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## Civil Government Lawyers in South Africa

60 N.Y.L. SCH. L. REV. [•] (2015–2016)

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## I. INTRODUCTION

This article explores and outlines a set of issues surrounding government lawyers who provide civil litigation services and legal advice in support of the constitutional project to transform South African society through law. There is reason to think that the functions performed by justice professionals employed by and working within the South African government are essential to the rule of law and transformative constitutionalism. Yet these lawyers are little studied, even twenty years after the transition to constitutional democracy in South Africa. And their functions and services are not often the subject of public debate. Indeed, in contrast to some other constitutional democracies,<sup>1</sup> neither of the two key government lawyering units appears to be held in high esteem within the South African legal profession.

Working in a preliminary vein and from official and other publicly available documents, Part II of this article offers an introduction to these two key government units and notes the official recognition of existing problems in this area. Part III of this article details the government's analysis of the current problems with the provision of government legal services, including the disproportionate allocation of funds to outside counsel instead of the government units themselves. Part IV addresses the planned way forward towards their transformation, focusing on the creation of a new administrative post within the Department of Justice and Constitutional Development (DOJCD)<sup>2</sup> and the implementation of a legislative change in the State Attorney Amendment Act 13 of 2014 (the "Amendment Act").<sup>3</sup> The section goes on to examine the sense of substantive transformation that is likely to result from this structural change. Part V concludes by describing an institutional possibility for transformation of state legal services that might be more closely aligned with the project of transformative constitutionalism, particularly through the newly created post of the Solicitor-General, and calls for a continuation of this work with semi-structured interviews and other research methods. Transformation may also be achieved by having government lawyers act as ancillary mechanisms for the judiciary to expand the court's policy-making power and implement greater societal change.

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1. See, e.g., Ryan J. Owens & Patrick C. Wohlfarth, *State Solicitors General, Appellate Expertise, and State Success Before the U.S. Supreme Court*, 48 *LAW & Soc'y REV.* 657, 657–58 (2014) (examining state solicitor general offices in the United States).

2. The Department of Justice and Constitutional Development is responsible for the administration of justice in South Africa. See *Transfer of the Administration of Legislation Under Section 97 of the Constitution of the Republic of South Africa*, 1996, GN 26 of GG 22231 (26 Apr. 2001); see also *Administration of Justice*, S. AFR. GOV'T, <http://www.gov.za/about-government/government-system/justice-system/administration-justice#role> (last visited Mar. 8, 2016). In May 2014, the DOJCD and the Department of Corrections merged to form the Department of Justice and Correctional Services. See *Zuma Announces New Cabinet*, EWN, <http://ewn.co.za/2014/05/25/Zuma-announces-new-Cabinet> (last visited Mar. 8, 2016).

3. State Attorney Amendment Act 13 of 2014.

## II. THE TWO KEY UNITS FOR STATE LAWYERING IN SOUTH AFRICA

The two key state lawyering institutions dealing with civil legal services are currently organized as two branches of the DOJCD. One is the Office of the Chief State Law Adviser (SLA).<sup>4</sup> The other lawyering institution dealing with civil legal services is the Office of the Chief Litigation Officer (CLO).<sup>5</sup>

The smaller of the two civil units, the SLA, describes its mandate as follows:

[P]rovid[ing] 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.<sup>6</sup>

In 2013–2014, the SLA ran an operating budget of ZAR577 million (approximately \$3.7 million).<sup>8</sup> The Department's annual reports do not provide much detail on the SLA's operations. The reports do, however, document a recent increase in the SLA's workload, as seen in the number of matters handled by the unit and the complexity of these matters.<sup>9</sup>

The larger and more operational of the two key units is the CLO.<sup>10</sup> This office is of recent vintage and was only approved in May 2007.<sup>11</sup> The CLO runs three chief directorates—Legal Services, Operations, and State Attorney Services.<sup>12</sup> State Attorney Services is the national department's channel to work with the twelve

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4. See *Office of the Chief State Law Adviser*, DEP'T: JUST. & CONST. DEV., <http://www.justice.gov.za/ocsla/index.html> (last visited Mar. 8, 2016).
  5. *Departmental Structure: Office of the Chief Litigation Officer*, DEP'T: JUST. & CONST. DEV., [http://www.justice.gov.za/branches/organo/organo\\_CLO.htm](http://www.justice.gov.za/branches/organo/organo_CLO.htm) (last visited Mar. 8, 2016) [hereinafter *Office of the Chief Litigation Officer*].
  6. *Office of the Chief State Law Adviser*, *supra* note 4; see also DEP'T OF JUSTICE & CONSTITUTIONAL DEV., ANNUAL REPORT 2013–2014: ACCESS TO JUSTICE FOR ALL 117 (2014), <http://www.justice.gov.za/reportfiles/anr2013-14.pdf> [hereinafter DOJCD ANNUAL REPORT 2013–2014].
  7. "ZAR" represents Rand, South Africa's currency.
  8. DOJCD ANNUAL REPORT 2013–2014, *supra* note 6, at 77. These budget statistics were converted to U.S. dollars in March 2016 and reflect the currency exchange rate as of that time.
  9. For instance, in 2013–2014, the SLA finalized 824 legal opinions, which included eighty-eight sets of comments on draft bills and the certification of 574 bills and other legal instruments. In addition, the SLA's work includes providing legal advice to the executive Cabinet. DOJCD ANNUAL REPORT 2013–2014, *supra* note 6, at 39.
  10. See *Office of the Chief Litigation Officer*, *supra* note 5.
  11. See *Minutes, Security and Constitutional Affairs Select Committee, 28 May 2007, Department of Justice Briefings: Court Services, Master's Office, Justice College, Chief Litigation Office, Chief State Law Advisor*, PARLIAMENTARY MONITORING GROUP, <http://www.pmg.org.za/minutes/20070527-department-justice-briefings-court-services-master%E2%80%99s-office-justice-college-chief-l> (last visited Mar. 8, 2016).
  12. *Office of the Chief Litigation Officer*, *supra* note 5.

existing State Attorney Offices,<sup>13</sup> which were established in 1925 through legislation in Pretoria and other large cities and litigation centers.<sup>14</sup> In 2013–2014, the operating budget for litigation and legal services of the State Attorney Offices was ZAR332 million (approximately \$21.5 million).<sup>15</sup> The functions of the State Attorneys are: “The drafting and managing of contracts on behalf of the State,” “[t]he handling of criminal and civil litigation cases instituted against State officials and committed by means of acts or omissions while executing their official duties,” “[t]he hand[l]ing of applications form [sic] qualifying personnel for admission as advocates for the High Court,” “[t]he handling of applications for admission as practicing attorney [sic],” and “the regulation and overseeing of the conduct of private attorneys operating under the State Attorney Act.”<sup>16</sup>

Additional details on operating trends in the State Attorney Offices are captured by a 2013 parliamentary question about the legal matters before the DOJCD from 2009 to 2013.<sup>17</sup> During this period, the number of matters relating to property deeds in these offices steadily and significantly declined.<sup>18</sup> The DOJCD engages private attorneys to work on state civil litigation matters in two situations: (1) when the State Attorney is legally precluded by a conflict of interest from acting and (2) when there exists no expertise within the State Attorney Office for matters that require specialization.<sup>19</sup> The statistics kept by the DOJCD fail to differentiate between the civil litigation matters that are dealt with by private attorneys on behalf of the state, and the matters that are dealt with by State Attorneys.<sup>20</sup> The number of cases dealt with by private attorneys, though, appears to have increased as the funds paid to private attorneys increased by approximately twenty per cent in each of the years or periods for which statistics were provided.<sup>21</sup>

While the SLA and the State Attorney Offices are key to the provision of state legal services, they by no means cover the field. Money is also spent to procure outside counsel.<sup>22</sup> In 2013–2014, ZAR641 million (approximately \$41.5 million) was

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13. *State Attorney Offices*, DEP’T: JUST. & CONST. DEV., [http://www.justice.gov.za/contact/cnt\\_stateatt.html](http://www.justice.gov.za/contact/cnt_stateatt.html) (last visited Mar. 8, 2016).

14. *See* State Attorney Act 56 of 1957 §§ 1, 10(1).

15. DOJCD ANNUAL REPORT 2013–2014, *supra* note 6, at 77.

16. *State Attorney Services*, DEP’T: JUST. & CONST. DEV., <http://www.justice.gov.za/branches/stateattorney.html> (last visited Mar. 8, 2016).

17. DEP’T OF JUSTICE & CONSTITUTIONAL DEV., NAT’L ASSEMBLY, QUESTION FOR WRITTEN REPLY: PARLIAMENTARY QUESTION No. 147, <http://www.justice.gov.za/pqa/pqa2013/2013-147.pdf> (last visited Mar. 8, 2016).

18. *Id.* at 2.

19. *Id.*

20. *Id.*

21. *Id.*

22. *See* DOJCD ANNUAL REPORT 2013–2014, *supra* note 6, at 68.

allocated to counsel in state litigation matters.<sup>23</sup> Although this spending is not reflected in the DOJCD budget, it represents the amount spent on counsel that served the State Attorney Offices.<sup>24</sup> The figure on outsourced legal spending is more than double the DOJCD's spending on its own State Attorneys and legal advisors.<sup>25</sup> A further point of comparison is provided by the budget for criminal matters of the National Prosecuting Authority (NPA). The total (adjusted) budget of the NPA for 2012–2013 was ZAR2,839.8 million (approximately \$183.9 million).<sup>26</sup> In other words, the government's spending on the establishment and operation of the criminal justice system is roughly three times the combined government spending on the combined civil legal services of advisors, attorneys, and outside counsel.

Further, there is significant spending on civil legal services done by line departments aside from the spending of the DOJCD.<sup>27</sup> As the government itself has noted, “[m]ost departments employ officials qualified in law in their establishments. They also make use of legal representatives in private practice to perform a range of state legal services.”<sup>28</sup> In 2013–2014, the DOJCD employed sixty-nine advocates and 230 attorneys in permanent posts.<sup>29</sup> That same year, the South African Police Services employed 427 persons in a “General Legal Administration” category that includes general legal administration and related professionals.<sup>30</sup> And of course, the lawyers employed in line departments beyond the DOJCD engage outside counsel and other lawyers as well.<sup>31</sup> In 2013–2014, the South African Police Service spent ZAR291 million (approximately \$18.8 million) on outsourced legal services.<sup>32</sup> Indeed, Jeff Radebe, then Minister of Justice and Constitutional Development,

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23. *Id.*

24. *See id.*

25. *Id.* at 77, 117, 137.

26. *The Budgetary Review and Recommendation Report of the Portfolio Committee on Justice and Constitutional Development, dated 5 November 2013*, at tbl.1, PARLIAMENTARY MONITORING GROUP, <https://pmg.org.za/tailed-committee-report/1314/> (last visited Mar. 8, 2016) [hereinafter *Budgetary Review and Recommendation Report*]. The adjustments to the amount initially allocated to the NPA were for court infrastructure (ZAR100 million) and improved conditions of service (ZAR167.6 million). *Id.* § 3(1).

27. Line departments are organizations in the national sphere of government, apart from the Office of the Presidency, that are headed by Ministers within the Cabinet. One example is the Department of Higher Education and Training, which has responsibility for the implementation of national laws and policy regarding higher education. *See National Departments*, S. Afr. Gov't, <http://www.gov.za/about-government/government-system/national-departments> (last visited Mar. 8, 2016).

28. DEP'T OF JUSTICE & CONSTITUTIONAL DEV., A FRAMEWORK FOR THE TRANSFORMATION OF THE STATE LEGAL SERVICE: OPENING THE DOORS OF ACCESS TO EQUAL AND AFFORDABLE JUSTICE FOR ALL 15–16 (2012), <http://www.justice.gov.za/docs/other-docs/2012tsls.pdf> [hereinafter DOJCD FRAMEWORK 2012].

29. DOJCD ANNUAL REPORT 2013–2014, *supra* note 6, at 187.

30. DEP'T OF POLICE, SOUTH AFRICAN POLICE SERVICE: ANNUAL REPORT 2013/14 FINANCIAL YEAR 253 (2014), [http://www.saps.gov.za/about/stratframework/annualreports\\_arch.php](http://www.saps.gov.za/about/stratframework/annualreports_arch.php).

31. *See id.* at 308.

32. *Id.*

estimated in 2012 that the total spending on state legal services was “billions of rands annually.”<sup>33</sup>

### III. THE PROBLEMS WITH STATE LAWYERING: A PRELIMINARY VIEW

Judges have expressed strong dissatisfaction with the quality of state legal services. Writing in a judgment delivered in the North Gauteng High Court, Judge Eberhard Bertelsmann stated:

The present condition of this office causes significant unnecessary expenditure of public funds that are wasted by costs orders granted against organs of state because of the poor quality of professional service provided by these officers of the court. Eventually the very essence of the Rule of Law is endangered if regular litigants fail to observe the most basic principles that protect the independence and quality of justice dispensed by our courts. It is high time that this malaise is addressed.<sup>34</sup>

There is official recognition of two types of problems with state legal services in South Africa: (1) the quality of the services delivered and (2) the demographic profile of the lawyers.<sup>35</sup> With respect to the quality of state legal services, the 2013–2014 annual report of the DOJCD forthrightly refers to “a number of operational challenges experienced across government . . . .”<sup>36</sup> These operational challenges include: “Prescription of claims involving government [allowing for debts owed to the government to lapse],” “[d]efault judgments granted against government,” “[l]ack of monitoring systems over the work and outputs of attorneys and advocates,” “[i]nconsistency in the determination of counsel fees,” and “[l]ow success rates in cases against the State.”<sup>37</sup>

Beginning in 2015–2016, the percentage of legislative instruments and international agreements successfully challenged in the Constitutional Court (where all *prima facie* successful constitutional challenges must be confirmed) serves as an additional performance indicator.<sup>38</sup> The goal is less than two per cent successful

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33. DOJCD FRAMEWORK 2012, *supra* note 28, at 1–2.

34. *Minister of Rural Dev. & Land Reform v. Griffio Trading CC* [2014] ZAGPPHC 666 (GNP) at para. 41. See generally Tony Beamish, *High Court Judges Lash the State Attorney*, MONEYWEB (Sept. 8, 2014), <http://www.moneyweb.co.za/uncategorized/high-court-judges-lash-the-state-attorney/> (describing Judge Eberhard Bertelsmann’s opinion as “lambast[ing] the State Attorney office for a gross dereliction of duty”); Zelda Venter, *Judge Lays into State Attorney*, IOL NEWS (Sept. 4, 2014, 11:26 AM), <http://www.iol.co.za/news/crime-courts/judge-lays-into-state-attorney-1.1745849#VAmBeEgxU9d>.

35. See DOJCD ANNUAL REPORT 2013–2014, *supra* note 6, at 35; DOJCD FRAMEWORK 2012, *supra* note 28, at 1.

36. DOJCD ANNUAL REPORT 2013–2014, *supra* note 6, at 35.

37. *Id.*

38. See DEP’T OF JUSTICE & CONSTITUTIONAL DEV., ANNUAL PERFORMANCE PLAN 2015/2016, at 115–16 (2015), <http://www.justice.gov.za/MTSF/dojcd-app.pdf> [hereinafter ANNUAL PERFORMANCE PLAN 2015–2016].

challenges.<sup>39</sup> While a step in the right direction, this performance indicator does not assess the satisfaction of client line departments with the state legal services provided by the DOJCD.

With respect to the demographic profile of those providing state legal services, the official view appears to be one of limited success. For 2013–2014, the DOJCD reported that ZAR482 million (approximately \$31.2 million) of the ZAR641 million (approximately \$41.5 million) allocated to counsel in state litigation matters was allocated to previously disadvantaged individual (PDI) counsel, “translating into 75% performance.”<sup>40</sup> Indeed, the DOJCD achieved its goal of raising the percentage of counsel spending on PDIs.<sup>41</sup> Specifically, the percentage of the funds spent on counsel who fit the definition of PDIs increased from seventy per cent to seventy-five per cent of the total funds spent by the DOJCD on counsel. The DOJCD considers as PDI counsel individuals “who are African, Indian, Coloured or White women.”<sup>42</sup> Moreover, it appears that the figure on spending by the State Attorney Offices on outside counsel fees is compiled to provide the performance indicator information on the allocation to PDI counsel. Monthly reports from the State Attorney Offices are monitored by the Office of the Chief Litigation Officer.<sup>43</sup> While the DOJCD issued a policy document on the Transformation of Legal Services that noted the further problem of underrepresentation of women in the assignment of government briefs and committed itself to assign fifty per cent of briefs to women over the medium term, there is no separate performance indicator for that category in the DOJCD’s annual reporting.<sup>44</sup>

#### IV. THE TRANSFORMATION OF STATE LEGAL SERVICES: THE OFFICIAL WAY FORWARD

In 2012, the DOJCD formulated a policy intended to guide and promote transformation of state legal services. In this policy, the goal of demographic transformation took pride of place. The key document for this policy is the Framework for the Transformation of State Legal Services (the “Framework”), approved by the Cabinet.<sup>45</sup> This policy largely, though not exclusively, understands transformation in terms of demographics. As the Framework states:

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39. *Id.* at 61.

40. DOJCD ANNUAL REPORT 2013–2014, *supra* note 6, at 68. The term “previously disadvantaged individuals” has often been used in post-apartheid South African law and policy to refer to those persons discriminated against before the enactment of the 1993 Interim Constitution. *See Class Discussion Topic: Naming People*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/article/naming-people-grade-12> (last visited Mar. 8, 2016).

41. DOJCD ANNUAL REPORT 2013–2014, *supra* note 6, at 68.

42. ANNUAL PERFORMANCE PLAN 2015–2016, *supra* note 38, at 110.

43. *See id.*

44. *See* DOJCD FRAMEWORK 2012, *supra* note 28, at 12; *see also* DOJCD ANNUAL REPORT 2013–2014, *supra* note 6.

45. *See* DOJCD FRAMEWORK 2012, *supra* note 28, at 1–3.



The primary objectives of the policy framework are to the [sic] develop legal skills in the private sector through the equitable outsourcing of legal work to PDIs in order to redress the imbalance of past discriminatory practices in the legal profession and the state. This is intended to ensure the progression of PDIs, and women in particular, in the practice of law, the judiciary and other positions of responsibility in the broader community and internationally.<sup>46</sup>

Nonetheless, the policy is not exclusively about a demographic change. In the process of developing and implementing this policy, improving the quality and performance of state legal services is often presented as an additional goal. For instance, according to Radebe:

The outcome of this . . . policy framework, in the medium term, is to consolidate and streamline all state legal services under a single functionary who will be appointed as Head of State Legal Services. The Head of State Legal Services, who will occupy a position of, or similar to, that of Solicitor-General in comparable jurisdictions, will be the state's chief legal adviser, who will represent the state in all civil litigation in the same way that the National Director of Public Prosecutions represents the state in criminal prosecutions.

The appointment of the Head of State Legal Services will be made as a matter of urgency so that the desirable consolidation, mainstreaming and co-ordination of state legal services may begin in earnest. This will set in motion all the institutional arrangements aimed at transforming state legal services.<sup>47</sup>

Moreover, there are performance indicators relating to the efficiency and efficacy of legal services, as well as to the percentage of funding for legal services spent on PDI counsel.<sup>48</sup>

Likewise, after noting the current challenges regarding the quality of legal services, the DOJCD's 2013–2014 Annual Report states: "The implementation of the Policy Framework will also go a long way in responding to the general outcry within the profession that previously disadvantaged individuals (PDIs) are not given briefs or that the value of the briefs are not commensurate with transformational objectives."<sup>49</sup> Additionally, Parliament passed amendments to the State Attorney Act of 1957 to aid the transformation initiatives.<sup>50</sup> These amendments allowed the DOJCD "an opportunity to establish the position of a Solicitor-General, who will represent the State in all civil litigation."<sup>51</sup>

Still, at least in more political rather than bureaucratic contexts, the demographic goal appears to dominate. For instance, in his maiden budget speech in Parliament,

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46. *Id.* at 2.

47. *Id.*

48. *See* DOJCD ANNUAL REPORT 2013–2014, *supra* note 6, at 68–70.

49. *Id.* at 35.

50. *Id.*

51. *Id.*



Tshililo Michael Masutha, the Minister of Justice and Correctional Services, linked the amendments to the State Attorney Act to transformation:

Through the State Attorney Amendment Bill which was enacted by the fourth democratic Parliament, government will develop and implement policies which will enable us to monitor the preferential allocation of state's legal work to female and other previously disadvantaged practitioners. These measures are aimed at widening the pool from which the Judicial Service Commission can select candidates who will advance the transformation of the judicial system.<sup>52</sup>

This same theme was taken up in the response by Dr. M.S. Motshekga, the chairperson of the African National Congress (ANC) Portfolio Committee on Justice and Correctional Services.<sup>53</sup> Speaking on behalf of the committee, Motshekga stated: "We also believe that you cannot produce good black judges unless you have good black lawyers. We are therefore, as this Parliament, going to monitor the issuing of briefs to black lawyers so that they can get the necessary experience that will make them eligible for appointment as judges."<sup>54</sup>

The most concrete step mandated by the Framework appears to be the impending establishment of a new post, the Solicitor-General.<sup>55</sup> According to Masutha:

With regard to the transformation of State legal services, I am pleased that the amendment to the State Attorney Act of 1997 has been passed by Parliament. This will enable the Department to appoint a Solicitor-General, who will oversee State litigation and put in place measures to effectively manage State litigation.<sup>56</sup>

The President assented to this position on May 16, 2014, in the Amendment Act,<sup>57</sup> which is not effective yet.

While there has not been much debate along these lines during the development and consideration of the Amendment Act, the ambition to coordinate all state legal services under the direction of a single government lawyer might provide some cause for concern from the point of view of a constitutional democracy. Such an office has the potential to become a locus of significant power. Consequently, one might need to assure the public that the Solicitor-General would not be acting in an arbitrary fashion.

It is instructive to compare the constitutional regulation of the criminal side of state lawyering in South Africa (including the NPA) and the civil side. South African criminal justice is regulated in part through the provisions of section 179 of the Constitution.<sup>58</sup> The operations and independence of the NPA are, of course, matters

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52. *Hansard: NA: Debate on Vote No 24—Justice and Constitutional Development*, PARLIAMENTARY MONITORING GROUP (July 15, 2014), <https://pmg.org.za/hansard/18564>.

53. *Id.*

54. *Id.*

55. See DOJCD ANNUAL REPORT 2013–2014, *supra* note 6, at 14.

56. *Id.*

57. State Attorney Amendment Act 13 of 2014.

58. S. AFR. CONST., 1996, § 179.

of intense current political and (to some extent) constitutional controversy.<sup>59</sup> Such tension exists at the lower-profile professional level as well. For instance, while the recruitment material for the DOJCD appropriately notes that the NPA is independent of the DOJCD,<sup>60</sup> the professional independence of the state advocates employed by the NPA sometimes comes into tension with the operation of the government.<sup>61</sup> In contrast to the relatively detailed provisions of section 179, the civil side of litigation appears to be directly addressed in the Constitution only by means of section 180, which provides that:

National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including—

- (a) training programmes for judicial officers;
- (b) procedures for dealing with complaints about judicial officers; and
- (c) the participation of people other than judicial officers in court decisions.<sup>62</sup>

On the civil justice side, however, the choice in drafting the relevant South African constitutional sections was to provide protection against such real or imagined problems indirectly, for instance through rights guarantees and the independence of the legal profession, rather than directly through specific regulation of the institutions of civil justice.<sup>63</sup> It is precisely a desire to achieve parity between the civil and criminal sides of state litigation that is cited by the Framework as one of the justifications for the policy:

The Head of State Legal Services, who will occupy a position of, or similar to, that of Solicitor-General in comparable jurisdictions, will be the state's

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59. See Martin Schönteich, *A Story of Trials and Tribulations: The National Prosecuting Authority, 1998–2014*, S. AFR. CRIME Q., Dec. 2014, at 5, 5–6 (2014); Mtende Mhango, *Don't Touch Independence of NPA*, SUNDAY INDEP. (July 13, 2014), <http://www.iol.co.za/sundayindependent/don-t-touch-independence-of-npa-1.1718836#U8TV8PvNyBo>. Here, the threat to the institutional independence of the NPA is executive pressure and control over those directing the NPA.

60. See DEP'T OF JUSTICE & CONSTITUTIONAL DEV., LEGAL & RELATED CAREERS IN THE JUSTICE SYSTEM, BROCHURE (2015), <http://www.justice.gov.za/brochure/careers-in-justice.pdf>.

61. See Geoff Budlender, Advocate, Ninth Annual Human Rights Lecture at University of Stellenbosch: 20 Years of Democracy: The State of Human Rights in South Africa 17–18 (Oct. 2, 2014), <http://blogs.sun.ac.za/law/files/2014/10/Annual-Human-Rights-Lecture-2014-Adv-G-Budlender-SC.pdf> (detailing the firing of Vusumzi “Vusi” Pikoli, the National Director of Public Prosecutions, and “the shambles which has followed”). In some cases, the government action is also seen as a threat to the professional independence of the NPA advocates, for instance with respect to decisions as to whether or not to continue to prosecute President Jacob Zuma. See *Zuma v. Democratic All.* 2014 (4) All SA 35 (SCA).

62. S. AFR. CONST., 1996, § 180.

63. The Constitution provides for more regulation of criminal justice than civil justice. See generally Diana R. Gordon, *Democratisation of Criminal Justice in South Africa: A Preliminary Report on Prospects and Problems*, in THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW 556 (Penelope Andrews & Stephen Ellmann eds., 2001) (discussing criminal justice issues in furthering constitutional democracy).

chief legal adviser, who will represent the state in all civil litigation in the same way that the National Director of Public Prosecutions represents the state in criminal prosecutions.<sup>64</sup>

One might think that, aside from the potential for constitutional debate, relatively little of what is envisioned for the Amendment Act and the post of Solicitor-General is new. Indeed, the funding for the Solicitor-General will come from money that would otherwise go to the Office of the Chief Litigation Officer (currently occupied by an acting appointment).<sup>65</sup> In this sense, it is simply a matter of renaming an office and finding a suitable office-bearer.

However, the better view recognizes that this new office represents a fundamental change. Under section 3(4) of the newly amended legislation, the Minister will have the power, after consultation with the Solicitor-General, to make binding policy on “[t]he coordination and management of all litigation in which the State is involved.”<sup>66</sup> Significantly, this will extend beyond coordination within the DOJCD to encompass all state litigation. Furthermore, the yet to be formulated policy will also cover “the briefing of advocates; [and] the outsourcing of legal work, including the instruction of correspondent attorneys.”<sup>67</sup> This will allow for further policies in favor of briefing and outsourcing work to PDI legal practitioners. According to the new section 3(5), such policy must be approved by the Cabinet and then tabled in Parliament.<sup>68</sup>

While the development of the policy will be the prerogative of the Minister, the implementation of the policy will be the responsibility of the Solicitor-General.<sup>69</sup> It is important to note that the DOJCD has put certain budget funds towards this objective and in 2013 requested an additional ZAR100 million (approximately \$6.5 million) over a three-year period, a request supported by the parliamentary Portfolio Committee.<sup>70</sup>

The DOJCD has already recognized the need to work with its client sister line departments, as well as the difficulties in doing so.<sup>71</sup> Indeed, an important element to consider in the substantive transformation of state legal services is undoubtedly the balance between centralized litigation management and the operation of cases by the various government departments themselves. This is likely to be part of the context through which the goal of demographic transformation is pursued. For instance, the explanation that the government client wishes to brief specific counsel

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64. DOJCD FRAMEWORK 2012, *supra* note 28, at 2.

65. See *Budgetary Review and Recommendation Report of the Portfolio Committee on Justice and Correctional Services, dated 22 October 2015*, PARLIAMENTARY MONITORING GROUP, <https://pmg.org.za/tables-committee-report/2557/> (last visited Mar. 8, 2016).

66. State Attorney Amendment Act 13 of 2014 § 3(4).

67. *Id.*

68. *Id.* § 3(5).

69. *Id.* § 3A(1)(c).

70. See *Budgetary Review and Recommendation Report*, *supra* note 26, § 7.2.1.

71. DOJCD ANNUAL REPORT 2013–2014, *supra* note 6, at 69.

(who are not PDIs) is often cited as an obstacle to transformation.<sup>72</sup> In noting that the goal of giving seventy-five per cent of government briefs to PDI counsel was not met in 2012–2013, the DOJCD explained that “client departments prefer to brief specific counsel.”<sup>73</sup>

While it will undoubtedly not be easy to pilot such a policy through Cabinet—this is probably the reason that the Amendment Act is not yet in operation—there is the potential to advance significantly towards a government-wide litigation management policy.

## V. CONCLUSION: SYMBOL OR SUBSTANTIVE TRANSFORMATION?

The newly created post of Solicitor-General is a substantive measure that has the potential to address the problems of demographic transformation within the legal profession, as well as the quality of state legal services.

Along these lines, a further goal of transformation might be increasing the degree to which state legal services may assist the state in transformative constitutionalism.<sup>74</sup> This ambition lies beyond that of providing quality and efficient legal services by competent legal professionals serving the government in advisory, transactional, and litigation capacities, and beyond that of demographic change. Instead, it aims at structural change, including cultural transformation.<sup>75</sup> Properly understood and reconfigured, state lawyers could amplify the transformative role played by the judiciary and the executive.

Further afield, a potential model for this sense of transformative government lawyering may be found in Israel, where a recent socio-legal study examined government lawyering.<sup>76</sup> *Lawyering for the Rule of Law*, by Yoav Dotan, introduces a new model in which government lawyers function as an ancillary mechanism that enables the court to expand its influence on policy-making within the political branches by forming settlements out of court.<sup>77</sup> Examining a case study focused on the Israeli Supreme Court, Dotan discusses the centrality of government lawyers to judicial mobilization.<sup>78</sup> He details the enforcement of social reforms through adjudication and sheds light on particular functions of government lawyers as adjudicators and facilitators of institutional arrangements.<sup>79</sup> Even without binding power, with the appropriate

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72. See Rebecca Davis, *JSC Day 3: Why Does Government Prefer Representation by White Male Lawyers?*, DAILY MAVERICK (Apr. 15, 2015), <http://www.dailymaverick.co.za/article/2015-04-15-jsc-day-3-why-does-government-prefer-representation-by-white-male-lawyers/#.VpOTyV4pmSo>.

73. See *Budgetary Review and Recommendation Report*, *supra* note 26, at tbl.11.

74. See Davis, *supra* note 72.

75. See *id.*

76. See YOAV DOTAN, *LAWYERING FOR THE RULE OF LAW: GOVERNMENT LAWYERS AND THE RISE OF JUDICIAL POWER IN ISRAEL* (2014).

77. See *id.* at 87–103, 147.

78. See *id.* at 87–118.

79. See *id.* at 172–87.

structural position and mandate, government lawyers may be able to broker and foster transformation in key areas of state policy and practice.<sup>80</sup>

By (tentative) comparison with this Israeli case study, it appears that the two key South African state lawyering units do not see their function as an ancillary mechanism to the courts. For instance, the Office of the Chief State Law Adviser appears closer to the executive than to the judiciary or the legislature.<sup>81</sup> A key function of this unit is providing legal advice to the executive.<sup>82</sup> As such, it would not be surprising to uncover some conflicts of interest and perspective between the SLA and the legal advisors functioning within Parliament.<sup>83</sup> In another significant difference from the Israeli case study, South African government lawyers do not appear to often play a role adjudicating upon or facilitating institutional arrangements within government. In order to play a transformative role, South African government lawyers will need to work more closely with the judiciary and the state institutions supporting constitutional democracy, such as the Public Protector and the South African Human Rights Commission, and they will need to work smarter.

The transformation of government legal services is ultimately, of course, tied up with the future of the legal profession in South Africa. There is much work to do.<sup>84</sup> Improving the performance of government lawyering in South Africa is worth more attention than it is currently receiving.

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80. *See id.* at 147–71.

81. *See Office of the Chief State Law Adviser, supra* note 4.

82. *Id.*

83. *See* Lisa Chamberlain, *Housing the Ghost-writers: The Appropriate Institutional Location of Legislative Drafting Expertise*, 132 SALJ 55, 57–58, 70–72 (2015).

84. *See* Nomfundo Manyathi-Jele, *Report: Transformation of the Legal Profession*, DE REBUS, Nov. 2014, <http://www.saflii.org/za/journals/DEREBUS/2014/211.pdf>.