; and
- Implementation of certain immediate steps to consolidate legal and litigation services (This will result in the establishment of an *interim consolidated Office of State Legal Services*.<sup>6</sup>)

## 2.1 Policy Framework

According to the Justice Minister the restructuring of state legal services forms part of the 'transformation discourse', as outlined in the *Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State*, (released for comment on 28 February 2012.)<sup>7</sup>

In May 2012, the Justice Department released a ***Policy Framework for the transformation of State Legal Services*** (the Policy Framework).<sup>8</sup> The Policy Framework refers to the need to consolidate and streamline all state legal services under a single functionary appointed as Head of State Legal Services, a position similar to that of Solicitor-General (SG) in comparable jurisdictions. He or she will be the state's Chief Legal Adviser, who will represent the state in all civil litigation in the same way that the National Director of Public Prosecutions represents the state in criminal prosecutions.<sup>9</sup>

The appointment of the SG is to be made as a matter of urgency<sup>10</sup> so that the consolidation, mainstreaming and co-ordination of state legal services may begin in earnest. The provisions of the State Attorney Amendment Bill seek to facilitate this appointment. Furthermore, the Bill also aims to empower the Justice Minister to develop policy in respect of various aspects of state litigation. This policy will be implemented by the SG through '*directives and standards*'.

The Policy Framework notes the need for the co-ordination and management of state litigation to provide greater uniformity and improved service delivery. This will involve the development of:<sup>11</sup>

- A strategic risk litigation assessment (requiring every organ of state track trends in litigation.)

<sup>5</sup> Ibid p3

<sup>6</sup> Ibid

<sup>7</sup> Ibid p4

<sup>8</sup> Ibid

<sup>9</sup> <http://www.sabinetlaw.co.za/justice-and-constitution/articles/solicitor-general-cards>

<sup>10</sup> Policy Framework p3

<sup>11</sup> Ibid p38



- A complaints handling mechanism (to deal with complaints against state attorneys and litigation officers-).
- A briefing policy to ensure adherence to government's policy to empower PDIs and provide for the fair distribution of legal work.<sup>12</sup>
- A central database to source legal firms and advocates wanting to do work for the state.
- A tool to allow for the monitoring and evaluation of legal work performed for the state and its entities by private practitioners and to measure the transfer of skills through the outsourcing of legal work.
- The development of a tariff model to encourage uniformity and prevent discretionary charging of fees.
- The reorientation of state legal services to become not only the defender of litigation against departments, but in certain instances also the initiator of litigation on behalf of the poor.

#### Comment

- The Policy Framework notes that *interventions to urgently modernise state legal services within existing resources are required until new legislation is passed by Parliament to usher in the transformed state legal services*. It is not, however, clear what this entails.

## 2.2 Transforming the Office of the State Attorney

The office of the State Attorney is central to the transformation of state legal services and the Justice Department acknowledges that ***a lack of capacity in the office of the State Attorney and a lack of effective co-ordination and management*** have had a detrimental impact on the efficiency and effectiveness of state litigation.<sup>13</sup>

One commentator observed the following about interacting with attorneys from the office of the State Attorney - both as an opposition attorney or client:<sup>14</sup>

“The impression is that the office is not adequately staffed in relation to its case load, resulting in the attorneys concerned being unable to discharge their functions competently compared with those in private practice...the office does not have the technology and resources, such as a library, legal forms, ICT systems and superior administrative support, that you would find in a large commercial law firm.<sup>15</sup> The overall impression of the office of the state attorney is that it is no more than an address or a post box by client departments to pass briefs to counsel.”

Some of the specific challenges affecting the office of the State Attorney include:

- A lack of skill in dealing with complex matters.<sup>16</sup>

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> Mahlangu S (an attorney and special adviser to the Minister of Public Enterprises), 'Tipped Scales Persist', (6 May 2013) <http://www.timeslive.co.za/opinion/commentary/2013/05/06/the-big-read-tipped-scales-persist>

<sup>15</sup> Ibid

<sup>16</sup> Ibid p33



- A poor success rate in respect of litigation. (Only 38% of the cases enrolled by the office of the state attorney in 2011/12 were successfully litigated.)
- Absence of a formalised framework on the management of state litigation.
- The absence of uniform standard operating policies. (Such as a written policy either for the appointment of correspondent attorneys or the appointment of senior counsel and/ or for the use of junior counsel (which risks feeding into a perception that there may be conflicts of interest and nepotism)).<sup>17</sup>
- Lack of monitoring and evaluation systems over the work and outputs of private attorneys and advocates.
- The Head of the office of the State Attorney in Pretoria faces a wide range of serious charges (including a failure to prevent and or condoning or colluding with some state attorneys in abusing the power to appoint private attorneys and or brief advocates contrary to the policy of briefing PDI's; a failure to monitor records relating to instructions, payments and the integrity of fee structures; and a failure to investigate allegations of corruption that some briefs to advocates and some appointments of private attorneys were issued in exchange for reward as well as fruitless and wasteful expenditure).<sup>18</sup>
- Various court judgements which have raised 'red-flags' about service delivery at the office of the state attorney<sup>19</sup> and have expressed concern about aspects of the conduct of individual state attorneys.<sup>20</sup> For example:
  - In *South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board and Others* 2006 (8) BCLR 901 (CC). O' Regan J expressed displeasure at 'the office of the State Attorney in Pretoria whose systems of training and supervision appear to be woefully inadequate.'<sup>21</sup> In response she made an order of costs *de bonis propriis*<sup>22</sup> against the State Attorney<sup>23</sup>
  - In *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* 2008 (5) SA 94 (CC) Madala J expressed concern at the ineptitude of the state attorney<sup>24</sup> and noted as follows; 'relying on the moral obligation of the State Attorney and the Department of Justice to improve the state of affairs has been an exercise in futility. I, accordingly, find that the relevant state institutions should take steps to rectify the problems highlighted above and report back to this Court as to the progress made.'<sup>25</sup>
  - In *Minister of Safety and Security v G4S International UK Ltd, In re: G4S International UK Ltd v South African Airways (Pty) Ltd and Others* (07/12735) [2012] ZAGPJHC 50 (30 March 2012) Van Oosten J of the South Gauteng High Court observed that the instances of neglect and general decline in standards

<sup>17</sup> The Department reports that it has no formal written policy in place when Senior Counsel are briefed (although seniors are *preferably* briefed with PDI juniors.)

<sup>18</sup> [http://www.pod702.co.za/Eyewitnessnews/docs/121120mosidi\\_charge.pdf](http://www.pod702.co.za/Eyewitnessnews/docs/121120mosidi_charge.pdf)

<sup>19</sup> <http://www.thepost.co.za/judge-slams-lawyers-sausage-machine-1.1533537>. Turning her attention to the State Attorney's Office, Satchwell J said it was "highly incompetent".

<sup>20</sup> *Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC).

<sup>21</sup> *Ibid* para [69]

<sup>22</sup> An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure.

<sup>23</sup> The State Attorney was ordered to pay the applicants' wasted costs of the hearing on 2 March 2006 on the scale as between attorney and client.

<sup>24</sup> *Nyathi* case Para [54]. These problems included the failure to file an appearance to defend in the High Court, as well as the failure to inform the relevant state officials of the outstanding judgment debts.

<sup>25</sup> *Nyathi* case Para [69]



of service at the office of the State Attorney required an urgent in-depth investigation by the authorities.<sup>26</sup>

- In *Tasima v Department of Transport 2013 (4) SA 134 (GNP)* Tuchten J of the North Gauteng High Court<sup>27</sup> stated that the experience of each of the members of this full Bench has been that frequently and most disturbingly civil litigation against the State in this division is allowed to go by default. He was of the view that *‘the office of the State Attorney, Pretoria, an important organ of state, is presently unable to comply with its constitutional and statutory obligations.’*<sup>28</sup> He ordered the individual state attorney and office of the State Attorney, Pretoria, jointly and severally to pay the costs of the application for a postponement of the appeal, including the costs of both senior and junior counsel on the attorney and own client scale. The liability of the individual state attorney for these costs was *de bonis propriis*.<sup>29</sup>

#### Comment

- The Policy Framework refers to the need for an **objective assessment of the performance of the office of the state attorney**, in order to be able to position the office in terms of the necessary strategic and operational interventions it requires.<sup>30</sup> The planned assessment will look at indicators such as:
  - the success rate in respect of litigation,
  - the number of PDI’s briefed,
  - the cost incurred,
  - management of contingent liabilities; and
  - management of recoveries (of debt).
- Has the objective assessment process begun? Can the Department elaborate on progress, if any, and timeframes?

### 3. STATE ATTORNEY AMENDMENT BILL [B52-2013]

A clause by clause consideration of the Bill notes the following:

#### • Clause 1

The 1957 Act established one office (Pretoria) and various branches under the control of the Justice Minister. The proposed amendment provides for the establishment by the Minister of **offices of the State Attorney** which will mean that the office in Pretoria and existing branches shall become offices of equal standing. The clause also provides that the Minister may create additional offices.

<sup>26</sup> *Minister of Safety and Security v G4S International UK Ltd, In re: G4S International UK Ltd v South African Airways (Pty) Ltd and Others (07/12735) [2012] ZAGPJHC 50 para [16]*

<sup>27</sup> Sitting with Van der Merwe J and Kollapen J.

<sup>28</sup> Para [39]

<sup>29</sup> In addition the Registrar was directed to send copies of the judgment to the Minister of Justice and Constitutional Development and the Parliamentary Portfolio Committee on Justice and Constitutional Development, with the request that such action be taken in the light of this judgment as may be considered appropriate. The registrar was also directed to send a copy of the judgment to the Law Society of the Northern Provinces with the request that the Law Society investigate the conduct of the state attorney concerned.

<sup>30</sup> Policy Framework



## • **Clause 2 – Appointments**

The 1957 Act provides that the Justice Minister may appoint (a person admitted and entitled to practise as an attorney) as State Attorney in charge of the Office (in Pretoria) as well as qualified persons in charge of any branch and any other persons deemed necessary.<sup>31</sup>

The Bill, in line with the policy outlined in the *Policy Framework on the transformation of state legal Services*, empowers the Justice Minister (subject to the laws governing the public service) to appoint a *'fit and proper'* person, *who is admitted as an attorney*, as the Solicitor-General. This will be the State's Chief Legal Adviser in all civil litigation matters.

Additionally the clause provides that:

- The SG is appointed for a five year term. (This term may be extended by the Minister **for any further period.**)
- The SG will be subject **to the control, direction and supervision of the Minister.**
- The Justice Minister may appoint State Attorneys to head each of the offices of the state attorney, **after consultation**, with the SG; including
  - as many other persons required who are admitted and entitled to practise as attorneys; and
  - other persons deemed necessary to staff the offices.
- The Justice Minister may delegate any of the powers contained in the clause to the SG.
- The classification, grading and remuneration of posts are determined by laws governing the public service.
- The existing incumbents, in charge of the Pretoria office and other branches respectively, and any other persons appointed to the office/branches shall be deemed to have been appointed to those positions at the commencement of the Amendment Act.
- The Minister may require state attorneys to perform additional functions as determined by the Minister.

### **Comment**

- The provision that after a five-year term the SG appointment may be extended by the Minister for *'any further period'* is vague. Is it appropriate for the government's Chief Legal Adviser in all civil litigation matters, to be employed indefinitely at the pleasure of the Minister?
- The Bill appears to envisage that the SG will be a hybrid position – part Ministerial appointee and part public servant. Will this be conducive to the provision of independent legal advice as may be required from a Solicitor General who going to head the consolidated Office of State Legal Services?
- The memorandum to the Bill notes the SG will be the States Chief Legal Adviser in all civil litigation matters, similar to the role of the National Director of Public Prosecutions in criminal matters. Should the appointment criteria not be similar? (The person

<sup>31</sup> Section 2(1)(a) and (b)



appointed as NDPP must be a fit and proper person, *with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.* Could it even be argued that the SG should be appointed by the President on the recommendation of the National Assembly?)

- If the statutory requirement is to appoint a 'fit and proper' person as SG should some provision also be made for removal from office on the basis, for instance, of inability to perform the functions of office; misconduct; incapacity; or incompetence?
- The 1957 Act provided that the office of the State Attorney established in Pretoria was under the control of the Minister. In terms of the Bill the Minister is given the power to *'control, direct and supervise'* the SG, who in turn exercises control, direction and supervision of the offices of the State Attorney. Ultimately though the SG will not only head the office of the State Attorney but a consolidated Office of State Legal Services is it appropriate for the Justice Minister to exercise absolute control over the government's Chief State Law Advisor?
- Given the challenges experienced by certain of the offices/branches of the State Attorney and the need for the heads of the various offices to have the full confidence of the SG, shouldn't appointments for the heads of the offices be made by the Minister *in consultation* rather than *after consultation* with the SG?

### • **Clause 3 – Functions of the State Attorney**

The clause retains the original function of the State Attorney as contained in the 1957 Act, namely, *the performance in court of work on behalf of government as is performed by attorneys, notaries and conveyancers, or by parliamentary agents on behalf of the administration of any province and the South African Railways and Harbours Administration.*

In addition, however, the Bill provides that:

- The Justice Minister shall (**in consultation with the SG and after consultation with the State Attorneys**) determine policy relating to the functions of the State Attorney in respect of:
  - The co-ordination and management of litigation
  - Briefing of advocates
  - Outsourcing of legal work (including instructing of correspondent attorneys)
  - Initiating, defending and opposing of matters
  - Implementation of Alternative Dispute Resolution mechanisms
- The **policy must be observed by all persons appointed to the offices of the state attorney.**
- This policy (and any amendments to it) must be **approved by Cabinet and tabled in Parliament.**

### **Comment**

- Why have seemingly 'outdated' references to parliamentary agents and the South African Railways and Harbours Administration been retained in the Bill?<sup>32</sup>

<sup>32</sup>In 1910 when Union was achieved the railways and harbours were used to unify and develop South Africa's economy. The result was that the South African Railways and Harbours administration (SAR&H) became an established arm of government. In 1981, the country's railway, harbour, road transport, aviation and pipeline operations became known as South African Transport Services (SATS).



- Can the Bill **compel** adherence to policy especially in respect of initiating, defending and opposing of matters?
- The requirement that all persons appointed to the offices of the state attorney must observe yet to be determined policy implies support staff? Is this necessary?

- **Clause 4 – Powers of the SG**

This clause lists the powers and functions of the SG and provides that he or she shall:

- Be appointed as Executive officer exercising *control, direction and supervision* over all state attorney offices.
- Issue directives and standards (in respect of the policy discussed in terms of clause 3). These directives and standards **must be tabled** in Parliament by the Minister.
- Perform any other function as directed by the Minister.

The clause also provides that the SG can delegate his or her powers (to any person appointed as a State Attorney by the Minister) but is not bound by decisions made in the exercise of that delegated power and may set aside or amend any decisions made. The SG cannot, however, delegate his or her powers in respect of the issuing of directives and standards relating to the policy matters set out in clause 3.

- **Clauses 5, 6, 7, 8, 9 and 10**

These clauses provide for technical amendments such as substituting outdated references to the office of the state attorney in Pretoria and its branches with the amended reference to offices of the State Attorney.

- **Clauses 11 and 12**

The two clauses amend the long title; and provide for the short title and commencement date respectively.

### 3.1 ADDITIONAL MATTERS

- **Tagging**

The State Attorney Amendment Bill was introduced as a **proposed section 75 Bill**.

**The Joint Tagging Mechanism (JTM) has tagged it a section 76 Bill.** The Parliamentary Legal Advisers contend that the Bill qualifies to be dealt with as a section 76 Bill on the basis that provisions of the Bill fall within the ambit of section 197 of the Constitution which deals with the Public Service.<sup>33</sup>

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On 1 April 1990, after 80 years of government and parliamentary control, SATS was given company status and was renamed Transnet SOC Ltd <http://www.transnet.net/ABOUTUS/History.aspx>

<sup>33</sup> Parliamentary Legal Advisers: Legal Opinion: Classification of State Attorney Amendment Bill (13 November 2013)





- **Consultation**

The Memorandum to the Bill notes that the Office of the State Attorney and Chief Litigation Officer were consulted.

**Comment**

- The closing date for public comments/submissions on the Policy Framework on the transformation of state legal services was 31 January 2013. Can the Department elaborate on submissions made in respect of the role of the Solicitor General?

- **Financial Impact**

The Memorandum to the Bill indicates that there are no financial implications. This may need further clarification.

**Comment**

- The Department reported to the Portfolio Committee that over the medium term an **estimated amount** of R100 million (2013/14 R25 million, 2014/15 R35 million and 2015/16 R40 million) is required for the transformation of State Legal Services.<sup>34</sup>

#### 4. COMPARATIVE EXAMPLES

Given the Justice Department's decision to appoint a Solicitor-General as the Head of State Legal Services it may be of interest to consider briefly the role and responsibilities of the Solicitor-General in some comparative jurisdictions.<sup>35</sup>

In general in most of the states considered, the Attorney-General (AG) is the chief legal adviser to the State, with the Solicitor-General assisting and supporting the AG. The AG often has a political role to play while the position of the Solicitor General is less clear cut. Many have argued that the Solicitor-General must either be independent or subordinate; but '*no simple formula can capture the complex nature of the Solicitor General's responsibilities*'. The Solicitor-General is both an advocate and an officer of the court with the need to strike an appropriate balance between the two. Thus it has been suggested that:

*'The Solicitor General should support the administration's views on sensitive legal issues. However, in the course of that advocacy, the Solicitor General must never sacrifice his credibility and reliability as a trusted officer of the Court. Maintaining a balance between the sometimes conflicting duties of advocate and officer of the Court is a difficult and often thankless task...Achieving and maintaining that balance, however, is the fundamental mission of the Solicitor General.'*<sup>36</sup>

<sup>34</sup> DoJ&CD Presentation to the Portfolio Committee on Budget Recommendations (10 October 2013)

<sup>35</sup> The Policy Framework also contains some comparative examples p45-50.

<sup>36</sup> Goff-Gray C, The Solicitor-General in context: A tri-jurisdictional study, Bond Law Review 2011



- **Kenya**

In terms of the Kenyan Constitution 2010 the Attorney-General (AG) is appointed, as the Principal Legal Adviser to the Government, by the President with the approval of the National Assembly. The AG is assisted by *the Office of the Solicitor-General* in the performance of his or her duties. The AG used to have prosecutorial powers but the 2010 Constitution provided for a separate office of the Director of Public Prosecutions.

The Office of the Attorney-General Act 49 of 2012 provides for the functions and powers of the AG and appointment and functions of the SG. The AG's functions include advising government departments, constitutional commissions and state corporations on legal matters; negotiating, drafting, vetting and interpreting local and international treaties; drafting legislative proposals; and representing government in all national and constitutional matters. In the exercise of his or her powers and performance of functions the AG is not under the direction and control of any person or authority.<sup>37</sup> The AG supervises the formulation of policies and plans for the Office and issues directives or practice notes to any officer to whom the Act applies in order to maintain standards and uniformity. The 2012 Act includes a Code of Ethics for state lawyers which is set out in a Schedule to the legislation.

In terms of section 9 of the Office of the Attorney-General Act the SG is appointed by the President with the approval of the National Assembly (such a person must be qualified to hold the office of Judge). The Solicitor-General is involved in helping the AG to: organize, coordinate and manage administrative matters; manage the legal functions of the State Law office; formulate legal policy and ensure proper administration of the legal system, (including professional legal education and human rights issues); ensure preparation of Cabinet Papers and Memoranda; represent government in constitutional and major litigation cases; arrange the attachment of candidates for pupillage in the State Law Office; undertake contractual obligations on behalf of the State Law Office as well as such other duties as may be conferred by specific statutes or otherwise assigned.

The President may remove the AG or SG from office for a serious violation of the Constitution; gross misconduct; physical or mental incapacity; incompetence or bankruptcy.

- **Malawi**

The Attorney-General is the principal legal adviser to the government. In addition to advising the government on all legal matters, the Attorney-General conducts civil litigation for and on behalf of the government. The Solicitor-General supervises and monitors civil litigation, the drafting of legislation and the negotiation of agreements for and on behalf of the government. The Solicitor-General is also responsible for the operations of the Ministry of Justice in the performance of its legal functions.<sup>38</sup>

The Attorney-General, the Solicitor-General and the Director of Public Prosecutions are all appointed by the President. The President also has the power of removal on the grounds of incompetence, incapacity or being compromised in the performance of their duties.<sup>39</sup>

<sup>37</sup> Office of the State Attorney Act 2013 (Kenya) section 6(5)

<sup>38</sup> [www.ibanet.org/Document/Default.aspx?DocumentUid=C9872074](http://www.ibanet.org/Document/Default.aspx?DocumentUid=C9872074).

<sup>39</sup> <http://www.sdn.org.mw/ruleoflaw/justice/legaldepts.html>



- **India**

The Solicitor-General of India is the second highest law officer of India and a subordinate to the Attorney General for India, who is the Indian government's Chief Legal Advisor and its primary lawyer in the Supreme Court of India.<sup>40</sup> The attorney general does not have executive authority and is not a government minister; those functions are performed by the law minister. The Solicitor-General of India is appointed for a period of 3 years and is assisted by several Additional Solicitors-General of India. Like the Attorney General for India, the Solicitor General and the Additional Solicitors General advise the Government and appear on behalf of the Union of India in terms of the Law Officers (Terms and Conditions) Rules, 1972. However, unlike the post of Attorney General for India, which is a Constitutional post under Article 76 of the Constitution of India, the posts of the Solicitor-General and the Additional Solicitors-General are statutory.

- **Zambia**

The Attorney General (AG) plays the role of principle legal advisor to the government. The AG is not part of the cabinet per se but works closely with the executive. Article 54(1) of the Constitution provides that the AG shall be appointed by the President. It further spells out the qualifications of the persons to be appointed. The AG represents the government in courts or any other legal proceedings to which government is a party. Government also makes use of the office of the Solicitor-General (SG) who is also appointed by the President as per Article 55(1). The SG may exercise any power or duty imposed on the AG when the AG is unable to act owing to illness or absence and in any case where the AG has so authorised it.<sup>41</sup>

- **Singapore**

According to the Government Instruction Manual IM4D, the Attorney-General and Solicitors-General are the Law Officers and Chief Legal Advisors of the Government. Section 35(7) of the Constitution states that it is the duty of the Attorney-General to "advise the Government upon such legal matters and to perform such other duties of a legal character, as may from time to time be referred to or assigned to him by the President or the Cabinet and to discharge the functions conferred on him under the Constitution or any written law".

The Solicitor-General of Singapore works to assist the Attorney-General to oversee and supervise the work of more than 250 lawyers in diverse fields of criminal prosecution, domestic and international civil advisory and litigation work and legislative drafting.<sup>42</sup> The Solicitors-General also works closely with the Attorney-General, in providing legal advice to the Government of Singapore. Under section 336(2) of the Criminal Procedure Code, the Solicitors-General also have all the powers of a Deputy Public Prosecutor and may act as the Public Prosecutor in the absence of the Attorney-General.

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<sup>40</sup><http://www.jagranjosh.com/current-affairs/mohan-parasaran-appointed-as-the-solicitor-general-of-india-1360828775-1#sthash.5dWLOdg7.dpuf>

<sup>41</sup> <http://www.nyulawglobal.org/globalex/zambia.htm#theattorneygeneral>

<sup>42</sup> [www.cccc.org.sg/vanguard/house/.../Nov\\_MOL%20Appendix.doc](http://www.cccc.org.sg/vanguard/house/.../Nov_MOL%20Appendix.doc)



- **Ireland**

The principal functions of the Attorney General's office are to advise the Government in matters of law and legal opinion and to provide the State with both drafting and litigation services. The Chief State Solicitor's Office is a constituent element of the Attorney-General's Office. The Chief State Solicitor's Office provides litigation services together with a wide range of legal services not involving litigation, such as advisory and conveyancing services.<sup>43</sup> In effect, the function of the Chief State Solicitor is to act as the solicitor to Ireland, the Attorney General, Government Departments and Offices, and State Agencies. The Attorney General no longer provides prosecution services as these were transferred in 1974 to the Director of Public Prosecutions.

- **Australia**

The commonwealth Attorney General is first law officer and Chief legal advisor to the federal government with three key functions: policy, legal services and public interest.<sup>44</sup> The AG is primarily a politician, heads a government department and is vested with numerous statutory powers.

The office of the Commonwealth Solicitor-General was established under the *Law Officers Act 1964 (Cth)* as a permanent non-political law officer.<sup>45</sup> Section 6(1) of the Act, states that '[a] person appointed as Solicitor-General shall be appointed by the Governor-General for such period, not exceeding 7 years, as the Governor-General determines, but is eligible for re-appointment.' Accordingly, although resourced and provided with administrative services by the Attorney-General's Department, the Solicitor-General is a holder of public office and is said to be independent of the Department. This is consistent with the view that 'there is an unbroken tradition that Solicitors-General render dispassionate and non-political advice to their governments, including those of the contrary nature to those under whom they took office'. Although in contrast to this view one commentator concludes that any 'assertion that the Solicitor General should be free of political persuasion ignores the reality that he is an official within the executive branch who serves at the pleasure of the President who appointed him.' The purpose of the office includes, 'acting as counsel for the Commonwealth, giving opinions on questions of law to the Attorney-General, and carrying out such other functions, ordinarily performed by counsel, as the Attorney-General requests'. The Solicitor-General appears as counsel in cases of constitutional significance, international cases and in areas of special government interest.

- **Philippines**

The Attorney-General of the Philippines was an office that existed from 1901 until 1932, when the office was abolished and its functions taken over by the Minister of Justice. Since then, the Solicitor General of the Philippines, previously the second law officer, became principal law officer. The Office of the Solicitor General (OSG) is tasked to represent the People of the Philippines, the Philippine Government, its Agencies and Instrumentalities, Officials and Agents (especially before appellate courts) in any litigation or matter requiring the services of a lawyer. It is an independent and autonomous office attached to the Department of Justice for budgetary

<sup>43</sup> <http://www.attorneygeneral.ie/csso/english/index.htm>

<sup>44</sup> <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/speeches/20081013TheRoleoftheAttorney.pdf>

<sup>45</sup> Goff- Gray C, *The Solicitor-General in context: A tri-jurisdictional study*, *Bond Law Review*, Vol 23, 2012



purposes. The OSG has a "dual responsibility" to both the Judicial Branch and the Executive Branch. The Solicitor General is first and foremost, an Officer of the Court, and possesses an inescapable responsibility to uphold the rule of law at all times. It is therefore imperative for the OSG to maintain the trust and confidence of the courts, especially the appellate courts. The vital role and function of the OSG was best summarized by the Supreme Court as follows: "*Endowed with a broad perspective that spans the legal interest of virtually the entire government officialdom, the OSG may be expected to transcend the parochial concerns of a particular client agency and instead, promote and protect the public weal.*"<sup>46</sup>

The Solicitor-General has various powers and functions which include; representing the Government in the Supreme Court and the Court of Appeals in all criminal proceedings; representing the Government and its officers in the Supreme Court, the Court of Appeals, and all other courts or tribunals in all civil actions and special proceedings in which the Government or any officer thereof in his official capacity is a party; investigating, initiating court action, or in any manner proceed against any person, corporation or firm for the enforcement of any contract, bond, guarantee, mortgage, pledge or other collateral executed in favour of the Government.

The Solicitor-General is appointed by the President and has the same qualifications for appointment, rank, prerogatives, and privileges as those of the Presiding Justice of the Court of Appeals. The Assistant Solicitors General and the Solicitors are appointed by the President upon recommendation of the Solicitor-General. The trial Attorneys and administrative personnel in the Office of the Solicitor General are appointed by the Solicitor-General.<sup>47</sup> The core values of the OSG are to add SPICE to government (Social Justice, Patriotism, Integrity, Competence and Efficiency.)<sup>48</sup>

- **Jamaica**

As Principal Law Officer, the Attorney-General's Office is responsible for providing legal advice and representation to all Ministries and Departments of Government. Civil proceedings against the Crown must be instituted against the Attorney-General. The AG can institute civil proceedings on behalf of the government and his role generally is that of protector of the public interest. The position is authorized by section 79 (1) of the Constitution, which provides that "there shall be an Attorney-General who shall be the principal adviser to the Government of Jamaica."<sup>49</sup> The Attorney-General is usually a political appointee.

The Solicitor-General is responsible for the administration of the Attorney-General's Chambers and the position is authorised by the Solicitor-General's Act, 1939. The position is that of a civil servant who is appointed by the Governor General. The Solicitor-General, under the general direction of the Attorney-General, is responsible for providing advice on legal matters relating to the drafting and enactment of Government legislation. Responsibilities include; advising the governor general, Cabinet, Parliament, the attorney general, and all ministries and their respective departments on the legal implications of Government policies.<sup>50</sup> The Solicitor -General is also expected, among other things, to represent Government ministers and various functionaries and departments of Central Government in the United Kingdom Privy Council, the Caribbean Court

<sup>46</sup> <http://www.osg.gov.ph/index.php/mandate>

<sup>47</sup> Ibid

<sup>48</sup> <http://www.osg.gov.ph/index.php/mission-vision-and-core-values>

<sup>49</sup> <http://moj.gov.jm/administration/attorney-general>

<sup>50</sup> <http://m.jamaicaobserver.com/mobile/news/Search-on-for-solicitor-general>



of Justice, the Court of Appeal, and the Supreme Court, and must also supervise personnel who represent these persons in the Resident Magistrates' Courts.

## 5. CONCLUSION

To conclude the following may be noted. The Policy Framework envisages a phased process to give effect to the alignment and integration of state legal services:

- **Firstly**, the consolidation of all state legal services currently performed in different branches and units of the Department of Justice into a single Office of State Legal Services under the Solicitor-General.
- The envisaged coordination of government-wide legal services, which will form part of **the second phase** of the policy development process, will be dealt with through the Cooperative Governance stream. This will entail wider consultation, which will be guided by research and benchmarking.

*During the first phase of the process the Office of the Chief Litigation Officer, the Office of the State Attorney and the Chief State Law Adviser, as well as elements from Legislative Development, International Affairs and Family Advocate Services, will be integrated into a single Office of State Legal Services. The Justice Department reports that an interim organisational structure has been designed to consolidate state legal services into a single Unit under the SG with the following work streams:*

- Intergovernmental co-ordination
- Specialist litigation
- General litigation
- Mediation and ADRM
- Legislation certification
- State legal advisory services
- Corporate management and research

Incumbents of the different legal posts in the different branches and units will be attached to one or more of the abovementioned work streams, based on their areas of service, as well as experience and expertise. The alignment and mainstreaming of posts and post designations will be a gradual process.<sup>51</sup>

### Comment

- Has the Department of Public Service and Administration (and if necessary Treasury) approved a structure in terms of the Public Service Act, 1994 for the establishment of a consolidated State Legal Services Unit and the creation of the position of Solicitor General?<sup>52</sup>

<sup>51</sup> Policy Framework p51

<sup>52</sup> The Policy Framework notes that the establishment of an interim consolidated Unit: State Legal Services in the Justice department is contemplated in terms of section 7B of the Public Service Act, 1994. The Department is in the process of finalising the development of policy and legislative frameworks which will result in the establishment of the Office of State Legal services as contemplated in section 7A of the Public Service Act. (p53)



- No timeframes are provided for the consolidation of state legal services and potential disruptions will have to be managed with care as the restructuring required to streamline offices may result in employee uncertainty.

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<sup>53</sup> The assistance of parliamentary librarian Mr T Schumann in sourcing the reference material for this paper is appreciated.