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BACKGROUND INFORMATION: THE SOLICITOR GENERAL, OFFICE OF THE STATE ATTORNEY AND STATE LITIGATION

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1. INTRODUCTION

This paper provides some background information on the Solicitor General, Office of the State Attorney and state litigation for the meeting with the Acting Solicitor General.

2. BACKGROUND

The **transformation/re-engineering of State Legal Services** has been a key strategic priority for the Justice Department for a number of years.

- At the heart of state legal services is its 'engine room', the **Office of the State Attorney**, which is central to the transformation of state legal services. State attorneys act in service of the state and represent the State and State Departments (national and provincial) in all lawsuits and transactions for and against the State. The state attorney, may brief private legal professionals to provide specialist drafting and advocacy skills.
- The State Attorney's Office is generally located where there is a High Court and there are currently **thirteen** State Attorney Offices based in; Bloemfontein, Cape Town, Durban, East London, Johannesburg, Kimberley, Mahikeng, Mthatha, Mbombela, Polokwane, Port Elizabeth, Pretoria and Thohoyandou.
- The 'health' of these offices has been identified as a concern by the Department, the courts, **the Portfolio Committee** and independent constitutional bodies such as the



Public Service Commission. The office has been plagued by poor performance, corruption, collusion, concerns about briefing patterns and a decentralised, uncoordinated structure.¹

- When the Justice and Correctional Services Minister Mr R Lamola addressed the Portfolio Committee in **October 2019**, he acknowledged that the Office of the State Attorney was in a “**dire**” situation.²

The Minister also warned that “**government civil litigation, if not handled well, can prove to be a major threat to a country's fiscal liability**”. The States litigation account runs into billions of rands annually. In his budget speech in **2019**, the Minister stated that:³

- “There is on-going work in transforming the Office of the State Attorney. This area is of significance, given the unprecedented levels of litigation against the State.
- **We are giving urgent attention to this area of work and will soon be approaching Cabinet with a Business Case and Draft Bill containing recommendations that will take the Department and the country forward.**
- **An efficient Office of the State Attorney is also essential for the transformation of the legal profession as a whole**, particularly in relation to the allocation of State legal work or what is loosely termed ‘briefing patterns’.
- We will also **conclude the state litigation strategy** and ensure the **Counsel Briefing Policy is finalised**. The Tariff Policy and Mediation Policy is receiving urgent attention. We are looking at presenting this to Cabinet in due course.”

Comment

- In the Fourth, Fifth and Sixth Parliaments, the Portfolio Committee (the Committee) has expressed concern about the reports of disarray and dysfunction in the Office of the State Attorney, as well as the fragmented approach to the management of State Legal Services.⁴ In the Sixth Parliament, the Committee has noted that this fragmentation undermines efforts to transform the legal profession by ensuring that briefing patterns across government support previously disadvantaged legal practitioners and contain costs.⁵
- The Committee has also expressed the belief that a great deal more should be done to support Black legal practitioners, in particular black women, wishing to make law

¹ Ensor L, State attorney's office plagued by poor performance, Ronald Lamola says, (Accessed at <https://www.businesslive.co.za/bd/national/2019-10-16-state-attorneys-office-plagued-by-poor-performance-ronald-lamola-says/>)

² Address by Honourable Minister Ronald Lamola to Parliament on the Annual Report 2018/19 on 16 October 2019 (Accessed at https://www.justice.gov.za/m_speeches/2019/20191016-AddressToParliament-AnnualReport-2018-19.html)

³ Address by the Minister for Justice and Correctional Services, the Honourable, Mr. Ronald Lamola (MP), on the occasion of the Budget Vote Debate of the Department of Justice and Constitutional Development in the National Assembly, Parliament, Cape Town, 16 July 2019 (Accessed at https://www.justice.gov.za/m_speeches/2019/20190716-BudgetVote.html)

⁴ ATC191030: Budgetary Review and Recommendation Report of the Portfolio Committee on Justice and Correctional Services, dated 29 October 2019 (Accessed at <https://pmg.org.za/taled-committee-report/3985/>)

⁵ ATC190712: Report of the Portfolio Committee on Justice and Correctional Services on Budget Vote 21: Justice and Constitutional Development, dated 12 July 2019, (Accessed <https://pmg.org.za/taled-committee-report/3883/>)



their career. The Committee has noted the Department's initiatives to ensure that its briefing patterns support previously disadvantaged individuals. Nevertheless, the impact of this does not seem to be felt by practitioners who complain that they lack work to sustain viable practices. It has been the view of the Committee that the many obstacles that young black legal practitioners encounter require a comprehensive response involving all stakeholders.⁶

3. ROLE OF SOLICITOR GENERAL

The **State Attorney Amendment Act 13 of 2014** came into operation on **7 February 2020**.⁷ The Act empowers the Justice Minister to appoint a Solicitor-General as a sort of **executive, super-structure**, overseeing the running of all offices of the State Attorney.⁸⁹

On **2 April 2020**, **Mr Fhedzisani Pandelani**, was appointed as South Africa's first **Acting Solicitor-General** for **24 months** by Justice and Correctional Services Minister R Lamola.¹⁰

3.1 Powers and Functions of the Solicitor General

According to the **State Attorney Amendment Act 13 of 2014** the Solicitor General is:¹¹

- (i) The executive officer of all offices of State Attorney; and must
- (ii) Exercise control, direction and supervision over all offices of State Attorney;

The Act states that the Minister of Justice and Constitutional Development must determine **policy** relating to the **functions of the offices of State Attorney**. However, this must be done **after consultation with the Solicitor-General**, who must consult with the State Attorneys, The following **policies** must be developed:

- (a) The coordination and management of all litigation in which the State is involved.
- (b) The briefing of advocates.
- (c) The outsourcing of legal work, including the instruction of correspondent attorneys;
- (d) Initiating, defending and opposing of matters; and

⁶ ATC200605: Report of the Portfolio Committee on Justice and Correctional Services on the respective Strategic Plans and Annual Performance Plans 2020/21 of the Department of Justice and Constitutional Development, National Prosecuting Authority, Legal Aid South Africa, Special Investigating Unit, Public Protector South Africa, South African Human Rights Commission and Information Regulator; and Budget Vote 25: Justice and Constitutional Development for the 2020 MTEF, dated 3 June 2020 (Accessed at <https://pmg.org.za/tailed-committee-report/4167/>)

⁷ Proclamation No R6 of 2020. Commencement of the state Attorney Amendment Act, 2014. (Accessed at https://cisp.cachefly.net/assets/articles/attachments/81492_42989rg11035pr6.pdf). The Act amended the State Attorney Act 56 of 1957.

⁸ Thamm M, New sheriff in town: State Attorney 'horror show' in for cleanup as acting solicitor-general appointed (Accessed at <https://www.dailymaverick.co.za/article/2020-04-06-new-sheriff-in-town-state-attorney-horror-show-in-for-cleanup-as-acting-solicitor-general-appointed/>)

⁹ According to the State Attorney Amendment Act the Solicitor-General should be appointed for a term of five years, which may be extended by the Minister of Justice and Constitutional Development for any further period or periods of not more than five years at a time.

¹⁰ Media Statement: Minister Lamola appoints Acting Solicitor General (Accessed at https://www.justice.gov.za/m_statements/2020/20200402-ActingSolicitorGeneral.pdf)

¹¹ Mailovich C, Justice minister appoints SA's first solicitor-general (Accessed at <https://www.businesslive.co.za/bd/national/2020-04-02-justice-minister-appoints-sas-first-solicitor-general/>)



(e) Implementing alternative dispute resolution mechanisms in the resolution of litigation against the State, which must be observed by all persons appointed in the offices of State Attorney.¹²

These policies **must** be, (i) approved by Cabinet and (ii) **tabled in Parliament**.¹³

The Act also empowers the Justice Minister, after consultation with the Solicitor-General, to appoint as State Attorneys, as many persons, who are fit and proper, as may be necessary for the proper performance of the business of an office of State Attorney. As well as such other persons as may be necessary for the proper performance of the business of an office of State Attorney.¹⁴

According to the Justice Ministry, **priorities** for the **Acting Solicitor-General** include:¹⁵

- Urgently tackling the ever-increasing state liability bill.
- Empowering the Offices of the State Attorney to collect recoveries on behalf of the state from third parties.
- Transforming the legal profession, particularly in terms of briefing patterns. **This is imperative.** This will allow for further policies in favour of briefing and outsourcing work to Previously Disadvantaged Individuals (PDI)/legal practitioners. While the development of the policy will be the prerogative of the Minister, the implementation of the policy will be the responsibility of the Solicitor-General.

WHY APPOINT AN **ACTING** SOLICITOR GENERAL?

According to the Department, the appointment of Mr Pandelani in an **acting position** is due to the “**operationalisation of the State Attorney Act**” and a permanent appointment “**is a lengthy process which is to be embarked on soon.**”¹⁶ It appears then the Acting Appointment is a stop-gap measure. The Committee may be interested in establishing from the Department whether the ‘lengthy process’ required to make a permanent appointment has been initiated. The term of the current Acting Solicitor General will end on **2 April 2022**.

The Committee should note that:

- The purpose of the amendments to the State Attorney Act in 2014 were to create the position of Solicitor General to address the systemic challenges facing the state attorney. However, it took **six years** for the legislation to be enacted and for an Acting Appointment to be made.¹⁷

¹² Sections 3 and 3A of Act 13 of 2014

¹³ Section 3 of Act 13 of 2014

¹⁴ Section 2 of Act 13 of 2014

¹⁵ Media Statement: Minister Lamola appoints Acting Solicitor General (Accessed at https://www.justice.gov.za/m_statements/2020/20200402-ActingSolicitorGeneral.pdf)

¹⁶ Ibid

¹⁷ At one point, the Solicitor General (SG) position was advertised. In 2016, the Public Service Commission reported that the post of SG had been advertised on 14 February 2016 with a closing date of 7 March 2016. (See the Report of the PSC, Assessment on the Effectiveness and Efficiency of the Office of the State Attorney (Accessed at <http://www.psc.gov.za/documents/reports/2016/SA%20Report%20Final%2026%20May%202016.pdf>)



- According to a comment from the Deputy Justice Minister, the Department had a challenge in terms of being able to find somebody suitable at the salary level.¹⁸
- A job evaluation resulted in the post being pitched at the level of a Deputy Director-General. The Justice Minister at the time Mr Masutha, however, was reportedly of the view that this would not attract a suitably qualified and experienced incumbent and decided it would be more appropriate for the post to be remunerated at least at the level of a Judge of the High Court.¹⁹
- The Department reportedly sought technical assistance from the Government Technical Advisory Centre (GTAC).²⁰
- In 2018, it was reported that the filling of the position had been halted pending the restructuring of the entire state advisory and litigation offices.²¹
- There have been no further amendments to the State Attorney Act. It is unclear at what salary level the Acting Appointment has been made or whether a permanent appointment will be made after 2 April 2022.

4. TIMELINE

It may assist the Committee to consider some background information on state legal services and the State Attorney.

YEAR	TIMELINE
2007	<ul style="list-style-type: none">• From 2007, the Department reported on the development of a State Litigation Blueprint to provide for efficient management of litigation involving the state.• In 2007, a Litigation Management Forum was formed to provide a platform for officials responsible for state litigation. Service Level Agreements (SLA's) were to be signed between Departments and the Justice Department. The needs and roles of parties were to be set out as dictated by the litigation each Department was faced with.
2009	<ul style="list-style-type: none">• It was reported that the SLA's could not be signed in the absence of a comprehensive policy to guide state litigation.²²• The State Litigation Blueprint was then absorbed into the Policy Framework for the Transformation of State Legal Services, which was released in 2012.

¹⁸ Ensor L, State attorney's office plagued by poor performance, Ronald Lamola says, (Accessed at <https://www.businesslive.co.za/bd/national/2019-10-16-state-attorneys-office-plagued-by-poor-performance-ronald-lamola-says/>)

¹⁹ ATC161026: Budgetary Review and Recommendation Report of the Portfolio Committee on Justice and Correctional Services, dated 26 October 2016 (Accessed at <https://pmg.org.za/taled-committee-report/2869/>)

²⁰ Ibid

²¹ ATC171019: Budgetary Review and Recommendation Report of the Portfolio Committee on Justice and Correctional Services, dated 19 October 2017 (Accessed at <https://pmg.org.za/taled-committee-report/3107/>)

²² DoJ&Cd Annual Report 2009/10



YEAR	TIMELINE
2011	<ul style="list-style-type: none"> In November 2011, Cabinet approved the restructuring/reorganisation of State Legal Services.²³ This would be driven by the Policy Framework for the Transformation of State Legal Services
2012	<ul style="list-style-type: none"> In May 2012, the Department introduced the Policy Framework for the Transformation of State Legal Services.²⁴ The overall goal of the Framework was a transformed, integrated, professional, cost effective, and highly skilled State Legal services. The Justice Minister at the time, Mr J Radebe, stated that the lack of effective coordination of legal services had led to a number of operational challenges, including: ²⁵ <ul style="list-style-type: none"> Previously disadvantaged individuals (PDIs) were not given briefs or, where they did receive briefs; the value of these was not commensurate with transformational objectives. Some of the specific inadequacies relating to allocation of legal work to PDI practitioners included: <ul style="list-style-type: none"> Briefs not being awarded on an equitable basis – big law firms in the cities and affluent areas and white counsel receive preference over PDIs and single practitioners in underprivileged areas. Women are overlooked due to gender prejudices. PDIs are not briefed to perform specialised and commercial legal work. PDIs are not briefed in constitutional matters, resulting in a select few advocates appearing in the Constitutional Court. Many young advocates are not given work. State entities brief private counsel directly, with some of them engaging the services of private counsel on a retainer basis. Prescription of claims involving government. Default judgments granted against government. Insufficient preparation by attorneys and advocates. Instead of settling matters, attorneys and advocates proceeded against instructions and consequently burdened the state with unnecessary cost orders. Lack of monitoring systems over the work and output of attorneys and advocates. Inconsistency in the determination of counsel fees by the different branches of the Office of the State Attorney.

²³Statement on Cabinet meeting of 23 November 2011 (Accessed at <http://www.gcis.gov.za/content/newsroom/media-releases/cabinet-statements/statement-cabinet-meeting-23-november-2011>)

²⁴ Department of Justice and Constitutional Development - A Framework for the Transformation of the State Legal Service (Accessed at <https://www.justice.gov.za/docs/other-docs/2012tsls.pdf>)

²⁵ Media Statement, Released by the Justice Minister on 21 May 2012. (Accessed at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=27583&tid=68971>)



YEAR	TIMELINE
	<ul style="list-style-type: none"> According to the Minister the reforms set out in the Policy Framework were intended to: <ul style="list-style-type: none"> Revolutionise the public legal sector to enable it to provide legal services of the highest standard. Address some of the shortcomings in the current system that result in government losing court cases it ought not to have lost, or embarking on ill-fated litigation where it ought to have considered alternative forms of redress to litigation, thus resulting in huge costs to the fiscus. Broaden the pool of legal practitioners who are briefed by the state to ensure a fair representation of black and female practitioners, consistent with the racial, gender and geographic demographics of our society. The scarcity of black and female practitioners in the pool of practitioners who continue to dominate constitutional and other high-profile litigations has a consequential effect on the slow pace of the transformation of the judiciary, as this profession is the main feeder to the judiciary. The empowerment of female practitioners remains a specific focus area. The 2012 Policy Framework proposed <u>various initiatives</u> intended to <u>transform</u> the state legal sector. These included:²⁶ <ul style="list-style-type: none"> Amending the outdated State Attorney Act 56 of 1957. Consolidating all state legal services under a single functionary appointed as Head of State Legal Services to be known as the Solicitor-General (SG). The appointment of the Head of State Legal Services will be made as a matter of urgency so that the desirable consolidation, mainstreaming and co-ordination of state legal services may begin in earnest. Developing a briefing policy to ensure adherence to government's policy to empower Previously Disadvantaged Individuals. (This was to ensure that not only are mechanisms developed so that historically disadvantaged practitioners are issued briefs but that the issuing of briefs is aimed at promoting and facilitating the development of skills in multiple disciplines of law, as well as to ensure an increase in the pool of expertise of black legal practitioners from which appointments to the judiciary can be made.)

²⁶Department of Justice and Constitutional Development-A Framework for the Transformation of the State Legal Services (Accessed at <https://www.justice.gov.za/docs/other-docs/2012tsls.pdf>). (This Framework can be forwarded to Members should they request it.)



YEAR	TIMELINE
	<ul style="list-style-type: none"> ▪ Developing a tariff model (for payments to private attorneys and advocates) to encourage uniformity and prevent discretionary charging of fees. ▪ Addressing the problem of the government losing court cases it ought not to have lost, or embarking on ill-fated litigation where it ought to have considered alternative forms of redress resulting in huge losses to the fiscus. ▪ Entrenching Alternative Dispute Resolution Mechanisms (ADRM). ▪ Managing state litigation to provide greater uniformity and improved service delivery. This will involve the development of: <ul style="list-style-type: none"> – A strategic risk litigation assessment (requiring every organ of state track trends in litigation.) – A complaints handling mechanism (to deal with complaints against state attorneys and litigation officers). – 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. <ul style="list-style-type: none"> • In 2012, in a sign of governance challenges in the state attorney: <ul style="list-style-type: none"> ○ The then Head of the Office of the State Attorney in Pretoria was charged with misconduct. This was on the basis that she failed to put in place proper financial and administrative governance controls; failed to develop, and implement adequate financial controls; failed to prevent and or condoned or colluded with some state attorneys in abusing the power to appoint private attorneys and or brief advocates contrary to the policy of briefing PDI's and failed to investigate allegations of corruption. ○ In the matter of Minister of Safety and Security v G4S International UK Ltd (Case No 07/12735), Judge van Oosten of the Johannesburg High Court expressed concern about the Johannesburg State Attorney. According to the Judge, <i>“the instances of neglect and the general decline in the standards of service rendered by the State Attorney’s office is a matter of grave concern which needs to be addressed.”</i> <i>“An urgent in-depth investigation by the authorities concerned, in my view, is necessary.”</i>²⁷ ○ The Department of Justice, confirmed an investigation was under way. <u>According to the Department, “there is currently a wider</u>

²⁷ Minister of Safety and Security v G4S International UK Ltd (Case No 07/12735)



YEAR	TIMELINE
	<u>investigation into the Office of the State attorney with a view to improving performance.</u> ²⁸
2014	<ul style="list-style-type: none"> In 2014, the problems at the State Attorney came to the fore with a series of critical court judgments.²⁹ For instance, Judge Bertelsmann in the North Gauteng High Court criticised the Office of the State Attorney for “gross dereliction of duty”. The judge said of the State Attorney: “The present condition of this Office causes significant unnecessary expenditure of public funds that are wasted by cost orders granted against organs of state. It is high time that this malaise is addressed.”³⁰ As a first step in the transformation of state legal services the State Attorney Amendment Act 13 of 2014 provided for the position of a Solicitor General. In response to the Portfolio Committees concerns about the dysfunction at the state attorney the Director-General at the time Ms Sindane informed the Committee that the challenges affecting the State Attorney had been caused by:³¹ <ul style="list-style-type: none"> Underfunding/ underinvestment and lack of capacity.³² High case loads and lack of supervision of junior attorneys. Lack of standard operating procedures/policies. Inadequate file management/poor diary management/use of manual registers due to issues with the electronic State Attorney System (SAS). A failure to implement Occupation Specific Dispensation (OSD) effectively meant that the Department of Public Service and Administration (DPSA) had frozen senior posts. When these posts are vacated, they cannot be filled.³³ This created capacitation issues especially at senior management level. Clients of the State Attorney who were generally government departments fight matters prolonging litigation until they have no other option but to settle. <p><u>Solutions</u> proposed by the Justice Department at the time included:³⁴</p> <ul style="list-style-type: none"> Appointment of the Solicitor General.

²⁸ Flanagan L, Joburg State Attorney offices slammed (Accessed at <https://www.iol.co.za/the-star/joburg-state-attorney-offices-slammed-1282272>)

²⁹ Tasmina v Department of Transport (A862/2012); Minister of Safety and Security v G4S International UK Ltd (Case No 07/12735).

³⁰ Minister of Rural Development and Land Reform v Griffio Trading CC; In Re: Griffio Trading CC v Minister of Rural Development and Land Reform (12440/11) [2014] ZAGPPHC 666 (2 September 2014)

³¹ PMG, Department of Justice 2013/14 on its Annual Report & 1st Quarter 2014/15 with stakeholder input & Auditor-General report (Accessed at <http://www.pmg.org.za/node/47425>)

³² DoJ&CD 2009/10 Annual Report p172

³³ Performance within subprogrammes; Office of the Chief State Law Advisor, Legislative Development, Office of the Chief Litigation Officer and the Office of the Chief Family Advocate is affected by this challenge.

³⁴ Ibid



YEAR	TIMELINE
	<ul style="list-style-type: none"> • Engagement with the DPSA around the unfreezing of posts. • Discussions with the Accounting Officers of Departments to give the Justice Department standing settlement powers so that it can settle cases. Task teams with the Departments of Home Affairs, SAPS and Department of Health: Gauteng Province have been established. • Address training needs through the Justice College.³⁵ • Identify core challenges faced by State Attorneys. • Skills audit. • Ensure Standard Operating Procedures in place. • Establish development initiatives for female and black advocates and attorneys. • Allocation of re-prioritised funds to the State Attorneys to improve capacity and to employ more State Attorneys. • Plans and processes for the creation and filling of new posts in 2015.³⁶ • The Portfolio Committee welcomed the Departments acknowledgement of the difficulties within the State Attorney's Office and that they are receiving urgent attention. It also noted that the implementation of OSD had made it difficult for the Department to attract legal skills at supervisory level.³⁷
2016	<p>In 2016, in response to various court cases³⁸ and public concern in relation to the State Attorney, the Public Service Commission (PSC)³⁹, undertook an Assessment on the Effectiveness and Efficiency of the Office of the State Attorney.⁴⁰ The PSC noted that at the time that it was reported that the state was losing seven out of ten court cases with significant financial implications for government.⁴¹ The report of the PSC revealed serious dysfunction particularly at the level of management.</p> <p>Key recommendations made by the PSC in the Report were that:</p>

³⁵ A skills audit was conducted in 2008/09 and a report was forwarded to Justice College for the development of training programmes. (DoJ&CD 2007/08 Annual Report p110).

³⁶ The Department reprioritised R34 million in 2015/16, R36 million in 2016/17 and R38 million in 2017/18 from the Administration programme to the State Legal Services programme mainly for 53 additional personnel, in particular state attorneys.

³⁷ ATC141031: Budgetary Review and Recommendation Report of the Portfolio Committee on Justice and Correctional Services on the Department of Justice and Constitutional Development, National Prosecuting Authority, Legal Aid South Africa, Special Investigating Unit, South African Human Rights Commission and the Public Protector, dated 30 October 2014 (Accessed at <https://pmg.org.za/taled-committee-report/2099/>)

³⁸ In *Grootboom v National Prosecuting Authority and Minister of Justice and Constitutional Development* [2013] ZACC 37 and *Lushaba v Member of the Executive Council for Health, Gauteng* [2015] JOL 32431 (GJ), the courts were highly critical of the State Attorney's office.

³⁹ In terms of Section 196 (4)(c) of the Constitution, 1996, the PSC has a mandate to "propose measures to ensure effective and efficient performance within the public service."

⁴⁰ PSC, Assessment on the Effectiveness and Efficiency of the Office of the State Attorney (Accessed at <http://www.psc.gov.za/documents/reports/2016/SA%20Report%20Final%2026%20May%202016.pdf>)

⁴¹ Ibid p6



YEAR	TIMELINE
	<ul style="list-style-type: none"> • The manner in which cases are allocated to attorneys at the OSA should be properly managed to ensure a fair distribution of work and to ensure that attorneys manage their time effectively and prevent situations where default judgments are handed against the State Attorney. • Control systems to record the number of files allocated to each attorney to monitor progress made therein should be developed. • Special attention should be paid to the recommendations relating to the requirement that Deputy State Attorneys using the BAS (which is the accounting system utilised by the State Attorney) reports ensure that: <ul style="list-style-type: none"> – All payments are fully accounted for. – Guidelines/policies are developed to provide objective criteria for the appointment of counsel and external attorneys, – A central system is developed for screening and approval of requests for appointment of counsel, • More checking and control measures must be instituted for the verifications of invoices submitted by correspondent attorneys and advocates. (The fruitless expenditure mentioned in the report by the Auditor-General is a good example of poor checking and control leading to a fruitless expenditure in excess of R 30 million in respect of the OSA.) • Continuous training and development of all professional and support staff should be addressed in an equitable manner. • The challenges associated with the implementation of the Occupation Specific Dispensation (OSD) must be rectified. The implementation of the OSD prescribes entry-level salaries at very low levels and the high volume of work does not justify the salaries paid. This coupled with the poor working conditions discourage well qualified attorneys from applying for positions at the OSA. There is also no clear policy regarding the promotion, career-pathing and retention of skilled attorneys within the OSA. • A framework should be developed that will guide State Departments on how to handle different cases and at what stage of the process should issues be escalated to the State Attorney. This may require the development of memoranda of understanding between the OSA and client departments. • Employment of paralegals, legal administrative officers and researchers to assist the attorneys with support function should be considered. • The OSA should consider approaching National Treasury to obtain a budget for purposes of employing candidate attorneys. This would assist the OSA to consider retaining competent candidate attorneys once they are qualified.



YEAR	TIMELINE
	<ul style="list-style-type: none"> The Department must implement all the Transformative policies of State Legal Services that have been drafted as soon as possible.⁴²⁴³ An amount of R36 million was allocated for the re-engineering of State Legal Services for the 2016/17 financial year.⁴⁴ The Portfolio Committee was informed that service turnaround of state legal services would focus on; (i) containing litigation costs for the State by implementing clear guidelines that regulate how state litigation is to be conducted; (ii) clarifying the roles and responsibilities of stakeholders (state attorneys and government departments) in state litigation management; and (iii) implementing cost cutting measures.⁴⁵ The Committee urged the Department to prioritise this matter. The Committee expressed concern that in the absence of a Solicitor-General the area of state litigation lacks a champion to drive important aspects of the transformation agenda.⁴⁶
2017	<ul style="list-style-type: none"> The Portfolio Committee was informed that the Department had designated <u>Ms Vidu Vedalankar, who had been the Chief Executive Officer at Legal Aid South Africa</u> for many years, as Project Leader to undertake an investigation and make a proposal on the Restructuring of State Legal Services.⁴⁷ The Department also reported that it intended to table a finalised business case and a State Legal Services Bill during the 2018/19 financial year to assist with the transformation process.⁴⁸ In his Budget Speech, the Justice Minister Mr Masutha stated that; “We are transforming State Legal Services, the aim of which is two-fold. Firstly, to enhance the efficiency and effectiveness of the legal services rendered to government at all levels and; Secondly, to use the system to expedite transformation within the profession and building capacity for inclusive participation in the profession, especially by those who were historically marginalized, notably Black people in general and women in particular.”⁴⁹

⁴² The Department was reportedly in the process of drafting (a) Draft Policy on Briefing and Fee Parameters; (b) Discussion Document: Litigation Turnaround Strategy (c) Discussion Document: Framework for the Management State Litigation; and (d) Discussion Paper: 2014 – Draft Policy: State Legal Representation.

⁴³ SA News (Accessed at <https://www.sanews.gov.za/south-africa/public-service-commission-notes-state-attorney-probe>). Minister Masutha responded to the PSC Report in April 2017. It was reported that the Justice Department was considering implementing a Framework Contract through National Treasury to guide the briefing of all private legal practitioners by the OSA and government departments who engage private attorneys

⁴⁴ ATC160415: Report of the Portfolio Committee on Justice and Correctional Services on Budget Vote 21: Justice and Constitutional Development, dated 14 April 2016 (Accessed at <https://pmg.org.za/taled-committee-report/2712/>)

⁴⁵ Ibid

⁴⁶ ATC161026: Budgetary Review and Recommendation Report of the Portfolio Committee on Justice and Correctional Services, dated 26 October 2016 (Accessed at <https://pmg.org.za/taled-committee-report/2869/>)

⁴⁷ ATC171019: Budgetary Review and Recommendation Report of the Portfolio Committee on Justice and Correctional Services, dated 19 October 2017 (Accessed at <https://pmg.org.za/taled-committee-report/3152/>)

⁴⁸ Ibid

⁴⁹ Budget Vote speech by the Minister of Justice and Correctional Services, Michael Masutha, MP (Adv) National Assembly, Parliament, Thursday, 18 May 2017 (Accessed at https://www.justice.gov.za/m_speeches/2017/20170518-BudgetVote.html)



YEAR	TIMELINE
	<ul style="list-style-type: none"> It was reported that in the Eastern Cape two private Attorneys firms were appointed to address shortcomings in the Mthatha State Attorney Office.⁵⁰ According to the report, the purpose of the multimillion-rand contract with specialised private firms was to defend the health MEC against medico-legal claims for damages.⁵¹ The provincial Health Department spokesperson stated that this was due to the Mthatha state attorney's "limping capacity" and "insurmountable troubles".⁵² The appointment reportedly secured R60 million in fees for these companies to finalise 300 medico-legal files — an average of R200 000 per case.⁵³ Reportedly, the purpose of this contract was to save the Eastern Cape Health Department money.⁵⁴ Theoretically, the two-year appointment should have concluded in 2019 but in March 2020 Judge Brooks of the Mthatha High Court raised concerns about the "unfortunate" sidelining of the Mthatha State Attorney by a commercial firm of attorneys without proper notice in terms of court rules.⁵⁵ Judge Brooks noted the point to which the State Attorney had been involved in the matter they had discharged their obligations with due diligence.⁵⁶ The Judge also noted that the significant challenge with medico legal cases before the Mthatha High Court was characterised by a trend on the part of the Department to conduct litigation in an indifferent, inefficient and expensive manner.⁵⁷
2018	<ul style="list-style-type: none"> In his Budget Speech, the Justice Minister Mr Masutha stated that; in respect of an efficient and agile State Legal Services, "we will soon present a policy framework document to Cabinet, which will outline the establishment of an appropriate institutional model to enhance efficiency in the delivery of the government's legal services across all spheres of government."⁵⁸ In July 2018, President Ramaphosa initiated a countrywide investigation into corruption allegations levelled against the Office of the State Attorney. Led by the Special Investigating Unit (SIU), the

⁵⁰ Hartle R, State attorney sidelined at a cost of millions (Accessed at <https://www.heraldive.co.za/news/2020-07-06-state-attorney-sidelined-at-a-cost-of-millions/>)

⁵¹ Ibid

⁵² Ibid

⁵³ Ibid

⁵⁴ Medical Brief, New legal team saving Eastern Cape Health millions (Accessed at <https://www.medicalbrief.co.za/archives/new-legal-team-saving-eastern-cape-health-millions/>). However, it was recently reported that outstanding legal claims for medical negligence against Eastern Cape healthcare workers now total R37.67bn – more than double the value reported four years ago. The provincial government's huge medico-legal problem was described as 'a runaway train' by the acting director of the Special Litigation Unit, Advocate Lwazi Kubukeli,. (LegalBrief)

⁵⁵ Mbokodi v Member of the Executive Council for the Department of Health, Eastern Cape (1950/2015) [2020] ZAECHMHC 25 (30 June 2020) (Accessed at <http://www.saflii.org/za/cases/ZAECHMHC/2020/25.html>)

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Budget Vote Speech by Adv Michael Masutha, Minister of Justice and Correctional Services, May 9, 2018, Parliament, Cape Town (Accessed at



YEAR	TIMELINE
	<p>investigations followed a Presidential Proclamation authorising the SIU to investigate irregularities at the institution.⁵⁹</p> <ul style="list-style-type: none"> • Briefing the media on the Proclamation in August 2018, the Minister of Justice at the time Mr Masutha said that, “the <i>investigation will help the Department of Justice to lay to rest concerns that have been raised by members of the public, the legal fraternity and other government departments regarding the functioning and conduct of some officials within the Office of the State Attorney.</i>”⁶⁰ • Concerns that were identified by the Minister which were raised about the state attorney included alleged malpractices, lack of professionalism, and suspicion of abuse of office towards unlawful ends”:⁶¹ According to the Minister:⁶² <ul style="list-style-type: none"> ○ The ‘scams’ which have been uncovered include the non-timeous filing of court papers in litigation matters, ○ Undue and particularly exorbitant unauthorised out of court settlements even in instances where such matters could have been defended on behalf of the state. ○ Allegations of apparent collusion between certain officials within the state attorney’s office, private legal practitioners and real or fictitious litigants to defraud and conduct other acts of irregular and corrupt activities against the state. <p>In terms of Proclamation R21 of 2018 (dated 13 July 2018) the Special Investigating Unit (SIU) is mandated to investigate:</p> <ol style="list-style-type: none"> 1. Any maladministration in connection with the affairs of the office of the State Attorney in relation to: <ul style="list-style-type: none"> (a) legal services that were provided, or procured, by the office of the State Attorney on behalf of the Gauteng Department of Health and the Eastern Cape Department of Health in respect of claims based on medical negligence; or the South African Police Service in respect of claims based on wrongful arrest or detention, assault or malicious prosecution
2020	<ul style="list-style-type: none"> • In February and June 2020, SIU Head, Advocate Mothibi, briefed members of the Portfolio Committee on the progress of investigations

⁵⁹ Proclamation R21 of 2018 (dated 13 July 2018) as amended, by Proclamation R33 of 2019 in respect of the office of the State Attorney (OSA).

⁶⁰ Minister Michael Masutha: Presidential proclamation on probe into affairs of Office of the State Attorney (Accessed at <https://www.gov.za/speeches/justice-minister-further-elaborates-reason-president%E2%80%99s-proclamation-authorising-special-14#>)

⁶¹ Ibid

⁶² Ibid



YEAR	TIMELINE
	<p>into the Office of the State Attorney.⁶³ Adv Mothibi informed the Committee of the following:</p> <ul style="list-style-type: none"> ○ Adv Kgosi Lekabe, former head of the Office of the State Attorney in Johannesburg, was charged with collusion totalling about R26.5-million. Subsequently, his pension was frozen by the Special Tribunal.⁶⁴ ○ Evidence of fraud, duplicate payments and overcharging. ○ Evidence of the use of intermediaries, (these are companies, which are like brokers, between the State Attorney's Office and service providers (such as medical specialists who may be needed to testify in court), who appear to have been employed at an exorbitant cost to the state resulting in potentially fruitless and wasteful expenditure.⁶⁵ According to the SIU, the mark-up by some of these intermediaries "was 100% of invoices which ran into millions". Invoices were vague and did not indicate the services provided.⁶⁶ These intermediaries "had not done anything other than forward the invoice for payment. There were also many invoices that had been submitted repeatedly, even though the invoice had been paid repeatedly". "One intermediary had charged R123-million "for services rendered despite the irregular appointment of the company".⁶⁷ ○ Medico-legal claims had been made, "without the knowledge of those involved in the supposed claim." For example, a birth difficulty claim had not been made by the parent whose name was on the claim form and the baby cited had suffered no harm whatsoever." ○ The SIU head cited the case of suspicious claims made by private law firms. (For example, Nonxuba Incorporated Attorneys, which had made eight, claims for R15.093 million in the Eastern Cape as well as in Gauteng. (In 2019, both the health department and the SIU successfully interdicted Mr Nonxuba from making two claims worth R39m from the department. Mr

⁶³ President Cyril Ramaphosa signed off a proclamation in July 2018 setting in motion the investigation by the SIU into the handling of state litigation by the Office of the State Attorney. Proclamation R21 of 2018 as amended, by Proclamation R33 of 2019 in respect of the office of the State Attorney (OSA).

⁶⁴ SIU Presentation to the Portfolio Committee on Justice and Correctional Services on Investigations Relating to Office of the State Attorney, Master's Office and Building of Courts (dated 26 February 2020) (Accessed at <https://pmg.org.za/committee-meeting/29895/>)

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Ibid



YEAR	TIMELINE
	<p>Nonxuba has since been criminally charged on allegations of fraud involving medico-legal claims to the value R90 million.)⁶⁸⁶⁹</p> <ul style="list-style-type: none"> • The SIU reported that it would be referring criminal, civil and disciplinary matters to the National Prosecuting Authority, Legal Practice Council and Bar Council, Special Tribunal and to the Justice Department respectively. • The Unit was to submit an Interim Presidential report on its investigations on 30 August 2020. • In December 2020, the Mthatha High Court refused an application by the SIU to intervene in a three-year-old R9-million settlement in a medico-legal matter brought against the Eastern Cape department of health.⁷⁰ The SIU wanted the bulk of the payout to be blocked and for the claimant, who had already received R2.6-million in interim payments, to return the money. The SIU had applied to the Mthatha High Court to reopen the matter on the basis that the office of the state attorney had failed to call crucial witnesses to defend the claim and to have the payout of the funds blocked pending further litigation.⁷¹ Although Judge Tokota said that the work of the SIU was laudable and that there may be merits in the suspicion of corruption in handling medical negligence cases, especially in the Eastern Cape. He said he was not convinced that the Presidential Proclamation allowed the SIU to reopen cases that had already been concluded. According to the Judge, “the remedy cannot lie in the reopening, but in the recovery of damages from the state attorney concerned, if there is room for such recovery.”⁷²

5. STRATEGIC PLANNING 2020-2025: TRANSFORMED STATE LITIGATION SERVICES

According to the Departments **Strategic Plan** for **2020-25** the State Attorney environment continues to present with several challenges.⁷³

- The first that will be addressed in 2020/21 will be **the appointment of senior leadership within different offices of the state attorney.**
- The second will be **the implementation of processes and procedures towards a fully-functional State Attorney environment that will manage litigation costs and**

⁶⁸ SIU Presentation to the Portfolio Committee on Justice and Correctional Services on Investigations Relating to Office of the State Attorney, Master's Office and Building of Courts (dated 26 June 2020)

⁶⁹ Fuzile B, Court stops R39m payments to controversial lawyer Zuko Nonxuba amid fraud investigation (Accessed at <https://www.timeslive.co.za/news/south-africa/2019-03-06-court-stops-r39m-payments-to-controversial-lawyer-zuko-nonxuba-amid-fraud-investigation/>)

⁷⁰ Ellis E, Court refuses to reopen settled R9-million medico-legal claim in a case 'mishandled' by state attorney (Accessed at <https://www.dailymaverick.co.za/article/2020-12-09-court-refuses-to-reopen-settled-r9-million-medico-legal-claim-in-a-case-mishandled-by-state-attorney/>)

⁷¹ Special Investigating Unit v MEC for Health, Province of the Eastern Cape and Another (694/14) [2020] ZAECMHC 57 (1 December 2020) (Accessed at <http://www.saflii.org/za/cases/ZAECMHC/2020/57.html>)

⁷² Ibid

⁷³ DoJ&CD Strategic Plan 2020-25 (Accessed at <https://justice.gov.za/MTSF/mtsf.pdf>)



address pervasive issues of poor management of cases. In this regard, a new case management system will be rolled out over the Medium Term Strategic Framework (MTSF) period.

While addressing these matters, the Department reports it will also continue its focus on **growing the pool of legal practitioners** from previously disadvantaged backgrounds.⁷⁴

According to the Departments **Annual Performance Plan 2020/21**, key indicators, which are the **responsibility of the Solicitor General** for the outcome: Transformed State Litigation Services include:⁷⁵

OUTPUTS	TARGETS		
	2020/21	2021/22	2022/23
Office of the Solicitor- General Strategy implemented	Draft Strategy for the office of the Solicitor General approved by the Minister by 31 March 2021	50% Implementation of the Approved Solicitor General Strategy	100% implementation of the Approved Solicitor General Strategy
Number of heads of offices of the State Attorney appointed	11	-	-
Number of policies to implement the State Attorney Amendment Act submitted to the Minister for approval	3 policies submitted to the Minister for approval	2 policies submitted to Cabinet for approval	Implementation of five policies approved by Cabinet
Percentage of value of briefs allocated to PDI's Legal Practitioners	83%	83%	85%
Percentage of value of briefs allocated to female Legal Practitioners	29%	30%	31%
State Attorney Framework	State Attorney Framework contract	State Attorney Framework contract to be	State Attorney Framework Contract to be

⁷⁴ Ibid

⁷⁵ DoJ&CD APP 2020-21 (Accessed at <https://www.justice.gov.za/MTSF/dojcd-app-2020-2021.pdf>)



contract implemented	finalised by 31 March 2021	implemented across national departments	implemented by provincial departments
Percentage of reduction in capital amount claimed in medical negligence, unlawful arrest, malicious prosecution and detention claim	60%	78%	80%
Percentage of litigation cases settled	53%	59%	60%

Comment

Strategy for the office of the Solicitor General

- Is the purpose of the Strategy to provide for a proper organisational structure, business and financing model for the State Attorney? The Committee may be interested in more information on the Strategy. Should the Committee be concerned by the fact that the strategy will take two years to implement fully.

Appointing Heads of State Attorneys Offices.

- The Committee was informed by the Justice Department in **February 2020** that it had initiated an action plan for the filling of **key SMS positions**. These included **eight (8)** posts for Heads of State attorneys, which the Department reported had been re-advertised.⁷⁶ Interviews were to be conducted for the posts in **March 2020**.⁷⁷ Subsequently, in **October 2020**, the Department reported to the Portfolio Committee that “*in the pipeline*” was the approval of six (6) Heads of State Attorneys in the provinces.⁷⁸ The Committee may wish to know, (i) how many offices are currently led by Acting Heads; and (ii) how many posts of Heads of State Attorneys in the Provinces have now been filled. Will the Department meet its target of 11 heads of offices of the State Attorney to be appointed by the end of March 2021?

Status of critical Policies

- In **2012**, the **Framework of the Transformation of State Legal Services** highlighted the importance of the development of a briefing policy and a tariff model.
- In **2014**, the **State Attorney Amendment Act** identified the critical policies needed for the efficient running of the office. The Act provided for the Justice Minister (after

⁷⁶DoJ&CD Presentation on the SMS Vacancy rate and Recruitment Plan (dated 19 February 2020) (Accessed at <https://pmg.org.za/committee-meeting/29843/>)

⁷⁷ Ibid

⁷⁸Presentation by the Department of Justice to the Portfolio Committee on Justice and Correctional Services (dated 7 October 2020)



- consultation with the Solicitor General) to develop these policies (specifically for, (i) the coordination and management of all litigation in which the State is involved; (ii) the briefing of advocates; (iii) the outsourcing of legal work; (iv) initiating, defending and opposing of matters; and (v) implementing alternative dispute resolution mechanisms.)
- In **2016**, the **Public Service Commission** recommended that **all the Transformative policies of State Legal Services that have been drafted must be adopted** as soon as possible. The Department was reportedly in the process in 2016 of drafting (a) Policy on Briefing and Fee Parameters; (b) Litigation Turnaround Strategy (c) Framework for the Management State Litigation; and (d) Policy on State Legal Representation.
 - In **2019**, the **Justice Minister** stated that, “the Department would conclude the state litigation strategy. The Counsel Briefing Policy was finalised and the Tariff Policy and Mediation Policy were receiving urgent attention. **We are looking at presenting this to Cabinet in due course.**”⁷⁹
 - In **2020**, the Solicitor-General informed the Committee that **the Department was currently ramping up policies** envisaged in the State Attorneys Amendment Act, 2014. These policies are required to be approved by Cabinet and tabled in Parliament. It is envisaged that of the five (5) policies, **three (3)** (*specifically the (i) Management of State Litigation Policy; (ii) Briefing and Tariff Policy and (iii) Mediation Policy*) would have been presented to the Minister by the end of **November 2020**.⁸⁰
 - The Committee may be interested in more information about the following:
 - (i) Whether the three policies were submitted to the Minister at the end of November 2020 and when they will submitted to Cabinet and subsequently tabled in Parliament;
 - (ii) What is the status of the two outstanding policies that have yet to be submitted to the Minister?
 - (iii) The implementation of a comprehensive **Management of State Litigation Strategy Policy** should assist to reduce the state’s contingent liability, which has been a huge drain to the fiscus. What is the state’s litigation strategy and how will this policy provide for the management of state litigation.⁸¹
 - (iv) How will the Department ensure that the **Management of State Litigation Strategy Policy** has the necessary ‘buy-in’ from all stakeholders?

⁷⁹ Address by the Minister for Justice and Correctional Services, the Honourable, Mr. Ronald Lamola (MP), on the occasion of the Budget Vote Debate of the Department of Justice and Constitutional Development in the National Assembly, Parliament, Cape Town, 16 July 2019 (Accessed at https://www.justice.gov.za/m_speeches/2019/20190716-BudgetVote.html)

⁸⁰ Report of the Department of Justice and Constitutional Development Responding to Questions Raised by the Portfolio Committee during its Briefing Session on the Performance Reports for the Fourth Quarter of 2019/20 and First Quarter of 2020/21 as Part of the Budgetary Review and Recommendation Process held on 13 October 2020

⁸¹ According to the 2012 Policy Framework on the Transformation of State Legal Services managing state litigation to provide greater uniformity and improved service delivery involved the development of:

- A strategic risk litigation assessment (requiring every organ of state track trends in litigation.)
- A complaints handling mechanism (to deal with complaints against state attorneys and litigation officers).
- 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.



- (v) The absence of a policy framework to manage state litigation has made it particularly difficult to address skewed briefing patterns to improve representivity. How will the Management of State Litigation Strategy Policy address this matter?
- (vi) How will the Briefing and Tariff Policy address critical issues of transformation and fair distribution of work?

State Attorney Framework Contract

- According to the Departments APP 2020/21, a State Attorney Framework contract will be finalised by the end of **March 2021**. This will be implemented nationally at first and then provincially. The Committee may be interested in more information on:
 - (i) The nature and purpose of this framework contract.
 - (ii) Whether any provision will be made to assess the satisfaction of client line Departments with the state legal services provided.

Enhancing the operating environment

- According to the Departments 2020-25 Strategic Plan it will focus on the implementation of processes and procedures towards a fully-functional State Attorney environment that will manage litigation costs and address pervasive issues of poor management of cases. In this regard, a new case management system will be rolled out over the Medium Term Strategic Framework (MTSF) period. The Committee may be interested to know;
 - (i) How the Acting Solicitor General plans to address pervasive issues of poor management of cases, caseloads and case turnaround times?
 - (ii) Whether there are any monitoring systems in place?
 - (iii) Given the importance of an effective case management system is it a concern that this system will be rolled out gradually over the MTSF period rather than being prioritised.

Growing the pool of legal practitioners

- The Department reports it will continue its focus on growing the pool of legal practitioners from previously disadvantaged backgrounds.⁸² **However, it provides no information on how it intends to achieve this.**
- In **2014**, the Centre for Applied legal Studies at the University of the Witwatersrand compiled a Report on the Transformation of the Legal Profession. The purpose of the report was to consider why has there had been so little change at the senior level of the legal profession, especially in respect of the intersection between race and gender. One of the recommendations was that the Justice Department should undertake a research project to monitor the career paths of black female law graduates and determine how and if they progress in the legal profession over a ten year period.⁸³

⁸² DoJ&CD Strategic Plan 2020-25 (Accessed at <https://justice.gov.za/MTSF/mtsf.pdf>)

⁸³ CALS, Transformation of the Legal profession (Accessed at <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/Transformation%20of%20the%20Legal%20Profession.pdf>)



- In 2016, a **Report from the Law Society of South Africa (LSSA) on Research Findings on the Distribution of Legal Work** noted that in respect of Government departments and State Owned Enterprises the work was not distributed evenly among advocates, with only a few receiving most of the work.⁸⁴ The Report recommended that regulatory bodies (bar councils and attorneys bodies) should be more involved; the state attorney should be audited; a policy developed to regulate SOE's to brief previously disadvantaged individuals and untransformed corporates should be pressured to brief black owned firms.⁸⁵ Subsequently, a **Summit on Briefing Patterns was held in March 2016** to consider the legal briefing patterns in the public and private sectors.⁸⁶ It was proposed at the time that an **Action Group on Briefing Patterns in the Legal Profession** should be established (consisting of representatives from the Justice Department, the attorneys' profession, the advocates' profession, the Black Business Council and Business Unity South Africa, as well as from six large law firms) to consider a range of issues.⁸⁷ These included; developing a uniform protocol on the procurement of legal services; setting of targets for entities doing State work; establishing a common register for the recording of State legal work, with reference to name, frequency, value and nature of brief; and drafting a Code of Conduct for private enterprise in respect of legal work.⁸⁸ In 2017, the Action Group reported that it had drafted a Procurement Protocol that had been approved by the attorneys and advocates' professions.⁸⁹ This was supposed to be signed in June 2017.⁹⁰ The Action Group highlighted that a particular challenge they faced concerned **the lack of cooperation** from certain Government departments, state-owned entities and the business sector.⁹¹
- **The Portfolio Committee has consistently identified briefing patterns as an area of concern.** The Department has indicated that a critical challenge has been the fact that "the advocate's profession, in particular, has not reflected the race and gender demographics of the country".⁹² The Department has set targets in its Annual Performance Plans, which provide for the (i) Percentage of value of briefs allocated to PDI Legal Practitioners and (ii) Percentage of value of briefs allocated to female Legal Practitioners. It also provides monthly statistics on its website on briefing patterns at the State Attorney offices.⁹³ Nevertheless, the Portfolio Committee has noted that the

⁸⁴ Phooko MR, Research Findings on Briefing Patterns (Accessed at https://www.lssa.org.za/wp-content/uploads/2019/11/Briefing-Patterns-presentation-Tsili-Phooko-Unisa_LSSA.pdf). The Report recommended that there must be a body that will be responsible for reporting to ensure that certain individuals and law firms are not favoured over others and that work is consistently and fairly distributed. It was further recommended that a study in the private sector should also be undertaken in order to ensure that the distribution of legal work in all sectors of the society is made known to the general public and monitored.

⁸⁵ Ibid

⁸⁶ LSSA, Summit on Briefing Patterns March 2016 (Accessed at <https://www.lssa.org.za/briefing-patterns-in-the-legal-profession/overview/summit-on-briefing-patterns-march-2016/>)

⁸⁷ Ibid

⁸⁸ Ibid

⁸⁹ LSSA, Statement on progress made by the Action Group on Briefing Patterns in the Legal Profession <https://www.lssa.org.za/news-and-events/statement-on-progress-made-by-the-action-group-on-briefing-patterns-in-the-legal-profession/>

⁹⁰ Ibid

⁹¹ Ibid

⁹² LSSA, Draft Report on Research Findings on the Distribution of Legal Work in the Legal Profession in South Africa, and Report on the Summit on Briefing Patterns in the Legal Profession (2016)

⁹³ DoJ&CD, State Attorney Services (Accessed at <https://www.justice.gov.za/branches/stateattorney.html>)



impact of this does not seem to be felt, especially by young black legal practitioners, who complain that they lack work to sustain viable practices.⁹⁴ **The Committee has expressed the view that it requires a comprehensive response involving all stakeholders.**

Risk mitigation

- Some of the risks identified by the Department in its Strategic Plans in respect of the process of transforming state litigation services concern the workload, lack of capacity, client departments imposing Counsel, the need for fair procurement and quality assurance.⁹⁵

6. ISSUES FOR CONSIDERATION

The Committee could consider the following:

- **Impact**
Given that the Acting Solicitor General is in the position for a relatively limited period of 24 months, The Committee could consider establishing from Mr Pandelani;
 - (i) His perspective on the condition of the Office of the State Attorney when he was appointed.
 - (ii) What deliverables he has **prioritised** for the period of his appointment to address the challenges affecting the state attorney.
 - (iii) What progress has been made in implementation of those deliverables?
- **Vacancies and Recruitment**
 - **Vacant posts:** According to National Treasury Report to the Standing Committee on Appropriations for the **Third Quarter of the 2020/21 Financial Year** actual spending on the **State Legal Services programme** was R67.2 million **lower** than its approved projection.⁹⁶ This was mainly due to lower than planned expenditure on compensation of employees and goods and services, **as a result of protracted personnel recruitment processes**. The Committee may wish to know how many vacancies there are currently in the State Attorneys offices and what are the reasons for protracted recruitment processes.
 - **Developing young talent.** One of the recommendations of the **Public Service Commission in 2016** was for the State Attorney to employ paralegals, legal administrative officers and candidate attorneys. This would serve the purpose of, (i) assisting overburdened state attorneys; (ii) critically

⁹⁴ ATC200605: Report of the Portfolio Committee on Justice and Correctional Services on the respective Strategic Plans and Annual Performance Plans 2020/21 of the Department of Justice and Constitutional Development, National Prosecuting Authority, Legal Aid South Africa, Special Investigating Unit, Public Protector South Africa, South African Human Rights Commission and Information Regulator; and Budget Vote 25: Justice and Constitutional Development for the 2020 MTEF, dated 3 June 2020 (Accessed at <https://pmg.org.za/tailed-committee-report/4167/>)

⁹⁵ DoJ&CD APP 2020-21 (Accessed at <https://www.justice.gov.za/MTSF/dojcd-app-2020-2021.pdf>)

⁹⁶ National Treasury Report to the Standing Committee on Appropriations - 3rd Quarter Expenditure Report 2020/21 Financial Year



addressing youth unemployment (specifically unemployed graduates with law degrees); (iii) providing the opportunity of access to the legal profession for young previously disadvantaged practitioners so as to advance the transformation of the legal sector, and (iv) serving as a pool of recruitment for the state. It is unclear if the Department ever acted on this recommendation. The Committee may be interested in the view of the Acting Solicitor-General.

- **Status of the State Legal Services Bill**

In 2017, the Department reported that it intended to **table a finalised business case** and a **State Legal Services Bill** during the 2018/19 financial year to assist with the transformation process.⁹⁷ The Committee could consider asking about the purpose and status of the **State Legal Services Bill**.

- **Status of the Governance Model**

In 2019, the Department indicated that it was in **the process of finalizing a governance model that will ensure that the state attorney becomes a model law firm**.⁹⁸ The Committee could consider asking about the finalisation of the governance model.

- **Capacitation and working environment**

- In 2016, the Public Service Commission noted that the office of the State Attorney was not adequately staffed in relation to its caseload, the office did not have the adequate technology and resources, such as a library, effective ICT systems and superior administrative support that you would find in a large commercial law firm.
- If the intention is to turn the State Attorney into a model law firm the Committee may be interested in what steps the Acting Solicitor-General is taking to improve the working environment for the personnel at the state attorney.

- **Transformation**

- The Office of the Acting Solicitor-General has reported to the Portfolio Committee previously that it was formulating a request for expression of interest by all legal practitioners registered with the Legal Practice Council **to ensure that there is a database that shall be monitored in relation to briefing and briefing patterns, to ensure equitable briefing protocols and skills transfer**.⁹⁹

⁹⁷ ATC171019: Budgetary Review and Recommendation Report of the Portfolio Committee on Justice and Correctional Services, dated 19 October 2017 (Accessed at <https://pmg.org.za/taled-committee-report/3152/>)

⁹⁸ DoJ&CD Annual Report 2018/19 Briefing; with Minister & Deputy Minister (dated 16 October 2019) (Accessed at <https://pmg.org.za/committee-meeting/29076/>)

⁹⁹ Report of the Department of Justice and Constitutional Development Responding to Questions Raised by the Portfolio Committee during its Briefing Session on the Performance Reports for the Fourth Quarter of 2019/20 and First Quarter of 2020/21 as Part of the Budgetary Review and Recommendation Process held on 13 October 2020



- The Committee may be interested in a progress report on this database. The Committee could also consider asking why 27 years into democracy and given ongoing and persistent calls from young previously disadvantaged practitioners, over that period, such a database is only being established now.¹⁰⁰

- **Resolving Procurement challenges**

- The Office of the Solicitor-General has conceded that there are challenges in relation to procurement of legal services. To this end, **an instruction has been given to Offices of the State Attorney to resist undue interference by client Departments who continue to micromanage acceptable briefing protocols** as approved by Treasury. The Committee may be interested in the success of this instruction.
- In the **2019 Budget Review and Recommendation Report**, the Portfolio Committee noted that it had been informed that there was a process to develop a permanent procurement system. Specifications have been developed and are in the consultation phase. **The expectation is that the process will be finalised by the end of the financial year with implementation in 2020/21.**¹⁰¹ The Committee may consider asking the Acting Solicitor General about the effective implementation of the permanent procurement system.
- The Office of the Solicitor-General has reported that it is **ramping up policies in order to properly manage issues relating to procurement**. The lack of clear policies that outline where responsibility to procure legal services resides, has resulted in client departments procuring these services without involving the State Attorney and when they do, they often want to dictate how the procurement process should unfold. According to the Acting Solicitor General, there is still lack of co-operation and resistance by client departments. How does the Acting Solicitor General envisage that this lack of cooperation and resistance can be overcome?

- **Debt Recovery**

- At the end of 2019/20, there was a R668 million debt owed to the Justice Department by various government departments. According to the Department, the historic debt owed to the Department is attributable to many causes.¹⁰² The Department informed the Committee that the Office of the Chief Financial Officer had written to the Office of the Solicitor-General requesting for a portion of the debt (R172 million) to be written off. It appears

¹⁰⁰ The 2012 Policy Framework focused intensively on the issue of transformation. Reference was made to the creation of a mechanism for sourcing legal work and allocating briefs to law firms and advocates from a database established for this purpose. The desired mechanism would be established with a view to achieving a fair and equitable distribution of legal work. The database will not be based on a handful of practitioners, but a broad representative pool of practitioners who are spread across the various specialised fields of the law. The tool must ensure that PDIs and new entrants into the legal practice, particularly women, are empowered

¹⁰¹ ATC191030: Budgetary Review and Recommendation Report of the Portfolio Committee on Justice and Correctional Services, dated 29 October 2019 (Accessed at <https://pmg.org.za/taled-committee-report/3985/>)

¹⁰² Report of the Department of Justice and Constitutional Development Responding to Questions Raised by the Portfolio Committee during its Briefing Session on the Performance Reports for the Fourth Quarter of 2019/20 and First Quarter of 2020/21 as Part of the Budgetary Review and Recommendation Process held on 13 October 2020



that this is the portion attributable to the functions of State Attorneys. The Office of the Solicitor-General did not concede to the request for write-off.¹⁰³

It was reported that the Office of the Solicitor-General was engaging with National Treasury in an attempt to recover some of the money owing to the DoJ&CD in respect of the portion indicated as constituting the work of the State Attorney.¹⁰⁴

- The Committee may be interested in an update on this engagement with Treasury.

- **Contingent liability**

- The Department has stated in response to the Committees concerns that Contingent Liability is a threat to the legal security of the State. **The Office of the Solicitor-General has conceded that this aspect should be urgently addressed across all client departments.**¹⁰⁵
- Currently, although State Attorneys are required to certify aspects relating to contingent registers held by the various client departments for annual audit purposes, **there are no mechanisms available to assist the Office of the Solicitor-General to verify the accuracy of the registers and this should be urgently addressed.** The contingent registers should be interrogated to eliminate duplications and weed out matters that are either dormant or withdrawn.¹⁰⁶
- The early detection and settlement of matters is one intervention that the Office of the Solicitor-General has reported it is directing the Offices of State Attorney to deal with.¹⁰⁷
- **The Committee could consider asking whether proper systems have been put in place to enable the Office of the Solicitor-General to meaningfully and properly monitor the Contingent Registers.**

- **SIU Investigations – Systemic Recommendations and Consequence Management**

- The SIU reported in February and June 2020 on its investigations at the offices of the state attorney in the Eastern Cape and Gauteng. Some of the issues that were identified by the SIU include:
 - Evidence of collusion and fraud.
 - The use of intermediaries. One intermediary during the period 2015 to 31 July 2018 (i.e. a period of three years), had invoiced approximately R123.3 million for services purportedly rendered to the OSA. Disturbingly the SIU also reported that at the time his amount could be more because even then, the office of the State Attorney

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ Ibid

¹⁰⁶ Ibid

¹⁰⁷ Ibid. Once the Alternative Dispute Resolution (ADR) Policy relating to ADR is in place (as envisaged in the State Attorney Amendment Act, 2014), it is hoped that the Office of the Solicitor-General shall be enabled to track and reduce all triggers to contingency liability and to reduce attendant costs to litigation.



was still utilising the services of the particular Intermediary except for the Johannesburg State Attorney where procuring of their services had been stopped. **This was done even after receiving recommendations from the Special Investigation Unit (SIU). A letter informing the Director General of the Department of Justice about this anomaly was signed and sent the on the 9 March 2020.** (This incident predates the appointment of the Acting Solicitor General, however, the Committee may be interested in establishing what action has been taken to stop the abuse.)

- Unlawful conduct by employees of the state attorney. For example in the Eastern Cape. A Life style audit was in progress in respect of six officials. The disciplinary referrals were to be made in August 2020.
- o When the **SIU** presented to the Committee in June 2020 it advised that following its investigations certain **systemic recommendations** were made to the Office of the State Attorney:¹⁰⁸
 - The need for vetting of all OSA employees
 - Employment of experienced legal practitioners
 - Enhanced and Continued Legal Education and Training of OSA Legal Practitioners
 - Development and maintenance of proper briefing policy
 - Maintenance of a proper filing system and archiving
 - Creation of panels of service providers
 - Legislative Reforms
 - Litigation risk on prescription
 - Continued advancement of attorney client relations
- o The Committee may be interested to know whether the Acting Solicitor General has; (i) initiated any consequence management arising out of the investigations by the SIU and (ii) acted on any of the SIU's systemic recommendations.

7. CONCLUSION

The Acting-Solicitor General has only been in office since **2 April 2020**. Moreover, Mr Pandelani was appointed in the middle of a national lockdown initiated in response to the COVID-19 pandemic. The timeline history of the dysfunction at the State Attorney point to the challenges facing the Acting Solicitor-General.

In **2012**, the Justice Departments **Framework for the Transformation of State Legal Services** stated that state legal services were hampered in the following respects:¹⁰⁹

¹⁰⁸ SIU Presentation to the Portfolio Committee on Justice and Correctional Services on Investigations Relating to Office of the State Attorney, Master's Office and Building of Courts (dated 26 June 2020)

¹⁰⁹ Department of Justice and Constitutional Development - A Framework for the Transformation of the State Legal Service (Accessed at <https://www.justice.gov.za/docs/other-docs/2012tsls.pdf>)



- There is no comprehensive set of clearly defined rules governing how litigation services are to be dispensed, acquired, managed and monitored.
- The provision of quality legal services is a challenge due to the absence of a strategy to train and nurture skills, coupled with a reliance on external legal service providers.
- There is no strategic, coordinated approach to defend the state against litigation.
- There is an overreliance on private practitioners without developing in-house expertise in critical areas of the law and policy that are peculiar to government.
- There is a need to broaden the pool of legal practitioners who are briefed by the state to ensure a fair representation of black and female practitioners, consistent with the racial, gender and geographic demographics of our society.

Nine years later, it could be said that these are still some of the critical challenges facing the state attorney and state litigation.

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