ASSESSMENT OF THE EFFECTIVENESS AND EFFICIENCY OF THE OFFICE OF THE CHIEF STATE LAW ADVISER

March 2016
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LIST OF ACRONYMS

AGS  Australian Government Solicitor
AGSA  Auditor-General of South Africa
CSLA  Chief State Law Adviser
DBE  Department of Basic Education
DCoGTA  Department of Cooperative Governance and Traditional Affairs
DCS  Department of Correctional Services
DCSLA  Deputy Chief State Law Adviser
DDG  Deputy Director-General
DG  Director-General
DIRCO  Department of International Relations and Co-operation
DOH  Department of Health
DoJCD  Department of Justice and Constitutional Development
DSD  Department of Social Development
DPSA  Department of Public Service and Administration
DTI  Department of Trade and Industry
EA  Executive Authority
GBE  Government Business Enterprise
HR  Human Resource
HRD  Human Resource Development
KRA  Key Result Area
LP  Legal Professional
OCSLA  Office of the Chief State Law Adviser
OSD  Occupation Specific Dispensation
OTP  Offices of the Premier
PA  Performance Agreement
PSC  Public Service Commission
PSLA  Principal State Law Adviser
SAPS  South African Police Service
SC  Senior Counsel
SMS  Senior Management Service
SSLA  Senior State Law Adviser
1. INTRODUCTION AND OVERVIEW

1.1 Introduction

The Office of the Chief State Law Adviser (OCSLA) plays an important role in ensuring that the machinery of government operates effectively within the rule of law and in a manner that is consistent with the values, principles and spirit of the Constitution of the Republic of South Africa, 1996. The OCSLA is a sub-programme within the Department of Justice and Constitutional Development (DoJCD), a national department within the Ministry of Justice and Correctional Services. It provides “legal advice, representation and legislative drafting services to the executive, all state departments, state owned enterprises and autonomous government bodies”. The executive authority of the DoJCD is the Minister of Justice and Correctional Services.

At a hearing hosted by the Public Service Commission (PSC), Mr Enver Daniels, the Chief State Law Adviser (CSLA) provided a background on the history of the OCSLA. Before 1994, South Africa had 11 departments of Justice and after 1994, the decision was taken to rationalise the departments and incorporate all the departments into one Department. The Department would be the Department of Justice that would be situated in Pretoria.

After the 1994 Elections, the Minister of Justice, Mr Dullah Omar, established a management committee that bore the task of making all final decisions regarding the management of the department and the Rationalisation Committee that would look at the amalgamation of the Departments of Justice into one democratic Department of Justice with regional offices in all provinces. This complex task was completed in 1996. Shortly after April 1999, under the leadership of Minister Penuell Maduna, a workshop was held wherein it was concluded that although the Department of Justice is established in this manner, the Legal Services of the Department had to be centralised as the fragmented version that existed at the time was deemed to be inefficient.

Legal Services were then centralised and Mr Daniels was appointed Acting Supervisor of the State Attorneys Offices. In his duties of heading these offices, Mr Daniels had to manage the Office of the State Attorney and execute his functions as Chief State Law Adviser. At the time, many issues remained unchanged in the Office of the State Attorney which resulted in a decision to separate legal services during the administration of the then Director-General Advocate Menzi Simelane. Legal Services have since remained separated in that the OCSLA operates independently from the Office of the State Attorney.

The OCSLA, headed by the Chief State Law Adviser (CSLA) supports “government to

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1 Estimates of National Expenditure, Budget 2015. National Treasury
2 A hearing took place on 14 December 2015 and was attended by the Reference Group, the Chairperson of the PSC and two Commissioners from the PSC, the CSLA, employees from the OCSLA and representatives of departments.
achieve its objectives of transforming South African society and redressing past imbalances by providing efficient and cost-effective legal advice, legislative drafting and translation services of high quality.”

It scrutinises international agreements and drafts legislation to ensure that they comply with the parliamentary legislative process and the Constitution.

The functions of the OSCLA are to:

a) Scrutinise, draft and certify primary and subordinate legislation.
b) Produce legislation in official languages of the Republic.
c) Advise on draft amendment bills for parliamentary committees.
d) Draft legal opinions.
e) Scrutinise all international agreements.
f) Serve as consultant to organs of state.
g) Opine on bonds and guarantees issued by government.
h) Review and certification of municipal by-laws;
i) Perform any other function referred to the Office by the Executive.

1.2 Background to the study

In the past few years, the Public Service Commission (PSC) received a number of grievances relating to the internal operations of the OCSLA and isolated concerns by stakeholders about the quality of services provided to departments. A thorough analysis of grievances received from the OCSLA revealed that there are operational challenges related to the workload, reporting lines, quality assurance, performance standards and management of staff and work. Concerns from stakeholders relate to the constitutionality of certain laws based on the advice provided by the OCSLA and the quality of advice given on various legal matters, including legislation and international agreements.

Cognisant of the role of the OCSLA and the nature of concerns raised by stakeholders and employees, the PSC identified a need to assess the functioning of the OCSLA. The overall purpose of the study is to review the effectiveness and efficiency of the OCSLA in order to make recommendations that will enhance its functioning and impact.

1.3 Mandate of the Public Service Commission

The PSC is, amongst others, charged with the following responsibilities in terms of the Constitution:

“196(4) (b) to investigate, monitor and evaluate the organisation and

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4 Chief State Law Adviser 20 Year Performance Review (27 April 1997 - 26 April 2014)
ASSESSMENT OF THE EFFECTIVENESS AND EFFICIENCY OF THE OFFICE OF THE CHIEF STATE LAW ADVISER

administration, and the personnel practices of the public service;

196(4) (c) to propose measures to ensure effective and efficient performance within the public service;”

“196(4) (f) (i) “to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executing authority and legislature;”

In accordance with the Public Service Commission Act, 1997 the PSC –

“8. may… subject to the provisions of the Constitution, exercise the powers and shall perform the duties entrusted to the Commission by or under this Act, the Constitution or the Public Service Act.

9. may … inspect departments and other organisational components in the public service, and has access to such official documents or may obtain such information from heads of those departments or organizational components or from other officers in the service of those departments or organisational components as may be necessary for the performance of the functions of the Commission under the Constitution or the Public Service Act.”.

The PSC has a mandate to “propose measures to ensure effective and efficient performance within the public service.”

1.4 Objectives of the study

The objectives of this study are as follows:

a) To assess the OCSLA’s mandate, in particular, the roles, status, powers and functions;

b) To assess the organisational structure, administration and operational processes that guide, amongst others, the allocation of work, quality assurance mechanisms and balance between individual and organisational professional opinions;

c) To apply the Effectiveness, Efficiency and Economic test in relation to human resource capacity, budget allocations and performance;

d) To establish whether the status of the OCSLA may be improved through providing the OCSLA with more operational independence;

e) To establish whether the work of the OCSLA is enhancing the optimal functioning of government departments; and

f) To establish whether the operations of the OCSLA have ever been reviewed, and if so, whether recommendations from such reviews were implemented and what the impact was.
1.5 Methodology

The Minister of Justice and Correctional Services, the Director-General of the DoJCD and the CSLA were informed in advance about the purpose and objectives of the study. To enhance the study, the PSC appointed legal specialists, namely, Mr K Govender\(^5\), former Deputy State Attorney and Adv M Simelane\(^6\), former Director-General of the DoJCD and National Director of Public Prosecutions who constituted a Reference Team. The members were specifically identified to assist the PSC in the analysis of the findings, participate in engagements with key stakeholders and to guide the development of feasible recommendations.

Although the OCSLA provides services to national and provincial departments, municipalities and other organs of the state across the three spheres of government, the scope of the study focussed on national and provincial departments, as well as the Parliamentary Services in the Parliament of South Africa. A sample of national departments and the nine Offices of the Premier\(^7\) were identified, because of their size and role, and based on the assumption that they are the biggest clients of the OCSLA.

Table 1: Sample of national departments

<table>
<thead>
<tr>
<th>Basic Education (DBE)</th>
<th>Cooperative Governance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Correctional Services (DCS)</td>
<td>Traditional Affairs</td>
</tr>
<tr>
<td>Defence</td>
<td>Health (DoH)</td>
</tr>
<tr>
<td>Public Service and Administration (DPSA)</td>
<td>National Treasury</td>
</tr>
<tr>
<td>The Presidency</td>
<td>South African Police Service (SAPS)</td>
</tr>
<tr>
<td>Social Development (DSD)</td>
<td>Transport (DoT)</td>
</tr>
<tr>
<td>Trade and Industry (DTI)</td>
<td></td>
</tr>
</tbody>
</table>

A desk-top study was undertaken to gain an understanding of the mandate of the OCSLA and its operations over the past few years. This included reviewing prescripts underpinning the OCSLA's mandate, National Assembly Rules and the Chief State Law Adviser 20 year Performance Review (27 April 1997 - 26 April 2014).

A brief comparative analysis of how other countries organise and manage functions similar to those performed by the OCSLA was conducted.

Questionnaires were developed for each of the following stakeholder groups: departments, employees and the Parliamentary Services in Parliament. Cross cutting issues which were probed through questionnaires included the following:

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\(^{5}\)Appointed and served on the Judicial Service Commission from 2010 to 2013; Served as the Co-Chairperson of the Law Society of South Africa (LSSA) for period 2012 to 2013; Member of the Exec of the National Efficiency Enhancement Committee under the Chief Justice of SA, representing the legal profession, from formation to date; Appointed to the National Forum in 2015, in terms of the Legal Practice Act; Member of the Bureau (EXCO) of the International Association of Democratic Lawyers (IADL) from 2013; Chairperson of the Ethics Committee of the Law Society of SA. Currently, Legal Consultant with Trishal Sharma Attorneys in Durban.

\(^{6}\)Currently employed as Special Adviser in the Ministry of Human Settlements.

\(^{7}\)Although the Offices of the Premier utilise the Occupation Specific Dispensation (OSD) for State Law Advisers (SLAs) for purposes of the appointment and career incidents of SLAs in their employ, these SLAs do not report to the OCSLA and they function independently.
A total of 32 completed questionnaires were received (1 from the CSLA, 18 from employees of the OCSLA, 8 from national departments, 4 from the OTP and 1 from Parliamentary Service).

1.6 Limitations of the study

Not all stakeholders responded to the PSC despite continuous reminders and numerous extensions of deadlines. All Premiers’ Offices have their own SLA whilst some departments like the Department of International Relations and Co-Operation (DIRCO) do not utilise the services of the OCSLA.

The CSLA explained the interrelatedness of the SLAs as follows:

“Each province appears to have a chief state law adviser or an equivalent…..some of those offices refer work to my office from time to time. ….The Department of Justice and Constitutional Development has converted a number of posts to state law advisers in terms of the OSD. Those state law advisors do not fall under my control at all. …..Law advisers are also employed by Parliament. My office cooperates with them, but they work independently of my office.”

Lastly, some of the questionnaires were not completed comprehensively, which impacted on the analysis. The number of employees that responded did not amount to a representative sample to make firm conclusions about employee reviews.

2. LEGISLATIVE FRAMEWORK

The Department of Justice and Constitutional Development is established in terms of section 7(2) (a) read with Schedule 1 of the Public Service Act, Act 103 of 1994.

Apart from this, there is no specific regulatory framework or legislation supporting the establishment of the OCSLA as a separate or unique entity.

3. COMPARATIVE LITERATURE ANALYSIS

3.1 To enable the PSC to contextualize the findings and formulate recommendations, a comparative analysis of offices that render legislative services similar to the South African OCSLA from other countries was conducted. Table 2 below provides a brief analysis of the operations of both functions in other countries. A more complete analysis is attached as Appendix A.
<table>
<thead>
<tr>
<th>Country</th>
<th>Population/Economy</th>
<th>Regulatory framework underpinning the establishment of the organisation</th>
<th>Location in the state machinery</th>
<th>Functions</th>
<th>Size of organisation in terms of personnel</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Africa</td>
<td>(53 675563) ($ 724 Billion)</td>
<td>The DoJCD is established as a national department in terms of section 7(2) (a), read with Schedule 1 of the Public Service Act, Act 103 of 1994. Apart from this, there is no specific regulatory framework or legislation supporting the establishment of the OCSLA as a separate or unique entity. The OCSLA is a sub-programme of the DoJCD and the employees thereof are public servants. The CSLA is appointed at the level of Deputy Director-General.</td>
<td>A sub-programme within the DoJCD, a national department within the Ministry of Justice and Correctional Services.</td>
<td>Provides “legal advice, representation and legislative drafting services to the Executive, all state departments, state owned enterprises and autonomous government bodies”</td>
<td>100 positions, of which 90 are filled.</td>
</tr>
<tr>
<td>Kenya</td>
<td>(45 925 301) ($ 45 925 301 Billion)</td>
<td>Article 156 of the Constitution of Kenya, 2010 as well as Office of the Attorney-General Act No. 49 of 2012</td>
<td>Attorney-General is Ex Officio member of Parliament and Cabinet</td>
<td>Principal Legal Adviser to Government</td>
<td>Fluctuates on average 1000-1100, 400 of which are lawyers8</td>
</tr>
<tr>
<td>Ghana</td>
<td>(26 327 649) ($ 113.3 Billion)</td>
<td>Article 88 (1) of the Constitution of Ghana, 1992</td>
<td>Minister of State</td>
<td>Principal Legal Adviser is dealing with all criminal and civil cases on behalf of the State</td>
<td>Information not available at date of drafting report, attempts to obtain information still in progress</td>
</tr>
<tr>
<td>Botswana</td>
<td>(2 182 719) ($ 37.16 Billion)</td>
<td>Section 51 of the Constitution of Botswana</td>
<td>Minister and Member of Parliament</td>
<td>Principal Legal Adviser is dealing with all criminal and civil cases on behalf of the State</td>
<td>Approximately 400 employees. (Not clear how many of these are support staff and how many are attorneys)</td>
</tr>
<tr>
<td>Australia</td>
<td>(22 751 014) ($ 1.489 Trillion)</td>
<td>Australian Government Solicitor was established by section 55B and Part VIIB of the Judiciary Act of 1903.</td>
<td>Government Business Enterprise with two shareholders namely the Attorney-General and the Minister of Finance.</td>
<td>The AGS advises on the full spectrum of government activity, including policy development, law-making, commercial negotiations, constitutional matters, risk management, dispute management, representation of the state in litigation cases, the establishment and administration of Commonwealth agencies and machinery-of-government changes.</td>
<td>Approximately 500 employees employed by AGS which is a Government Business Enterprise.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>(64 088 222)</td>
<td>Government Legal Service is a non-ministerial government department</td>
<td>Executive Agency reporting to the Attorney-General</td>
<td>Providing litigation services to government departments and public bodies, covering</td>
<td>Government Legal Department has</td>
</tr>
</tbody>
</table>


9 Madam Faith Human Resources Officer in the Office of the Attorney General in Kenya Tel: 00254 20 227461
<table>
<thead>
<tr>
<th>Country (Population)(^6) Economy GDP</th>
<th>Regulatory framework underpinning the establishment of the organisation</th>
<th>Location in the state machinery</th>
<th>Functions</th>
<th>Size of organisation in terms of personnel</th>
</tr>
</thead>
<tbody>
<tr>
<td>($2.66 Trillion)</td>
<td>established as an Executive Agency.</td>
<td>General.</td>
<td>public and private law issues. Providing legal services to support public enquiries. Advising ministers and policy makers on domestic, public and private law, European Community law, international law and human rights. Drafting statutory instruments and other subordinate legislation. Advising the Civil Service on the modernisation of the terms and conditions of government employees.</td>
<td>1800 employees of which 1350 are attorneys.</td>
</tr>
<tr>
<td>Ireland (4 892 305) ($250.3 Billion)</td>
<td>Article 30 of the Constitution of Ireland</td>
<td>Department headed by a Director-General</td>
<td>Responsible for all legal services and civil litigation except criminal prosecutions.</td>
<td>The Staff complement: Merion Street Office 127 employees, there are 17 employees in the Law Reform Commission and 217 in the Chief Solicitor general’s Office. (however this number fluctuates)(^10)</td>
</tr>
<tr>
<td>Canada (35 099 836) ($1.628 Trillion)</td>
<td>Attorney-General Act</td>
<td>Ministry</td>
<td>Responsible for all legal services, civil litigation as well as prosecution services.</td>
<td>5000 employees of which roughly half of the department’s staff are lawyers. The other half is made up of a broad range of professionals.</td>
</tr>
<tr>
<td>United States of America (321 368 864) ($17.97 Trillion)</td>
<td>The House of Representatives and Senate approved legislation to establish a Department of Foreign Affairs on 21 July 1789.</td>
<td>Office of the Legal Adviser located in the Department of State overseeing specialised units as well as regional offices.</td>
<td>Responsible for all legal services and civil litigation.</td>
<td>200 permanent attorneys and about 100 support staff (Department of State)</td>
</tr>
</tbody>
</table>

3.2 The comparative analysis shows that in some countries the principal legal adviser to the government is the Attorney-General, who is a member of the Executive (i.e. a

\(^{10}\) Annual Report 2012: Office of the Attorney General of Ireland
Minister), as is the case with Kenya, Ghana and Australia. Additionally, in some countries the functions of the South African State Attorney and those of the OCSLA are combined in one Office, as is the case with the Australian Government Solicitor (the group), which works closely with the Solicitor-General and other units within the Attorney-General’s portfolio. The Australian model is even more unique in that the Attorney-General is also a Minister for a different portfolio (i.e. Art), and yet there is a Minister for Justice within the Attorney-General’s portfolio. The Kenyan model is also unique in the sense that the Attorney-General is regarded as a government agency.

3.3 The location of the functions of the OCSLA within a Department and a mixture of reporting lines to a Director-General and the Attorney-General in some countries is not unique to South Africa, irrespective of whether the institutions are creatures of statute or not.

3.4 It has also been observed that in countries such as Australia and Canada, specialist legal practitioners are not necessarily appointed in all the line function departments, but are centrally appointed by the Department of Justice (Canada) or by a specialist agency such as the AGS (Australia) and dispatched to departments when there is a need for such specialist services to deal with complex cases. It seems that the latter arrangement is facilitated through effective inter-departmental communication and coordination between the central departments/agency and the rest of the departments.

3.5 In countries such as Australia and the U.S., offices that perform functions that are similar or related to those of the OCSLA are also structured and organised according to critical areas of specialisation. This ensures that there are specialist groups of lawyers who are experts on specific disciplines.
4.4 TO ASSESS THE OCLA'S MANDATE, IN PARTICULAR, THE ROLES, STATUS, POWERS AND FUNCTIONS

4.1 Understanding of the Role and Mandate

According to the DoJCD Annual Report 2014/15 the OCSLA “…provides legal advice, representation and legislative drafting services to the Executive, state departments at both national and provincial levels, municipalities, parastatals and independent or autonomous bodies that may refer work to it. It supports the government to achieve its objectives of transforming South African society and redressing past imbalances by providing efficient and cost-effective legal advice, legislative drafting and translation services of high quality.”

It was established that there is a common understanding of the role and mandate of the OCSLA among all the stakeholders. However, different stakeholders put emphasis on different aspects of the mandate, depending on their areas of work and/or the nature of issues they engage on with the OCLSA. Many respondents summarised the role and mandate of the OCSLA as follows:

a) Provide reliable legal advice, representation, legislation and legislative drafting services to the State in a cost-effective and efficient manner.
b) Provide legal advisory services to the Executive to ensure certification of bills, and draft amendments as directed by Parliamentary Committees.
c) Scrutinise or draft bills for tabling in Parliament and certify them as being Constitutional, compatible with the existing legal framework and properly drafted in accordance with legislative practice.
d) Provide independent and impartial legal advice, vetting of subordinate legislation and translation of laws in a cost effective manner to the national executive, parliamentary committees, other organs of state and units within the DoJCD.
e) Scrutinise legislation, international agreements, MOUs and other matters that impact on government.

When considering the mandate of the OCSLA as set out in the annual report mentioned above and the responses received it would seem that stakeholders have the correct understanding of the mandate.

Some national departments such as DIRCO and the Presidency as well as Premier's Offices have their own State Law Advisers (SLAs), hence some provinces indicated that the OCSLA does not play a role in the functions of Provincial legal services.

4.2 Adequate implementation of the mandate of the OCLSA

There are divided views on whether the OCSLA implements its mandate adequately. Some respondents, mainly departments and a few employees are of the view that the OCLSA endeavours to provide professional service of high quality at all times. However, due to competing demands, the non-specialisation of teams or the blurring
of responsibilities between the Cape Town and Pretoria based officials, it is not always possible to meet deadlines, provide 100% quality services and for drafters of opinions to participate in relevant portfolio committees.

According to one respondent, concerns about the quality can be illustrated by the fact that there are Bills that have been declared unconstitutional by the Constitutional Court. The CSLA was requested to verify how many Bills were passed versus those that were declared invalid and or unconstitutional during the period 1994 to 2016. The PSC was referred to the OCSLA 20 Year Performance Review 27 April 1994 – 26 April 2014. According to this document, a total of 1232 Laws were enacted from 27 April 1994 to 2014. Out of 1232, 26 Bills and Acts of Parliament were declared invalid and unconstitutional.

Some respondents expressed concern over the fact that the OCSLA sometimes assumes responsibility for ad hoc work that is not related to its mandate or should be performed by the Office of the State Attorney and legal advisors in departments and other spheres of government, such as “taking over the work of Departments at the initial stages of legislative drafting and policy formulation stages” and dealing with litigation matters. At times, SLAs are instructed to put aside everything they are busy with in order to attend to urgent ad hoc assignments. Some respondents are of the view that the OCSLA does this in order to maintain good relations with some stakeholders.

In addition, some respondents were of the view that the legal opinions “are not always genuine and impartial”, but they are drafted in a manner that would satisfy the leadership of the institution and advice on legislation is at times “pro-executive or executive minded”, thus creating a "conflict of interest" in the roles of advisers.

Legal opinions are not always objective. The CSLA … gives opinions that the members of the Executive want to hear, which results in embarrassment for the President and Government. Some bills are certified and rejected by the Constitutional Court as unconstitutional. International agreements are summarised and returned to client departments who were party to the negotiations and therefore do not require a summary of a document to which they are party. [This amounts to] unnecessary waste of resources and time. The same applies to regulations which have to be summarised. The Office should concentrate on its own mandate and not try to do work of other departments and divisions within the DoJCD, which falls beyond their scope of knowledge and field of expertise. The CSLA should desist from creating work by unnecessarily summarising court cases for no purpose.”

The CSLA addressed this aspect during the hearing and responded to the perception that the CSLA was executive-minded by indicating that he believes that when one performs work on behalf of clients, one looks at the task from the perspective of the client. Accordingly, he is able to advise the client whether the client has a case or not and further considers how the client may achieve their objectives. He emphasised that the OCSLA performs their functions independently. Parliament accepts advice from the OCSLA and the departments accept the OCSLA advice. During the discussions

11 Page 20 to 35 of the OCSLA 20 Year Performance Review 27 April 1994 – 26 April 2014
in parliament, the OCLSA interacts with the departments with a view to accommodate what parliament and the executive wants and thereby creating a balance.

4.3 Improving the execution of the OCLA’s mandate

Suggestions made by respondents to improve the execution of the mandate mostly related to the need to address operational processes and to safeguard the independence of the OCSLA from the DoJCD and political interference. With respect to the latter, the following comments were made:

a) The OCSLA should maintain its impartiality and professionalism by ensuring that when executing its mandate, there is no undue pressure to say what the Executive wants to hear, given that previous experience has resulted in embarrassment in court. The PSC will scrutinise the Key Performance Indicators and analysis
b) The OCSLA should be more independent and objective when advising to eliminate the perception that they are “Executive minded”.

c) The independence of OCSLA will enable the OCSLA to work independently from the DoJ&CD and be a central body to all organs of State.

An operational suggestion to improve the execution of the mandate varied. Several respondents, including employees and departments, indicated the need for the OCSLA to employ more legally qualified people to enable the OCSLA to address the increased demand for its services, including participation in Portfolio Committees. This is contrary to the view that some highly qualified and senior officials in the OCSLA “act as post boxes” instead of fulfilling their primary duties of drafting legal opinions and scrutinising legislation. To this end, it was proposed that the OCSLA should provide overall guidance, establish standards and monitor overall performance and compliance with standards. The SLAs should be responsible for ensuring quality.

Some respondents employed in the OCSLA suggested the need to allocate work equally among employees and between the Pretoria and Cape Town office. Furthermore, they said that it is important to ensure that the Cape Town office specialises in legislation drafting while the Pretoria office specialises in drafting legal opinions and scrutinising international agreements. One department proposed that the Cape Town based employees who are responsible for legislation drafting should move back to Pretoria in order to be closer to client departments.

While some departments appreciated the support provided by the OCLSA and some respondents were of the view that the OCLSA should be integrally involved in the drafting of legislation by departments in order to shorten the pre-certification process, there were also assertions that the OCLSA must focus on its core
mandate.

The need to establish uniform standards with regards to quality and style when drafting legal opinions and commenting/advising on legislation was identified. This issue is also linked to the proposal that employees must be trained on a continuous basis to ensure quality and consistency.

The importance of educating client departments about the services offered was raised by some officials and departments, and so was the need to obtain feedback from departments on the quality of service they receive from the OCSLA. Relationship building with the Parliamentary Office and departments was also emphasised to ensure a thorough understanding of what each institution does, and to minimise duplication of services and unnecessary turf-wars.
5. TO ASSESS THE ORGANISATIONAL STRUCTURE, ADMINISTRATION AND OPERATIONAL PROCESSES THAT GUIDE, AMONGST OTHERS, THE ALLOCATION OF WORK, QUALITY ASSURANCE MECHANISMS AND BALANCE BETWEEN INDIVIDUAL AND ORGANISATIONAL PROFESSIONAL OPINIONS

5.1 Organisational Structure

The State Law Advisers fall under Programme 3 of the DoJCD which also comprised of the Litigation and Legal Services; Legislative Development, Master of the High Court and Constitutional Development. It also provides legal advisory services to the executive, all state departments, parastatals and autonomous government bodies.\(^\text{12}\)

Figure 1 provides a high level overview of the organisational structure of the OCSLA.\(^\text{13}\)

![Figure 1: Structure of the OCSLA](image)

The factual situation is however that there are no longer Deputy CSLA posts on the establishment of the OCSLA. These posts were translated from the level of Chief Director to Principal State Law Adviser (PSLA) posts (specialist) on salary level Legal Professional (LP) 10. The former incumbents of these posts are now on the same post level as the post level of PSLA.

Another anomaly is that there were six Deputy CSLA posts prior to the implementation of the Occupation Specific Dispensation (OSD) but of the six posts, only two incumbents were involved in functions associated with these posts. Of the remaining


\(^{13}\) DoJCD Website as at February 2016
four posts, one post has been vacant since 11 October 2012, and the other three incumbents of these posts are utilised in other positions (two in the DoJCD and another at The Presidency). This creates an untenable situation and has a negative impact on the operations of the OCSLA.

At the hearing, it was indicated that specialisation is not possible currently because of capacity issues. However, it was considered a possibility to be explored especially since the OCSLA has a number of young state law advisers that joined the OCSLA. As part of the role of the OCSLA is to ensure that employees develop in all areas of the service that is offered, which includes international agreements, and checking whether it affects our domestic law or whether it’s in conflict with our domestic laws or other international agreements. Specialisation or secondment was supported considering the fact that the same SLAs deal with the same legislation time and time again.

The PSC submits that in a society where law is extremely specialised the only sensible route would be to encourage specialisation. It is unlikely that any person could have a thorough knowledge of all fields of law. In the USA for example, specialisation is a common feature. There are specialised units and employees are rotated for exposure to various fields of specialisation. It seems as if the practice in South Africa may lead to a situation of “Jack of all trades…”

The Acting State Attorney confirmed that there is a duplication of services rendered to clients of the Chief State Law Adviser with regards to the provision of legal opinions. There are instances where the OSA has been requested to appoint counsel to provide a second opinion, to put matters in perspective. As far as the OSA is aware, there is no specific class of opinions which are exclusively reserved for the OSA or the OCSLA. In this regard, there is a duplication of services. In complex opinions, the State Attorney is usually instructed to brief counsel to provide opinions but due to the nature of the work, the brief is issued by the State Attorney and the services are regarded to have been performed by the State Attorney. In less complex matters the State Attorney is expected to provide opinions to clients.

A comparison of state of representivity in the OCSLA as at March 2016 and the percentage distribution in respect of the demographics of the economically active population in South Africa shows that Coloureds and Whites are over represented in the OSA. In addition, the overall gender profile of the OCSLA shows that 62% of the employees as at March 2016 are females.
5.2 Administration and operational processes that guide, amongst others, the allocation of work, quality assurance mechanisms and balance between individual and organisational professional opinions

5.2.1 Prevailing Reporting Arrangements

The feedback from respondents on the reporting arrangements alludes to a lack of clarity, inconsistency and inefficiency. Although it was reported that performance agreements (PAs) are signed with all employees, most respondents indicated that the lack of delegation means that in the end, the only approving authority in the OCSLA is the CLSA, and this arrangement, coupled with the long chain of command that is also not adhered to, makes the OCSLA’s operations ineffective and inefficient.

According to the respondents, some PSLAs have more subordinates (up to 4) and others have one subordinate. Notwithstanding this, concerns were raised over the fact that sometimes Senior and PSLAs have to report and account directly to the Deputy CSLAs or the CLSA respectively, in spite of the fact that there is a hierarchical reporting system in place. It may be argued that the fluidity of the reporting arrangements is supposed to enhance effectiveness and efficiency, unfortunately, the employees who often find themselves in a difficult position of having to account to higher levels for the ‘supposedly poor quality’ of work that was approved by their immediate line managers are dissatisfied about the system.

The ‘confusing and inconsistent’ reporting arrangements have also contributed to the perception that some employees are favoured by top management, mutual trust is lacking amongst top management and the CSLA and Deputy CSLAs are allegedly not willing to deal with their subordinates, hence they confront SLAs, Senior SLAs or PSLAs when there are queries on the quality of work submitted. There were even queries on the rationale to the arrangements that Secretaries should report to the...
Office Manager instead of the advisers that they are expected to support.

Some respondents went further to state that the “reporting line between CSLA and DG is non-existent since the CSLA seems to think that the Office is independent and is accountable to no one.” Many respondents used different expressions to the effect that “there should be mutual trust between CSLA and Deputy CSLA to ensure the CSLA feels comfortable with decisions taken by the Deputy CSLA.”

Despite some of the negative responses, one respondent was of the view that the accessibility of the Deputy CSLA and CSLA creates an opportunity for employees at all levels to be guided first hand by top management.

Implementation of the OSD has also contributed to management and reporting challenges in the sense that the posts of Deputy CSLA have been translated to specialist posts (LP 10) and the incumbents are now on the same post level as the Principal State Law Advisers.

Despite the challenges indicated the participants at the hearing indicated that they are coping and managing the work load to the best of their ability. The reporting structure and challenges were however not addressed during the hearing.

5.2.2 Preferred Reporting Arrangements and Proposals for Improvement

The responses show that the implementation of the reporting arrangements is fraught with many challenges.

Employees of the OCSLA were asked to indicate who they would prefer to report to, if given the opportunity to choose, and the responses were rather mixed in the sense that a few respondents said they are comfortable with the current arrangement, many made proposals to ensure the consistency and effectiveness of the existing system and some wanted a clearly defined system or an alternative arrangement.

It would appear from the information received, that the lines of communication are problematic at the OCSLA. Proposals to enhance the existing system were provided as follows-

a) Reporting only to one supervisor i.e. either the Deputy CSLA or the CSLA but not to both.

b) The Principal State Adviser should have more influence in dealing with issues of performance.

c) The research unit should report to a legally qualified officer as it is ill positioned...
in the administration unit.

With respect to alternative arrangements, the following proposals were made:

a) There should be more DCSLAs to allow for effective, efficient and professional management of the Office.
b) Legally qualified professionals prefer reporting to senior legal professionals.

Within this category of responses, emphasis was put on the need to ensure that supervisors are knowledgeable, have practical knowledge of the law and are able to contribute meaningfully to an opinion.

5.2.3 Working relations among officials

The working relations among employees were rated as fair by the CSLA. Employees rated the working relations as fair and poor. The reasons given for this rating suggest that the interactions between the Cape Town based and Pretoria based employees is very limited and that meetings are only held with the PSLAs in Cape Town.

It would appear from an analysis of the questionnaires that the main challenges relate to reporting arrangements and differentiation between employees based in Cape Town and Pretoria.

5.2.4 Case load allocation and support

According to the respondents, the allocation of cases to SLAs and Senior SLAs is done by Management and Administration (Library) staff, however the DCSLA manages the work register. Many of the employee respondents said they do not get support to handle large volumes of work at all, whereas few said the support provided is not good because it does not contribute towards reduced workloads. At the hearing, the PSC enquired how cases are allocated and it was mentioned that allocation of cases is dependent on whether the matter is of a complex nature or whether the matter would occupy a SLA for an extended period of time.

Challenges identified were that:

a) More support staff were allocated to the Cape Town Office.
b) It was in some instances difficult to obtain the services of researchers unless a motivation was provided.
c) Work allocated was in most instances urgent; and
d) Work that should have been done by the OSA were accepted instead of referring this work to the OSA.

Table 3 on the next page sets out the caseload per output for the 2013/14 and 2014/15 financial years. A substantial decrease in the number of cases handled in the 2014/15
financial year can be observed.

Table 3: Caseload versus total finalised for the 2013/14 and 2014/15FY

<table>
<thead>
<tr>
<th>Outputs</th>
<th>FY 2013/14 Caseload</th>
<th>FY 2013/14 Total finalised</th>
<th>FY 2014/15 Caseload</th>
<th>FY 2014/15 Total finalised</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal opinions</td>
<td>975</td>
<td>824</td>
<td>712</td>
<td>611</td>
</tr>
<tr>
<td>Preliminary opinions on draft bills</td>
<td>98</td>
<td>87</td>
<td>54</td>
<td>43</td>
</tr>
<tr>
<td>Certification of bills and other legislative instruments</td>
<td>722</td>
<td>574</td>
<td>217</td>
<td>190</td>
</tr>
<tr>
<td>International agreements and accompanying legal opinions</td>
<td>-</td>
<td>-</td>
<td>228</td>
<td>211</td>
</tr>
<tr>
<td>Translations into South African official languages</td>
<td>260</td>
<td>205</td>
<td>187</td>
<td>167</td>
</tr>
<tr>
<td>Total</td>
<td>2055</td>
<td>1690</td>
<td>1398</td>
<td>1222</td>
</tr>
</tbody>
</table>

5.2.5 Training and development

Respondents provided inconsistent information regarding the provision of training. Some said training is seldom provided, if provided it would be in-service training, whereas some said they receive sufficient training. The Training Committee arranges training but there are financial constraints and there are also views that the approval of training is subjective.

The PSC was informed by the OCSLA that the training requirements according to the OCSLA Training Report for 2015/2016 included *inter alia* Legislative Drafting, Statutory Interpretation and Constitutional Law, Forensic Investigation in the Public Sector, Labour Law and Leadership courses.

Additionally, it was alleged that no measures have been put in place to ensure that SLAs undergo pupillage and are given the opportunity to write Bar Exams. One respondent said this is not provided for because the requirement to be employed at the OCSLA is that one should be an admitted attorney or an advocate. Another respondent partially echoed this view by stating that most of the people appointed are “attorneys and not advocates as it was the case previously.” It is noted that there are independent advocates who have not written the Bar Exams and have not served pupillage.

5.2.6 Quality assurance mechanisms – OCSLA perspective

There is a common understanding of the process of quality assuring legal opinions among internal stakeholders in that “the State Law Adviser drafts, Principal State Law

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Adviser checks the opinion, Deputy Chief State Law Adviser checks again, Chief State Law Adviser checks again then the document is approved and sent to clients.” One respondent also noted that the CSLA brings matters of National interest to the Cape Town office's attention and discussions are held with staff. In addition to checking all work that leaves the OCSLA, the CSLA provides guidance, inputs, correction, discusses current affairs and assists in keeping the OCSLA abreast on legal developments.

As illustrated in Figure 3 below, half of the respondents indicated that the quality assurance mechanisms were “fair” and 21% deemed the quality assurance mechanisms to be effective. The remaining 29% rated the effectiveness of quality assurance mechanisms as “poor” and mentioned that the challenges related to the lack of clear guidelines on what is expected.

![Figure 3: Opinions of employees regarding the effectiveness of quality assurance mechanism applied in the OCSLA](image)

There was a view that the quality assurance process concentrates more on the quantity rather than the quality of outputs. The quality of inputs given to drafters is often not comprehensive, without substance and not good because employees with less experience occupy higher ranks. According to some respondents, the changes proposed by some senior managers, including, the CSLA and Deputy CSLA, do not improve the overall quality of the opinions. In addition, the process is considered to be cumbersome by some employees because ad hoc questions are posed by the CSLA that require mini opinions only for the CSLA to address another issue. The to-and-fro processes result in delays in the finalisation of legal opinions.

5.2.7 **Mechanisms to ensure service delivery excellence**

Different stakeholders proposed various mechanisms to enhance service delivery, ranging from staff training, ensuring the equitable distribution of workloads, improving staff morale through treating employees properly, and increasing capacity. The proposals made by respondents have been categorised below:

a) Capacity enhancement mechanisms

- Allocate more budget for continuous staff training in areas that are relevant to the work of the OCSLA such as legislative drafting and refresher courses especially where there are new developments in law.
Increase the capacity of the OCSLA by appointing more qualified and experienced professionals.

Structure the OCSLA in a manner that enables professionals to focus on their core mandate, not management and administration issues.

Ensure fairness in the promotion of qualified and experienced professionals.

Allow for some level of specialisation among employees and between the Cape Town and Pretoria Office.

b) Collaboration and communication with stakeholders

- Develop a more co-operative relationship between colleagues in other departments / Parliament and be open to the exploration of different views.
- Improve communication with client departments.
- Communicate standards and services provided to departments clearly.
- Provide on-going training to departments to minimise the referral of cases to the OCSLA.

c) Operational measures

- Put clear and objective standards in place – the standards to relate to quality, turnaround times and stakeholder relations.
- Develop templates to be used by departments and the Office for commenting on international agreements and contracts to ensure standardisation and minimise delays due to many changes.
- Hold senior professionals accountable for quality assurance and delivery in line with the standards so that senior management can “stop micro-managing professional work”.
- Distribute work equitably, taking into account the rank, experience and expertise of professionals.
- Avoid taking on ad hoc assignments that are not linked to the mandate of the Office.

d) Work environment

- Ensure fairness and consistency in how staff and differences are dealt with.
- Put in place a mechanism to enable the Minister or Director-General to intervene when junior staff members are ill-treated.
- Improve communication between the top management and employees in both offices.
- Address the problems that underpin the tension between the Cape Town and Pretoria offices, such problems include management’s tendency to compare the performance of staff in both offices and the perception that some employees are superior to others.
- Put interventions in place to improve staff morale and to stimulate service delivery.
6. TO APPLY THE EFFECTIVE, EFFICIENCY AND ECONOMIC TEST IN RELATION TO HUMAN RESOURCE CAPACITY, BUDGET ALLOCATIONS AND PERFORMANCE

6.1 Post establishment and vacancy rate

The OCSLA’s post establishment for the years 2013 and 2015 reflect an overall vacancy rate of 10% and 9.9% in respect of the year 2014. This is within the 10% norm for the Public Service.

![Vacancy Rate in the OCSLA for the 2013 to 2015 financial years](image)

As depicted in Figure 4 above, the number of vacant legal specialist posts as at 31 March of each year increased from two in 2013 to five in 2014 and six in 2015. This corroborates the criticism against the OSD but more specifically the moratorium placed on the filling of posts on salary level LP 10.

The PSC perused information that was provided by the DoJCD and it was observed that three former DCLAs are utilised at different offices i.e. Chief Operations Officer, DG and one was moved to The Presidency. This implies that in effect the OCSLA has 13 vacant posts of which 9 are legal specialist posts. The impact that this has on service delivery is evident.

6.2 Effect of the implementation of the OSD for Legally Qualified Professionals in the recruitment and retention of legal advisers

Public Service Coordinating Bargaining Council Resolution 2/2008 implemented the Occupation Specific Dispensation (OSD) for qualified legal professionals with effect from 1 July 2007. It caters for career progression opportunities for SLAs.

The management posts such as the DCSLA posts in the OCSLA were historically filled by members of the Senior Management Service, but since the implementation of the OSD, these posts have been translated to LP 10 which is actually a legal professional post.

The challenge that is most crippling is the fact that the former DCSLA posts are on
level LP 10 and employees who will be appointed in such posts and who supervise other LP 10’s will earn less than their subordinates. The fact that one of the former DCSLA posts has been vacant since 11 October 2012 is indicative of the challenges faced in this regard.

The DPSA has now placed an embargo on the filling of LP 10 posts but it is not clear when the challenges will be addressed.

Respondents made the following suggestions to retain the services of experienced SLA’s:

a) The need for the establishment of a staff retention plan.
b) Increase the prospects of promotions and career advancements within the OSCSLA.
c) Provide regular and relevant training, including granting employees, one-year with full pay to serve article or further their studies.
d) Provision of a conducive working environment.
e) Eradication of bullying and favouritism through the utilisation of the performance bonus system.

In addition to challenges with reporting lines, respondents were of the view that the OSD has adversely affected the recruitment and retention of SLAs due to the following reasons:

a) Low salaries are offered for the experience required and no attempt has been made to retain SLAs that are affected.
b) Implementation and interpretation of the OSD has resulted in disputes that were referred to arbitration and are now subject to review proceedings in the Labour Court.
c) Some SLAs were placed on LP8 (i.e. Senior SLA) whereas they were of the view that they should be placed on LP9 (PSLA), resulting in the perception that they are being underpaid.

The OSD provides for advanced pay progression as well as grade progression. The dissatisfaction concerning salaries may be experienced by the more senior officials who have progressed past these levels and have to apply for vacant posts.

It is however not a phenomenon unique to SLAs and it is a practice found in most organisations that vertical advancement becomes more and more limited with progress up the corporate ladder.

It is evident from Figure 5 below that the first salary notch of a State Legal Adviser is slightly above the first salary notch of Deputy Directors on salary level 11 (R 569 538) and the top salary notch of Specialist State Law Advisor exceeds the top salary notch of Deputy Director-General on salary level 15 (R 1 428 186) in the public service.
ASSESSMENT OF THE EFFECTIVENESS AND EFFICIENCY OF THE OFFICE OF THE CHIEF STATE LAW ADVISER

Figure 5: Appointment requirements and salaries of State Law Advisers

The PSC was informed that employees who possess B Proc fall under the OSD because their qualification is a four year qualification. The CSLA was requested to provide an indication of what became of employees who possess a B Proc and B Juris.

The CSLA responded:

“The positions for the Legally Qualified Employees in the OCSLA were as follows before OSD:
Deputy Chief State Law Advisers (Chief Director’s level)
Principal State Law Advisers (Director’s level)
Senior State Law Advisers (Deputy Director’s level)

All the employees who occupied the above positions were translated into OSD as follows:
Deputy Chief State Law Advisers and Principal State Law Advisers: translated into LP10 (Specialist: State Legal Adviser)
Senior State Law Adviser: translated into LP8 (State Law Advisers)

The Head of Branch is the Chief State Law Adviser and his post is not an OSD Post”.

6.3 Work experience

Figure 6 below illustrates the average number of years’ experience in the public service in relation to employees in the employ of the OCSLA. There are 53 employees with less than 10 years’ experience, 19 employees with 10 to 19 years’ experience and 8 employees with 20 to 29 years’ experience. Seven employees have between 30 to 39 years’ experience whilst 3 employees have in excess of 40 years’ experience.
Figure 6: Years of experience of employees of the OCSLA

Work experience is not viewed as a critical area with 41% of the employees having in excess of 10 years or more experience. It is anticipated that in the next five years, at least three employees occupying specialist posts will retire.

Figure 7 below shows that the total expenditure of the OCSLA has increased from R 53 020 million to R 56 434 million from the 2012/13 to the 2014/15 financial year. The biggest contributor of the expenditure is ‘Compensation of Employees’ at R 52 143 million (92.39%) in respect of the 2014/15 financial year. The rest of the budget R 4 291 million is spent on other expenses including “Goods and Services.”

Figure 7: Expenditure by the OCSLA for 2012/13 to 2014/15 expressed in millions

Although the number of vacancies remained at ten vacant posts over the three financial years, it was recorded that the number of vacant posts in respect of specialists has increased to six posts. In the event that these vacant specialist posts are filled, it will result in a higher percentage of the budget being spent on Compensation of Employees.

6.4 Performance Information

Figure 8 below shows that there has been a steady decline in the number of outputs of the OCSLA.
As can be observed, there has been a substantial decline on opinions on Bills and in certification of Bills. This could possibly be attributed to limited changes required in the legislative environment.

**Table 4** below sets out the Annual Performance Plan specific to the OCSLA. The performance indicators sets timeframes within which the outputs are to be delivered, as well as the targets.

**Table 4: Performance Indicators in respect of the OCSLA**

<table>
<thead>
<tr>
<th>Key Performance Indicator</th>
<th>Timeframes</th>
<th>Targets</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage of legal opinions</td>
<td>Finalised within 30 days from the date of receipt</td>
<td>83% 84% 85%</td>
</tr>
<tr>
<td>Percentage of preliminary opinions on draft Bills for Cabinet’s consideration</td>
<td>Completed within 40 days from the date of receipt</td>
<td>70% 73% 75%</td>
</tr>
<tr>
<td>Percentage of Bills and Subordinate Legislation</td>
<td>Finalised within 40 days from the date of receipt</td>
<td>85% 86% 87%</td>
</tr>
<tr>
<td>Percentage of international agreements and accompanying legal opinions</td>
<td>Finalised within 30 days from the date of receipt</td>
<td>70% 73% 75%</td>
</tr>
<tr>
<td>Percentage of translations finalised</td>
<td>Finalised within 55 days from the date of receipt</td>
<td>84% 85% 86%</td>
</tr>
</tbody>
</table>

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**Figure 8: Case load comparison over the past three financial years**
7. TO ASSESS WHETHER THE STATUS OF THE OCSLA MAY BE IMPROVED THROUGH PROVIDING THE OCSLA WITH MORE OPERATIONAL INDEPENDENCE

The aspect of operational independence was discussed at the hearing and the CSLA indicated that in many of the jurisdictions he has looked at, there is no contradiction between the state law adviser serving both Parliament and the Executive, because he was of the view that the OCSLA is independent and that they work independently because they have autonomy and to date, no one has interfered with how the OCSLA works. He added that the National Executive had taken a decision, that before Bills are presented to Cabinet, the OCSLA must provide a preliminary opinion and a final opinion after Cabinet has approved it. More recently, Cabinet took another decision saying that even if Bills are advertised for public comment, that the OCSLA has to provide the departments and cabinet with an opinion on that Bill, even though the Bill is only going to solicit public comment.

The OCSLA is not a constitutional institution. There is no legislation that provides the OCSLA with independent status. The OCSLA is not akin to the NPA because the section 179 of the Constitution created a single National Prosecution Authority (NPA), which is governed by the National Prosecuting Authority Act (Act No. 32 of 1998). The Constitution, read with this Act, provides the NPA with the power to institute criminal proceedings on behalf of the State, to carry out any necessary functions incidental to institution of criminal proceedings and to discontinue criminal proceedings. The NPA is accountable to Parliament, while the final responsibility over the prosecuting authority lies with the Minister of Justice.

There were suggestions made that the OCSLA should be made a public entity and operate in a way that enhances its independence and autonomy and allows it the space to develop organically and to respond quickly and efficiently to the needs of government. The PSC supports the suggestion that the legal framework must be amended if the independence of the OCSLA is to be guaranteed. This includes the OSA. Just as the National Prosecuting Act has delineated the criminal prosecutorial authority and given autonomy and independence, so too can the civil arm of government which includes all the legal services through state attorneys and other civil matters be given such independence and autonomy. Legislation which will be consistent with the Constitution will give autonomy and independence to legal advisers and lawyers and protect them.

The tacit independence of the OCSLA including the State Attorneys was discussed and it was stated that they have a clear advantage over even the private sector lawyer. The private sector lawyer can express an opinion to generate income. The State Attorney and SLAs owe nobody any money; no benefit other than earning their salary decently, and so they have a very powerful sense of independence. CSLA stated that the independence of the OCSLA should preferably be set out in legislation like that of the NPA where the NPA Act clearly says that the NDPP is independent. This would clarify confusion regarding the OCSLA’s position.
On the question of where the OCSLA may be located and whether it has to be an independent body outside the DoJCD, it was agreed that this still needs more research, so that informed decisions can be taken.

There was a view that was expressed that since State Attorneys are members of the law society, they are also protected by attorney/client privilege. An attorney and client relationship is therefore clear. They are attorneys and they would advise people as clients and there may be certain things that are said that may be confidential, but even in the state attorney’s office, there is only a certain limited type of communications that may be privileged, because one is acting in the public interest. Everything that is done is supposed to uphold and advance the Constitution and anything that is suspicious or wrong will become unlawful. If one is a party to something that is unlawful with someone from any department or wherever, one will not be escaping on the grounds that it may be privileged.

Another view that was expressed rejected that State Attorneys and State Legal Advisers were protected by attorney/client privilege. There was a distinction drawn between attorneys and law advisers of the State in that in the private sector, the client pays the attorney’s or advocate’s fees. Attorneys and law advisers work as servants of the State and are remunerated by the State and should therefore only serve the Constitution.

The PSC is aware of the decision In Mohamed and Another v President of the Republic of South Africa and Others\(^\text{16}\) wherein the court held that legal professional privilege applies or extends to salaried legal advisers in the employ of government and in the employ of private bodies i.e. an Auditing firm giving legal and tax advice. Privilege covers these parties in that the State Attorney has the same duties as an attorney in private practice.

\(^{16}\) (CCT 17/01) [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) (28 May 2001)
8. TO ESTABLISH WHETHER THE WORK OF THE OCSLA IS ENHANCING THE OPTIMAL FUNCTIONING OF GOVERNMENT DEPARTMENTS

8.1 Departmental capacity, and referral of requests to the OCSLA and Senior Counsel

Departments were requested to indicate the number of employees who have the necessary skills to draft legal opinions. Of the 12 departments and Premier’s Offices that responded, it was established that 74 employees possess the required skills.

In order to enhance drafting skills of the respective legally qualified personnel, the respondents from the departments suggested the following:

a) continued on-the-job training to enhance understanding of the drafting of primary and subordinate legislation;

b) exposure to drafting of legal opinions for the State through exchange programmes aimed at exposing employees to different environments and gaining practical experience;

c) facilitating information sharing among SLAs;

d) ensuring that State libraries are well resourced;

e) facilitation of government seminars for officials to understand government standards; and

f) provision of courses provided by specialist private institutions.

According to one respondent, the department drafts their own opinions but for complex cases and where there are differences in opinions, the matter is outsourced to Senior Counsel. Another department said their office is a mirror image of the OCSLA, therefore they can perform all functions that the OCSLA performs. However it was indicated by a department that functions such as “certification of legislation and regulations cannot easily be replaced with in-house services.”

Although all departments that responded confirmed that in one way or another they utilise the services of the OCSLA, some have also confirmed that they have referred matters to counsel through private attorneys over the past three years due to the following reasons:

a) The urgency of the matter especially where litigation was foreseen.

b) A lack of confidence in the advice of the OCSLA.

c) Matters relating to provincial regulations and legislation.

“Primary drafting of bills should be done by departments (because they are best placed to understand the underlying policy) and not by the SLAs. Their role should be to scrutinize the bills, as drafted by the department before submission to Cabinet and eventually Parliament. They must express an objective view. If they are the principal drafters it is likely to affect their objectivity.”
8.2 **Performance Standards**

The performance indicators of the OCSLA with the timeframes within which the outputs are to be delivered, as well as the targets are already discussed in Table 4 above.

A total of 52% of employees in the OCSLA, including the CSLA, confirmed that performance standards are in place that regulate the work of employees. Interestingly, the comments made by the majority of the respondents portrayed a negative image.

According to some respondents, the performance standards were developed in compliance with the standards set out by Human Resources (HR) and the performance management system. They form an integral part of performance agreements of employees.

In particular, many respondents said the performance standards are not well explained and communicated; they are not clear and are subject to different interpretations. There were also concerns that the Performance Management System is not implemented correctly because of a lack of clear, objective and uniform standards. The assessment of staff is subjective and this leads to low morale amongst employees.

Below are examples of positive comments made by respondents:

a) “The annual performance agreements clearly identifies the [Key Result Areas] KRAs of the employees and the criteria or standard the employee should meet to perform satisfactorily or outstandingly.”

b) “There are forms from National Office that are completed and signed by employees and immediate supervisors.”

While the above comments represent a fraction of the complaints and frustration of the majority of the respondents, it is clear that employees are dissatisfied with the standards and the manner in which they are implemented. The negativity of the comments made by the respondents further substantiates the view that the working relations among employees in the OCSLA are fair-to-poor.

Probing on the extent of adherence to the performance standards revealed that the level of compliance is extremely low, as illustrated in Figure 9 below.
The general sentiment by half of the respondents was that performance standards are partially complied with and that good performance is rewarded. 31% of the respondents were of the view that there is inconsistency. In addition 19% of the respondents noted that perceptions about quality are also influenced by whether officials are willing to write opinions that suit the preferences of the Executive or not, as required by the CSLA and DCSLAs. As indicated in this report, Performance Assessment is not working well in the OCSLA and this is a matter that should be addressed because in essence, there is room for subjectivity when it comes to Performance Assessments.

8.3 Competency Levels and Quality of Work

The majority of client departments and other stakeholders rated the competency levels of employees in the OCLSA as good. It seems that despite internal challenges, the perception of the majority of external role players is still positive.

Departments were complementary on the competence of officials from the OCSLA. Their view was that the officials have relevant qualifications, knowledge in a range of areas and more objective than departmental advisers.

Cognisant of the perceptions on competency levels, client departments expressed appreciation and satisfaction with the quality of work received from the OCSLA. The legal opinions are well researched and based on recent court judgments in some instances have contributed towards resolving differences between the opinions of the AGSA and its auditors, however, there is room for improvement. The quality of legal opinions provided by the OCSLA was overall rated good by departments. As one respondent put it, “we have always received good quality opinions which were easy to implement.”

Relating to the quality of work performed by the employees of the OCSLA, the overall quality of work performed by the OCSLA was rated as “Good” by the majority of the respondents and “Fair” by the minority. This is indicative of an overall quality of work that is satisfactory.

Notwithstanding a few negative comments, acceptance of the overall quality of work done by the OCSLA is illustrated by the fact that a majority of client institutions indicated that they have never requested another opinion from private senior counsel after receiving a legal opinion from the OCSLA. Just a few of the sampled departments i.e. three have requested a second opinion from senior counsel.

8.4 Employee Perceptions on Work Quality

Employees in the OCSLA were asked to rate the quality of their own work, that of their subordinates (where applicable) and that of their superiors. Table 5 illustrates that although some respondents chose not to respond to this question, it is clear that the majority rated themselves, their subordinates and superiors well, taking into account
concerns about workload and unreasonable timeframes. The quality of work performed by superiors was rated poor by three respondents.

Table 5: OCSLA Employee’s rating of quality of work

<table>
<thead>
<tr>
<th>Rating for quality of work</th>
<th>Good</th>
<th>Fair</th>
<th>Poor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Own rating</td>
<td>11</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Subordinates</td>
<td>8</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Superiors</td>
<td>8</td>
<td>3</td>
<td>3</td>
</tr>
</tbody>
</table>

Employees justified their own ratings by stating that they work hard, have enough research experience, get positive feedback from clients and seldom receive complaints from clients. In addition, it was reported that the SLAs and SSLAs have a "peer review mechanism which facilitates learning and development in the office and an improved final product to be submitted to the client."

Some respondents said the current quality of their work is fair, when compared to the past four to five years because of the uneven distribution of work, forced changes to opinions by superiors, excessive work load, vague instructions, ad hoc tasks which must be completed at short notice and lack of guidance from superiors.

Since some of the respondents did not have subordinates or chose not to elaborate on their ratings, there were limited qualitative responses. It was however indicated that many subordinates work as hard as their superiors, and at times under difficult circumstances. As such, the quality of work is good, well researched and required minimum changes. However, some officials struggle with different aspects of work due to lack of training and/or support.

There was also a view that the SSLAs provide work of fair quality, considering the workload and urgent requests that must be completed within a short period. This creates the view that the OCSLA puts "emphasis on quantity of the work that we finalise as opposed to the quality of the work." According to some respondents, some superiors work hard as well and the quality of their work is good. However, the quality of work of some superiors is not good because they are busy with more administration and management duties and do not have time to review the quality of work produced by their subordinates. When they eventually get time to do so, they merely focus on editorials, instead of the research aspect and overall quality of the product. The lack of good working relations and lack of clarity on the role of Deputy CSLAs were also cited as factors that have a negative impact on the quality of work.
8.5 Feedback mechanisms

There were mixed views among the employee respondents on whether clients and stakeholders are happy with the quality of work of the Office in general, because there is no systematic feedback mechanism in place. Some respondents said they measure client satisfaction based on the positive feedback they receive from their contacts within departments, an increase in the number of requests/briefs and technical briefs received from departments and other organs of the state. However, others said they cannot comment because they seldom or never receive feedback from clients, but there is a possibility that clients are not always happy because sometimes deadlines are missed and the quality is not always up to standard due to multiple factors such as workload and other factors alluded to in the preceding sections. In addition, the level of satisfaction is also determined by whether the Office’s advice or opinion supports popular views or not.

Almost consistent with the views of the employees, client departments rated the OCSLA’s ability to provide continuous feedback on matters referred to them mostly good and fair.

Table 6: OCSLA provision of feedback

<table>
<thead>
<tr>
<th>OCSLA provision of feedback</th>
<th>Good</th>
<th>Fair</th>
<th>Poor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Departments, OTP &amp; Parliamentary Office</td>
<td>4</td>
<td>4</td>
<td>1</td>
</tr>
</tbody>
</table>

Analysis of the responses suggests that feedback is provided proactively to some departments, while other departments said they take the initiative to request an update because if they do not initiate contact, nothing is provided. Other client institutions did not respond.
9. TO ESTABLISH WHETHER THE OPERATIONS OF THE OCSLA HAVE EVER BEEN REVIEWED, AND IF SO WHETHER THE RECOMMENDATIONS FROM SUCH REVIEWS WERE IMPLEMENTED AND WHAT WAS THE IMPACT

Apart from the internally driven 20 Year Performance Review ((27 April 1997 - 26 April 2014), the OCSLA has never been externally evaluated and its operations have not been benchmarked with similar or related offices from other countries.

According to the CSLA 20 Year Performance Review, the role of the OCSLA has evolved over the years. Between 1999 and 2006, the OCSLA performed its core functions, and also exercised control over the State Attorneys, Legal Process and Legal Enforcement and International Affairs within the DoJCD. In addition, between 2003 and 2005 it exercised control over the Masters of High Court and on a trial basis, a Constitutional Litigation Unit between 2004 and 2006. According to the review report, the OCSLA achieved the following in relation to its core function17:

The PSC was referred to the OCSLA 20 Year Performance Review 27 April 1994 – 26 April 201418. According to this document, a total of 1232 Laws were enacted from 27 April 1994 to 2014. Out of 1232, 26 Bills and Acts of Parliament were declared invalid and unconstitutional. The PSC commends the OCSLA for this achievement considering the fact that just 26 Bills were declared invalid of the 1232 Bills that were scrutinised, drafted and certified.

The OCSLA has also played an important role in various international fora such as the United Nations, African Union and “numerous bilateral treaty negotiations, especially on extradition and mutual legal assistance”. The report further states that the use of the services of the OCSLA is expected to increase, due to the introduction of austerity measures in government.

According to the report, it is envisaged that “the role of the Chief State Law Adviser may change in the future, particularly as Parliament itself is reviewing how it should deal with the legislation which it has to pass.”

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18 Page 20 to 35 of the OCSLA 20 Year Performance Review 27 April 1994 – 26 April 2014
10. **ADDITIONAL COMMENTS PROVIDED BY RESPONDENTS ON OTHER ISSUES RELEVANT TO THE STUDY**

Respondents provided valuable general information in relation to their interactions with the OCSLA.

Some external stakeholders indicated that they have an excellent working relationship with the OCSLA citing the following reasons:

a) They are approachable and the level of cooperation is good.

b) The legal opinions provided by the OCSLA are of high quality, but the turnaround time should be improved.

Respondents who participated in the study highlighted the lack of coordinated efforts between the Provincial SLAs, National OCSLA and Parliamentary Lawyers/Advisers. It was suggested that the OCSLA should collaborate with Provincial and Parliamentary teams to avoid unnecessary competition.

A few external stakeholders indicated that the OCSLA is "not visible enough" and should expand its operations to Local Government. The PSC notes that the latter forms part of the mandate of the OCSLA.

Internal respondents reiterated some of the challenges addressed regarding OSD rank translation and reporting lines, and also indicated the need to streamline the quality assurance processes. Emphasis was also placed on the need to address the importance of professional relations between employees and the need to improve communication channels to ensure that staff members are briefed and consulted before decisions are made about issues that have an impact on them. Additionally, an environment where employees are free to voice their opinions should be created.

According to the respondent, not much will change unless the core problems experienced are effectively dealt with by the relevant authorities.
11. SUMMARY ANALYSIS OF FINDINGS

11.1 There is a common understanding on the role and mandate of the OCSLA amongst all respondents. However there were divided views on whether the OCSLA is executing its mandate adequately due to multiple factors, including increased workload, unrealistic timeframes, insufficient or lack of continuous training, and concerns about the impartiality of some legal opinions.

11.2 Proposals to improve on the execution of the mandate focused more on the need to ensure independence and impartiality, increasing capacity, strengthening relations with client institutions and addressing operational challenges such as the equitable allocation of cases to SLAs, clarification of reporting lines, streamlining the quality assurance mechanisms and releasing SSLAs, PSLAs and DCSLAs from management and administrative duties.

11.3 The competency levels of employees in the OCSLA and overall quality of work were mostly rated good and fair. The ratings were largely consistent with the ratings of employees from the OCSLA. These ratings were further corroborated by the fact that the majority of client institutions accepts the legal opinions provided and therefore seldom request for a second opinion from SC.

11.4 The study also revealed that in spite of its transversal mandate, the OCSLA is not the sole provider of legal and advisory services to government because provinces and other departments have their own advisers, hence some do not or seldom refer matters to it. The existence of SLAs in Provinces and other departments create confusion and at times unnecessary competition.

11.5 While some employees from the OCSLA are of the view that some departments refer matters instead of dealing with them directly, the responses from client institutions suggest that client departments have the will and ability to do some of the work internally, provided they have adequate capacity.

11.6 Cognisant of the predominately positive feedback given by internal and external stakeholders, the underlying message is that there is room for improvement. To this end, both internal and external stakeholders proposed measures to enhance service delivery, including but not limited to the need for additional capacity and training; cooperation and collaboration with client institutions; and addressing the work environment and some of the mentioned operational challenges.

11.7 Given that the OCSLA has approximately 90 employees, including professional staff and administration support, it may be argued that the OCSLA is under-capacitated in relation to its broad mandate. However, it is important to note that unlike in countries such as Australia where legal advisory services are centralised, there is some capacity in provinces and other departments, which is unfortunately not managed and coordinated by the OCSLA. The number of vacancies of specialists and the dilemma in relation to the OCSLA posts is creating strain. These challenges must be addressed.

11.8 With respect to the objectives of the study, and taking cognisant of challenges relating to the allocation and utilisation of the existing capacity, it may be argued that the OCSLA is effective and efficient to some extent.

11.9 Given the existence of additional capacity in the public service that is not in the control of the OCSLA, it is difficult to determine the economical functioning of the OCSLA in
Overall, the analysis has revealed that the challenges and limitations experienced by the OCSLA, as perceived by both internal and external stakeholders, are created by strained relations and internal operational processes that are perceived to be ineffective and inefficient.

It would appear that the employees still remain aggrieved even after the PSC made recommendations following grievances that were previously lodged by 12 employees of the OCSLA employees with the PSC. The recommendations related to non-compliance with the Grievance Rules, performance management, communication and functioning of the OCSLA, the perceived CSLA’s management style and the drafting of International Agreements. It would be beneficial for the OCSLA to implement the recommendations made by the PSC in August 2014, in order to alleviate some of the operational and management issues raised by the respondents who participated in this study.
12. **RECOMMENDATIONS**

12.1 The PSC proposes that the following be implemented by the OCSLA, with the assistance and support of the DoJCD:

a) Engagement with all relevant stakeholders on the effectiveness, economic efficiency of having SLAs employed by the OCSLA, Premier’s Offices and some national departments with a view to exploring the possibility of centralising the function in terms of recruitment, quality assurance and performance standards, while still using a decentralised approach to service delivery through the deployment of capacity to the relevant sites by the OCSLA.

b) Explore the use of an external party from the OCSLA and the DoJCD to assist the OCSLA in addressing the relationship, change management, culture change communication and staff morale as a matter of urgency.

c) Engage with the DPSA on the challenges that have been created by the OSD and on measures to address the identified challenges.

d) Assist all employees with regard to the interpretation and application of the OSD with respect to rank translation, reporting lines and employee performance management and further investigate whether the framework is achieving its objectives.

e) The utilisation of specialists in posts other than the posts that they are carried in, in terms of PERSAL, is a concern that must be addressed.

f) Enhance external communication and visibility to facilitate information sharing, minimise duplication and enable officials to liaise with client institutions if and when required.

g) Play a critical role in coordinating continuous training and development for SLAs in government, in order to keep abreast with developments in law locally and internationally.

h) The OCSLA should undertake a comparative analysis in selected countries such as Kenya, Australia and Canada to establish how Offices performing similar functions are structured and what operation systems have been put in place to ensure effectiveness and efficiency. Some of the operation systems to be looked at should include the internal allocation of work, performance standards and quality assurance mechanisms.

i) Conduct a feasibility study into the establishment of an independent OCSLA through legislation (similar NPA). This may include setting it up as a public entity or an agency.
13. **CONCLUSION**

The study has highlighted the strengths and the weaknesses of the OCSLA. The PSC thanks all employees who willingly provided thorough information by completing the questionnaires and for engaging with the PSC at the hearing. An attempt has been made to present the findings in a balanced manner based on the issues raised by the respondents. The study has highlighted the strengths and the weaknesses of the OCSLA.

The independence of the OCSLA came under the spotlight and debates for and against its independence yielded thought-provoking results. What is important to bear in mind is the fact that the OCSLA is not a constitutional institution. In order for it to have the status equated to the NPA as it was proposed during the discussions to have, legislative changes will be to be made. While there were many positive and negative issues raised in the report, the PSC has outlined few recommendations, which if properly implemented, would reinforce some of the existing systems and processes and simultaneously address some of the weaknesses.
APPENDIX A: COMPARATIVE ANALYSIS

South Africa

The OCSLA is also a sub-programme within the DoJCD, which “provides legal advice, representation and legislative drafting services to the Executive, all state departments at both national and provincial levels, municipalities, parastatals and independent or autonomous bodies that may refer work to it. It supports the government to achieve its objectives of transforming South African society and redressing past imbalances by providing efficient and cost-effective legal advice, legislative drafting and translation services of high quality.”

The CSLA is appointed at the Deputy Director-General (DDG) level and is therefore supposed to report to the Director-General (DG) of the DoJCD, who in turn reports to the Minister of Justice and Correctional Services. The Office of the CSLA has a staff establishment of 102 positions, of which 89 are filled. It had an operational budget of R 56 434 000 for the 2014/15 financial year.19

The OSA operates from two offices, respectively situated in Pretoria, which is the centre of government, and Cape Town, which is the main seating for the National Assembly. Apart from State Law Advisors (SLAs) employed by the OCSLA, there are SLAs in the Premiers’ Offices appointed by the various Provincial Administrations and departments such as DIRCO and Presidency have their own SLAs. The exact number of SLAs in these offices could not be verified due to lack of information.

Kenya

In Kenya the Attorney-General is the Principal Legal Advisor to the Government and ex officio Member of Parliament and Cabinet. The Attorney-General’s duties include the promotion of the Rule of Law, formulation of legal policy; ensuring the proper administration of Kenya’s legal system, including professional legal education; and upholding, protecting and defending the interests of the public.20 Other functions of the Office include the provision of public legal services with a view to promote a just, democratic and corruption-free nation.21 The Attorney-General is assisted in the performance of his/her duties as Principal Legal Advisor to the Government.

The Office of the Attorney-General draws its mandate from Article 156 of the Constitution of Kenya (2010), which vests on the Attorney-General the responsibility of being the Principal Legal Advisor to the Government, to ensure that the rule of law is promoted, protected and upheld and defend the public interest22. Further the Office of the Attorney-General Act No. 49 of 201223 clearly spells out the functions of the Attorney-General as follows:

(a) Advising Government Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters;
(b) Negotiating, drafting, vetting and interpreting local and international documents, agreements and treaties for and on behalf of the Government and its agencies; and
(c) Performing any function as may be necessary for the effective discharge of the duties and the exercise of the powers of the Attorney-General.

The Attorney-General is considered a government agency together with the Auditor-General, Parliamentary Commission, Registrar of Trade Unions and other institutions in Kenya.

Ghana

Under the Constitution of Ghana, there is an Attorney General of Ghana who is a Minister of State and the principal legal adviser to the Government. In line with the Constitution, the Attorney General of Ghana is the chief legal advisor to the Ghanaian government and is also responsible for the Ministry of Justice. The Attorney-General discharges such other duties of a legal nature as may be referred or assigned to him by the President, or imposed on him by the Constitution or any other law.

The objectives of the Attorney General are to:

(a) Formulate Policies, Monitor and Evaluate for the fair and efficient operation of the legal systems.
(b) Revise, reform and replace laws for the realisation of the policy objectives of Government with regards to National and Social growth.
(c) Broaden the scope of legal aid services.
(d) Develop and provide the requisite legal and paralegal manpower.
(e) Accelerate the disposal of criminal prosecution.
(f) Improve crime prevention and public accountability in the utilisation and management of the nation's financial and resources.
(g) Heighten public awareness of the nation's law and statues and publish the official law reports.

The Ministry of Justice and Attorney-General’s Department, the portfolio for which the Auditor General is responsible, comprises various departments and agencies.

The Attorney General is responsible for the initiation and conduct of all prosecutions of criminal offences. All offences prosecuted in the name of the Republic of Ghana is at the suit of the Attorney-General or any other person authorized by him in accordance with the law. The Attorney-General is responsible for the institution and conduct of all civil cases on behalf of

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the State; and all civil proceedings against the State shall be instituted against the Attorney General as defendant. The Attorney General has audience in all courts in Ghana.27

**Botswana**

The Attorney-General's Chambers is an "extra ministerial" Department under the Ministry of Justice, Defence and Security and it is headed by the Attorney-General.28 The role of the Attorney General is defined in section 51 of the Constitution of Botswana as the Principal legal adviser to the government. The Attorney-General is also an ex-officio Member of Cabinet, and serves on various high level policy committees.

The functions of the Attorney-General's Chambers are carried out under various divisions.29

The Attorney General's Chambers operates through five offices located at, Gaborone, Francistown, Maun, Lobatse and Palapye.30 The Attorney-General's Chambers have a staff compliment of approximately 400 employees.31

**Australia**

The current Australian Attorney-General is also the Minister of Art and Vice-President of the Executive Council.32 Within the Attorney-General’s portfolio, there is a Minister for Justice.33 The Attorney-General’s Portfolio is supported by the Attorney-General's Department. The Solicitor General, as the second law officer of the Commonwealth of Australia is assisted by two Senior Counsel to “act as counsel for the Commonwealth and its emanations, to furnish opinions on questions of law on referral by the Attorney-General and to perform such other functions ordinarily performed by counsel as the Attorney directs. In the role as counsel, the Solicitor-General will ordinarily appear as one of the counsel representing the Commonwealth in all matters before international judicial and arbitral tribunals.”34 The Solicitor-General is established in terms of the Solicitor-General Act of 1969.35

With respect to legislation drafting and other subordinate legislation, the Attorney-General is supported by the Office of Parliamentary Counsel.36 There is an Australian Government Solicitor (AGS) within the Department, which is a group of specialists in the legal field, led by the Australian Government Solicitor.37 The AGS was established in terms of section 55B and Part VIIIB of the Judiciary Act of 1903.38

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33 [http://www.ministerjustice.gov.au/Pages/Portfolio.aspx](http://www.ministerjustice.gov.au/Pages/Portfolio.aspx)
According to the AGS’s 2013/14 Annual report, the AGS is the nation’s leading provider of legal services to Government and has two shareholders – the Attorney-General and the Minister for Finance. The AGS works closely with the Solicitor-General and the Attorney-General’s Department’s Office of Constitutional Law on significant constitutional cases in the High Court of Australia.  

The AGS is structured into three (3) groups – the Office of General Counsel (OGC), AGS Dispute Resolution and AGS Commercial – which work together on complex matters that require expertise across different areas of law.

The AGS advises on the full spectrum of government activity, including policy development, law-making, commercial negotiations, constitutional matters, risk management, dispute management, representation of the state in litigation cases, the establishment and administration of Commonwealth agencies and machinery-of-government changes. It also plays a role in representing government in litigation cases.

What is quite distinct from other countries is that the AGS, is both a statutory authority within the Attorney-General’s portfolio and a government business enterprise (GBE). This implies that the AGS does not receive a budget from government but operates on a commercial basis as a big law firm and comments on all submissions to Cabinet. Previously it operated as an independent agency under the Minister of Finance, but was incorporated into the Attorney-General’s Department in July 2015. It has a staff compliment of approximately 500 employees, with expertise in different areas. When government departments have complex cases to deal with, specialists are deployed from the office of the AGS to the line function departments to work closely with departments directly.

The Australian model provides a good example of an institutional arrangement and capacity to build and promote specialisation in complex areas.

United Kingdom

The Attorney-General is a non-cabinet minister who leads the Attorney-General’s Office. As a government minister, the Attorney-General is directly answerable to Parliament. He or she is also the chief legal advisor of the Crown and its government, and has the primary role of advising the government on any legal repercussions of their actions, either orally at meetings or in writing.

Although the primary role is no longer one of litigation, the Attorney-General still represents the Crown and government in court in some select, particularly important cases, and appoints the Treasury Counsel who handles most government legal cases and the Director of Public Prosecutions who is head of the Crown Prosecution Service (CPS).

43 AGS 2013/15 Annual Report
44 https://www.gov.uk/government/organisations/attorney-generals-office
The Attorney-General represents the government in every case in front of the International Court of Justice and is administratively supported by the Attorney-General’s Office. His deputy is the Solicitor-General. The Attorney-General is responsible for the following:

- **Crown Prosecution Service (CPS)** is charged with the responsibility to make decisions on prosecutions other than in exceptional cases i.e. where the Attorney General's consent is required by statute or in cases relating to national security. The CPS is responsible for prosecuting criminal cases investigated by the police and other investigative authorities, in England and Wales.

- **Serious Fraud Office** is responsible to coordinate activity across the whole economy, both private and public sectors, to make the UK a hostile environment for fraudsters.

- **HM Crown Prosecution Service Inspectorate (HMCPSI)** inspects the work carried out by the CPS and some other prosecuting agencies. Its purpose is to enhance the quality of justice and make an assessment of prosecution services which improves their efficiency, effectiveness and fairness. HMCPSI also undertakes joint inspections with the other Criminal Justice Service (CJS) inspectorates which focus on broader issues across the CJS and collaborates with other inspectorates or public authorities.

- **Government Legal Department (GLD)** (formerly the Treasury Solicitor's Department until March 2015) is the largest in-house legal organisation in the United Kingdom's Government Legal Service. The department is mainly funded through the fees charged to clients for legal services. The department has to seek approval to make capital investment and spend the income generated each year through the Parliamentary Supply process and allocated in the HM Procurator-General and Treasury Solicitor Main Estimate. The Department is headed by the Treasury Solicitor. According to the Treasury Solicitor's Department Annual Report and Accounts 2014–15, the Government's Legal Department is the principal legal adviser to government. Its core purpose is to help government to govern well, within the rule of law by providing legal advice on the development, design and implementation of government policies and decisions, drafting secondary legislation and working with Parliamentary Counsel on primary legislation, and representing the government in court. The GLD has more than 1800 employees, of which approximately 1350 are solicitors and barristers.

- **Parliamentary and advisory work** is supported by the Government Legal Department (GLD) lawyers who are expected draft policies in accordance with election manifestos. They also advise on whether policies may be implemented under existing legislation and if so, how it should be done. In the event that new legislation is required, the GLD lawyers prepare a bill and ensures that it is endorsed by Parliament. They have to ensure that the legislation they produce will withstand the scrutiny of both the courts and Parliament.

- **Litigation services** are provided by the Litigation Group to the majority of government departments and executive agencies, as well as many non-departmental public bodies. The Litigation Group’s work encompasses litigation in public and private law as well as supporting public inquiries. Lawyers attend hearings in a wide range of courts, including
Coroners’ Courts, the Asylum and Immigration Tribunal, the Royal Courts of Justice and the Supreme Court.

- **Commercial:** The GLD has a specialist Commercial Law Group of around 120 commercial law specialists giving advice on large-scale complex public procurement or day-to-day transactional commercial matters. The work of this unit is essential to support the reduction of public spending and to ensure that government obtains value from their contracts. Legal advice is provided on a wide range of matters, including public procurement law, contract law, intellectual property and state aid. Commercial lawyers work closely with their clients (the procurement officers, contract managers, commercial directors and other in-house lawyers) to help develop sound policies, devise robust commercial and procurement strategies and to construct resilient contractual arrangements with suppliers.

- **European:** European Union law has a bearing on virtually every aspect of the work of GLD and lawyers are closely involved in changes and developments within the EU. The lawyers in this unit are involved in various aspects such as negotiation of EU measures, drafting statutory instruments for the implementation of EU directives as well as advising on domestic policy changes as a result of EU law. The unit is also responsible for preparing cases to be heard before the European Court of Justice.

- **Employment:** GLD’s employment lawyers are required to act for departments of state and public bodies in cases brought before the Employment Tribunal, the County Court, Employment Appeal Tribunal and beyond. Specialist lawyers in this area also advise on matters such as employment policies and practices and compliance with new legislation. They also provide information and training to clients to ensure that employment problems are avoided.

- **Bona vacantia:** According to the Treasury Solicitor’s Department Annual Report and Accounts 2014–15, the bona vacantia division “administers the estates of people who die intestate and without relatives entitled to inherit, and collects the assets of dissolved companies and failed trusts in England, Wales and Northern Ireland, except in the Duchies of Cornwall and Lancaster. The costs of the Division are recovered from the estates and assets it administers”. 47

### Ireland

In Ireland, the Attorney-General is described in Article 30 of the Ireland Constitution as “the Advisor of the government in matters of law and legal opinion.” 48 The functions, powers and duties of the Attorney-General are found in the Constitution and legislation. These include providing advice to government departments and certain public bodies on constitutional and legal issues that arise prior to or at government meetings, including whether proposed legislation complies with the provisions of the Constitution and the acts and treaties of the European Union or other international treaties to which Ireland has acceded. The Attorney-General also provides advice on whether the state can ratify international treaties and conventions. It is also the representative of the public in all legal proceedings for the enforcement of law and the assertion or protection of public rights. The Attorney-General no

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48 Constitution of Ireland, Enacted by the People, 1st July 1937. In operation as from 29th December, 1937.
longer provides prosecution services following the enactment of the Prosecution of Offences Act, 1974, which transferred prosecutions to the Director of Public Prosecutions.

The Attorney-General’s Office is headed by a Director-General. The Office of the Parliamentary Counsel and the Chief State Solicitor's Office are both constituent parts of the Attorney General’s Office. Accordingly, the principal legal functions carried out by the Office as a whole are the provision of legal advice (Advisory Counsel), legislative drafting (Parliamentary Counsel), the provision of litigation, conveyancing and other transactional services (Chief State Solicitor's Office).

The principal duty of the Advisory Counsel in the Office is to assist the Attorney General in performing his/her functions, powers and duties. The range of subjects covered is broad, but the activities themselves fall broadly into three categories: (1) the provision of advice, (2) the direction of litigation and (3) legal advice in the provision of drafting services to Government Departments. Advisory Counsel work closely with lawyers in both the Office of the Parliamentary Counsel in relation to advising on legal issues in the drafting of legislation and the Chief State Solicitor's Office in relation to advising on the conduct of litigation and other legal advice.

Parliamentary Counsel’s main function is to draft Government Bills and to provide drafting advice to government departments on achieving their aims in proposed legislation. The Chief State Solicitor’s Office performs functions similar to that of the Office of the State Attorney in South Africa, except for the fact that the Chief State Solicitor's office was also responsible for criminal prosecutions.

Ireland is an example of a system where the prosecution, civil litigation and state advisory services are kept separate.

Canada

In Canada the Ministry of the Attorney-General is established and regulated by the Ministry of the Attorney General Act. The Attorney-General wears two hats, being a Minister and the Chief Law Advisor of the Executive. Since the role has been referred to as "judicial-like" and as the "guardian of the public interest", the Attorney-General is expected to fulfil the Ministerial functions of public prosecution in a non-partisan manner and independent of Cabinet.

The Department of Justice has the mandate to support the dual roles of the Attorney-General. Canada's federal system allows for the administration of justice to be a shared jurisdiction between the federal government and the provinces and territories. The Department supports the Minister/Attorney-General in his/her responsibilities for 49 statutes and areas of federal law by ensuring a bilingual and bijural national legal framework principally within the following domains: criminal justice (including youth criminal justice), family justice, access to justice, Aboriginal justice, public law and private international law.

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49 [http://www.attorneygeneral.jus.gov.on.ca/english/about/ag/agrole.asp](http://www.attorneygeneral.jus.gov.on.ca/english/about/ag/agrole.asp)

The Department also supports the Attorney-General as the chief law officer of the Crown, both in terms of the ongoing operations of government and of the development of new policies, programmes and services for Canadians. As a result, the Department provides legal advice to the Government and federal government departments and agencies, represents the Crown in civil litigation and before administrative tribunals, drafts legislation and responds to the legal needs of federal departments and agencies.\(^\text{51}\)

The Department of Justice is a medium-sized department with around 5,000 employees. Roughly half of the department’s staff are lawyers. The other half is made up of a broad range of professionals, including paralegals, social scientists, programme managers, communications specialists, administrative services personnel, computer service professionals, and financial officers\(^\text{52}\). Departments do not employ legal personnel but rely on the services provided by the Department of Justice.

The Department delivers services through a mix of co-located departmental legal services units, specialized branches located within the Department of Justice and a network of six regional offices located across the country. As the government’s legal advisor, the Department of Justice helps federal departments develop, reform, and interpret laws.

Once Cabinet has decided what new laws should be introduced during a session of Parliament, work begins on preparing bills (drafts of proposed laws). When the subject in question is the responsibility of a department other than Justice, specialists in that department work with Justice Lawyers, who provide the legal expertise to draft the bill. The Department of Justice is consulted in the early stages of the work and continues to be involved through each step, from obtaining Cabinet approval to drafting and redrafting the bill until it is enacted by Parliament.\(^\text{53}\)

The Department also ensures that all draft regulations are legally valid, that they are clear in both official languages, and that they take into account both of Canada’s legal systems (the civil law in Quebec and the common law in the rest of the country). Justice lawyers draft the regulations or examine those sent by other departments, and provide advice and other services as needed.

The Canadian model provides an excellent example of how South Africa can provide legal services to all departments and other state agencies. This is done by way of working with specialists in the functional areas and providing specialised legal services to draft legislation.

**United States of America**

The Office of the Legal Adviser, which is located in the U.S. Department of State, furnishes advice on all domestic and international legal issues, arising in the course of the Department's work. This includes assisting Departments in formulating and implementing the foreign policies

\(^{51}\) Department of Justice Act R.S.C., 1985, c. J-2  
of the U.S., and promoting the adherence to, and development of, international law and its institutions as a fundamental element of those policies.

The Office is comprised of approximately 200 permanent attorneys and about 100 support staff, including paralegal specialists, treaty analysts, secretaries and general administrative personnel. The Office is headed by the Legal Advisor who holds the rank equivalent to that of the Assistant Secretary of State. The Legal Advisor reports to the Secretary of State and four Deputy Legal Advisors report to the Legal Advisor. The Deputy Legal Advisors supervise Assistant Legal Advisors who are in charge of the respective regional and functional offices. Most attorneys are based in Washington but their work may require them to travel overseas on a temporary duty basis.

The attorneys in the employ of the department:

a) Negotiate, draft and interpret international agreements;
b) Draft and interpret domestic statutes, Departmental regulations, Executive Orders and other legal documents; and
c) Represent the U.S. before international tribunals such as the International Court of Justice.

According to the U.S. Department of State website, “the Office is organized into sections that roughly correspond with the Department of State’s various bureaus, including regional offices that focus on specific areas of the world and functional offices that deal with specific subject matters such as: Human Rights and Refugees; Political and Military Affairs; Economics and Business Affairs; Oceans, International Environmental and Scientific Affairs; Legislation and Foreign Assistance or Management. Accordingly, the Office of the Legal Adviser is divided into twenty-three sections, in addition to the offices at The Hague, Geneva, Brussels, and New York. Attorneys’ preferences for “rotation” are requested after they have served approximately two years in an assignment; attorneys typically rotate assignments within the Office every two or three years to broaden their experience and take on new challenges.”\(^5^4\)

The structure of the Department is designed in a manner that ensures that regional bureaus oversee the U.S. embassies and consulates and coordinate U.S. foreign relations in their respective geographic areas. The regional bureaus are headed by Assistant Legal Advisers who supervise the attorneys who support those bureaus. Five regional offices have also been established.

The regional offices deal with all the legal, bi-lateral negotiations, administrative support, advice, enforcement of treaties as well as military and peace keeping forces in the regions concerned.

There are also Functional Offices that support the various functional bureaus of the Department of State. The Functional Offices have crosscutting, worldwide responsibilities for specific programme areas in relation to specific areas of the law.

\(^5^4\) US Department of State, [www.state.gov/s/l/](http://www.state.gov/s/l/)