A Framework for the transformation of the State Legal Service
Opening the doors of access to equal and affordable justice for all
# A Framework for the Transformation of the State Legal Services

## Content

<table>
<thead>
<tr>
<th>No</th>
<th>Preface by the Minister</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>1</td>
</tr>
</tbody>
</table>

**EXECUTIVE SUMMARY**

<table>
<thead>
<tr>
<th>Key Concepts and Acronyms</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>8</td>
</tr>
</tbody>
</table>

### Chapter 1: Introduction

<table>
<thead>
<tr>
<th>1</th>
<th>TRANSFORMATION OF STATE LEGAL SERVICES AS PART OF THE BROADER REFORM OF THE ADMINISTRATION OF JUSTICE</th>
<th>10</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>THE SIGNIFICANCE OF THE LEGAL PROFESSION FOR THE TRANSFORMATION OF THE JUDICIARY</td>
<td>10</td>
</tr>
<tr>
<td>1.3</td>
<td>THE TRANSFORMATION OF THE BROAD LEGAL PROFESSION</td>
<td>11</td>
</tr>
<tr>
<td>1.4</td>
<td>PURPOSE AND SCOPE OF THIS POLICY FRAMEWORK</td>
<td>11</td>
</tr>
</tbody>
</table>

### Chapter 2: The State of Legal Services within Government and Its Impact on the Implementation of the State’s Policy and Operations

<table>
<thead>
<tr>
<th>2</th>
<th>DEFINING STATE LEGAL SERVICES</th>
<th>14</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.2</td>
<td>DISTINGUISHING BETWEEN PRIVATE AND PUBLIC SECTOR LEGAL PROFESSIONALS</td>
<td>14</td>
</tr>
<tr>
<td>2.3</td>
<td>LEGAL SERVICES FOR THE STATE AND ITS ENTITIES</td>
<td>15</td>
</tr>
<tr>
<td>2.4</td>
<td>LITIGATION SERVICES FOR GOVERNMENT</td>
<td>16</td>
</tr>
<tr>
<td>2.5</td>
<td>THE ROLE OF PUBLIC SECTOR LEGAL PRACTITIONERS IN LITIGATION INVOLVING THE STATE</td>
<td>17</td>
</tr>
<tr>
<td>2.6</td>
<td>THE GOVERNMENT’S MANDATE IN RELATION TO STATE LEGAL SERVICES</td>
<td>18</td>
</tr>
</tbody>
</table>

### Chapter 3: The Constitutional Imperatives Underpinning the Transformation of State Legal Services

<table>
<thead>
<tr>
<th>3</th>
<th>SETTING A VISION FOR STATE LEGAL SERVICES SUITED TO THE CONSTITUTION</th>
<th>28</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.2</td>
<td>CONSTITUTIONAL AND POLICY IMPERATIVES FOR STATE LEGAL SERVICES</td>
<td>29</td>
</tr>
<tr>
<td>3.3</td>
<td>GUIDING PRINCIPLES FOR THE TRANSFORMATION OF STATE LEGAL SERVICES</td>
<td>30</td>
</tr>
</tbody>
</table>
4 CHAPTER 4: ADDRESSING CHALLENGES IN THE MANAGEMENT OF STATE LITIGATION

A FRAMEWORK FOR STATE LITIGATION (BLUEPRINT) 32
4.1 INTRODUCTION 32
4.2 ELEMENTS OF THE POLICY FRAMEWORK RELATING TO LITIGATION 34
4.3 TRANSFORMATION IMPERATIVES IN RESPECT OF WOMEN 35
4.4 CORE VALUES 37
4.5 CORE PRINCIPLES IN GIVING EFFECT TO THE BRIEFING POLICY 38

5 CHAPTER 5: HOME-BASED AND INTERNATIONAL PRECEDENTS IN RELATION TO STATE LEGAL SERVICES

5.1 THE NATIONAL PROSECUTING AUTHORITY 44
5.2 AUDITOR-GENERAL OF SOUTH AFRICA 44
5.3 GOVERNMENT COMMUNICATION AND INFORMATION SYSTEM 44
5.4 INTERNATIONAL BEST PRACTICES 45

6 CHAPTER 6: INTERIM MEASURES TO IMPROVE STATE LEGAL SERVICES

6.1 KEY POLICY AND LEGISLATIVE MANDATES 50
6.2 FUNCTIONAL ALIGNMENT OF STATE LEGAL SERVICES 50
6.3 FUNCTIONS OF STATE LEGAL SERVICES AND THE DIFFERENT FUNCTIONAL STREAMS 51
6.4 ENVISAGED FUNCTIONAL STRUCTURE OF STATE LEGAL SERVICES 53

CONCLUSION 54
This Policy Framework for the Transformation of State Legal Services forms part of a comprehensive approach to the transformation discourse, as outlined in the Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State, which I released for comments on 28 February 2012. The transformation of the judicial system, and of the judiciary in particular, would be incomplete without the transformation of the legal profession. They are the two sides of the same coin. It is in respect of both the judiciary and the legal profession that the Constitution sets the foundation to redress the legacy of inequality, exclusion and fragmentation that were the hallmarks of the policy of segregation of the apartheid government.

The legal profession enables the training of professionals to facilitate their possible entry into positions where they can contribute to national duty, in broader national and international institutions, including the judiciary. It is therefore necessary that legal practitioners in both the private and public sectors are adequately skilled, and that the advancement of women into leadership positions is promoted.

The lack of effective coordination of legal services has led to a number of operational challenges being experienced across government, such as prescription of claims involving government, default judgments granted against government and inconsistency in the determination of advocates’ fees.

Key guiding principles that underpin the transformation of state legal services are, among others:

(i) Professional efficiency
(ii) Collegiality; and
(iii) Accountability and value for money.

There has been a general outcry within the profession that Previously Disadvantaged Individuals (PDIs), especially women, are not given briefs, or where they receive some in rare occasions, that the value of the briefs they receive is not commensurate with the transformational objectives set out in the Constitution. Briefs are not awarded on an equitable basis. Large law firms in the cities and affluent areas and white advocates get preference over PDIs and one-man-practices in under-privileged areas. PDIs are not briefed in constitutional matters, or to perform specialised and commercial legal work. This results in a select few advocates appearing in the Constitutional Court more often. Many young advocates who join the Bar are not given work, which results in their struggling to sustain their practices.

These challenges come against the backdrop that the state is the biggest consumer of legal services in Southern Africa, and its litigation account runs
into billions of rands annually. However, it is evident that the cake is not shared equitably among the diverse constituencies of practitioners, with Blacks and women trapped at the bottom of the ladder. It is therefore important that we enable access to equal justice.

Therefore, this proposed policy framework seeks in part to remove obstacles to access, and to unleash the potential of all practitioners, by ensuring a fair and equitable distribution of legal work.

The primary objectives of the policy framework are to 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.

Through this policy framework a mechanism will be created for sourcing legal work and allocating briefs to law firms and advocates from a database established for this purpose. The desired mechanism will be established with a view to achieving a fair and equitable distribution of legal work. The database will not be based on a handful of practitioners, but a broad representative pool of practitioners who are spread across the various specialised fields of the law. As part of the envisaged mechanism, a tool will be created to set norms and standards in terms of which the work of practitioners will be measured, as well as to measure the transfer of skills through the outsourcing of legal work. The tool must ensure that PDIs and new entrants into the legal practice, particularly women, are empowered not only as a constitutional imperative, but also to hone their legal skills and thereby enhance the quality of their output. In tandem with ensuring the empowerment of historically disadvantaged practitioners, the issuing of briefs shall be aimed at promoting and facilitating the development of skills in multiple disciplines of law, as well as to ensure an increase in the pool of expertise of black legal practitioners from which appointments to the judiciary can be made.

The outcome of this the 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.

I view this policy framework as a milestone in the transformation of the legal profession and it, together with the Legal Practice Bill which was recently introduced into Parliament, will go a long way towards the development of the jurisprudence necessary to advance our democratic society as envisaged by the Constitution.

Jeff Radebe
Minister of Justice and Constitutional Development, MP
The Policy Framework for the Transformation of State Legal Services aims to address the requirement by the government of South Africa for efficient, coordinated legal services, to promote the values and obligations arising from the Constitution. The service is required across departmental boundaries. It should be aligned to international best practices and should assist government in responding to urgent and complex legal circumstances. In this regard, government needs access to top-quality legal services provided by the state.

As a result of the deficiencies relating to the current structures and performance regarding state legal services, Cabinet approved certain principles on 23 November 2011 that underpin the transformation of state legal services. These principles include the following, among others:

• The reorganisation of state legal services across national, provincial and local spheres (in the long run) of government and state institutions to enhance the effectiveness and efficiency of state legal services across the public sector.

• The development of a new legislative framework to substitute the outdated State Attorney Act, 1957 with a view to addressing the shortcomings in the management of litigation for and on behalf of the state.

• The implementation of immediate steps that aim to consolidate legal and litigation services, pending the reorganisation of state legal services and legislative reforms contemplated above.

The policy framework provides a background to the current situation and the envisaged changes for the short and longer term. In this regard, there is a specific focus on the initial envisaged restructuring of the branches/units dealing with state legal services in the Department of Justice and Constitutional Development (the Department), thereby laying a foundation for the provisioning of better legal services and embracing the need to consolidate state legal services on an urgent basis. The consolidation will take place under the direct guidance of the Department through the establishment of an interim consolidated Office of State Legal Services.

This policy framework should be seen against the following backdrop.

Since 1994, government has consciously sought to reverse the legacy of inequality by putting structures and policy frameworks in place that address past inequities, and by diverting increasing proportions of the national budget to the needs of the poor and the vulnerable. Every piece of legislation that has been enacted and a significant portion of those pieces of legislation championed by the Department, as well as the policies and programmes introduced and implemented since 1994, have been geared towards making this mandate a living reality for all the people of this country. While encouraging strides have been made, the extent to which the majority of our citizens participate meaningfully in the legal system remains far too limited.

In the first ten years of democracy, the legal profession, like a number of other professions, had to grapple with the issue of transformation and adapt to the new demands of a democratic dispensation.

Apart from its primary role of providing an enabling environment for the adjudication of criminal and civil disputes through the courts, the other major role of the Department, as derived from the Constitution, is to provide legal advisory services to government and state institutions. Section 180 of the Constitution provides a broad mandate for the enactment of national legislation on matters relating to the administration of justice that are not specifically dealt with in the Constitution. The Ministry and the Department, by virtue of their portfolio and mandates in relation to the “administration of justice” and “constitutional development”, have a broad constitutional mandate.
that not only relates to the Department and its clients, but also to other departments and organs of state. By virtue of this mandate, the Department consequently has the opportunity to develop and nurture constitutional and specialised legal expertise, which are scarce skills that impact on government’s policy and the constitutional landscape. This should be seen against the backdrop that the Department employs more than 240 admitted attorneys and 148 legally qualified officials in its legal divisions. Although the Department can be perceived to be a big law firm, its actual capacity and expertise are not consistent with its size and potential.

In view of the above, the transformation of the administration of justice, which includes the restructuring of state legal services, forms part of the broader societal transformation agenda aimed at fundamentally changing institutions of governance and society with a view to aligning all aspects of South African life with South Africa’s post-apartheid Constitution. The reform of legal services, in the context of both private legal services and legal services within government, is part of the broader transformation of the judicial system geared to enhance access to justice and deepen constitutional democracy underpinned by the Rule of Law.

These transformation initiatives are taking place, in particular, in relation to the following segments of the administration of justice:

- Transformation of the judiciary and the rationalisation of the courts (which the Department is pursuing through various policy and legislative reforms). This encompasses a policy framework on the transformation of the judicial and court systems and its accompanying Constitution Seventeenth Amendment Bill and the Superior Courts Bill.
- Transformation of the legal profession (to be implemented through the Legal Practice Bill).
- Improvement of the criminal justice systems (implemented through the Justice, Crime Prevention and Security Cluster programmes geared to strengthen efforts to fight crime and corruption).
- Review of the civil justice system (including improving the functioning, and extending the number, of small claims courts) to provide an accessible and affordable civil justice system.

The transformation of the judiciary and of the legal profession has progressed steadily, and it is now opportune for a structured debate to commence within government and the legal profession on the processes and the mechanisms to transform state legal services to bring them in line with the ethos and values of the Constitution.

This policy framework seeks to initiate the policy discourse that will culminate in the comprehensive transformation of this important sector of government’s work, while at the same time providing for some immediate interventions that can be implemented as part of the broader process of transformation.

The state is a large consumer of legal services in the country. It employs hundreds of professionals who provide litigation and legal advisory services to the state in different capacities. In this regard, top-quality legal services to government and its entities are essential to ward off legal challenges and contribute to the development of sound jurisprudence through thoroughly researched defences. However, state legal services are currently hampered in the following respects:

- There is no comprehensive set of clearly defined rules governing how litigation services are to be dispensed, acquired, managed and monitored.
- The provision of quality legal services is a challenge due to the absence of a strategy to train and nurture skills, coupled with a reliance on external legal service providers.
- There is no strategic, coordinated approach to defend the state against litigation.
There are no structured, effective alternative non-litigious methods to resolve legal disputes involving the state.

There is an overreliance on private practitioners without developing in-house expertise in critical areas of the law and policy that are peculiar to government.

The number of court rulings made against government, particularly with regard to Constitutional matters, attests to the need to address the challenges in state legal services. A more focused and urgent intervention is required to resolve the problem. The challenges that are elaborated upon in this policy framework reflect a need for a transformational discourse on the matter and the addressing of institutional deficiencies that are experienced in the delivery of legal services for the state.

The current fragmentation of legal services in the Department and across the public sector signals an opportunity to be seized by the state to pool resources effectively and efficiently to render the services it ought to do.

Furthermore, it is essential that government develops and nurtures skills in those areas where there are acute shortages that cannot be adequately sourced from the private sector. Practitioners with exposure to complex areas of the law, such as commercial matters, land reform, mining, aviation, environmental, constitutional and international law are in high demand, both within the profession and in the judiciary. Government should therefore create a platform that will contribute to the development of jurisprudence in those areas of the law in its line function departments nationally and provincially. This can best be achieved through an integrated, transformed state legal service, which will enhance the pool from which the required skills and expertise can be drawn.

The main objectives of this policy framework, therefore, include the following:

- The consolidation, coordination and integration of state legal services across the government spectrum to ensure institutional efficiency.
- The creation of processes and infrastructure to provide for the strategic management of litigation, and achieve broader socio-economic transformation and alignment with the broader developmental objectives of government.
- The establishment of a mechanism and structure to coordinate the effective delivery of legal services by the state and its entities to enable the pooling of resources.
- The creation of capacity in, and advancement of, areas of specialisation which promote and create state legal services as a centre of excellence and instil greater confidence across all the state’s legal services. This will enable state attorneys to claim their rightful place as professionals able to service government without an unhealthy overreliance on private legal practitioners.
- The development and advancement of a state legal practitioner who serves the public with pride and confidence.
- Entrenching alternative dispute resolution mechanisms (ADRM) as an essential component of the management of state litigation.
- The creation of a process to centralise the issuing of state legal briefs in the Office of the State Attorney to ensure maximum adherence to government’s policy to empower previously disadvantaged individuals (PDIs). In this regard, state legal briefs include briefs issued by the state and its entities.
- The reorientation of state legal services to become not only the defender of litigation against departments, but in certain instances...
also the initiator of litigation on behalf of the poorest of the poor to advance and protect the rights of the vulnerable in society (for example, compensation for mining disasters, etc.).

- The development of a tariff model that will support and advance government objectives.
- Maximising the resources of state legal services to ensure the achievement of the end goal of access to justice for all.

The goal is transformed, integrated, professional, cost effective, and highly skilled state legal services.

The policy framework recognises that the process of enhancing the quality of legal services to the state presents the Department with an opportunity to establish a structured State Legal Services component, which will strengthen the state’s policy objectives of improving the lives of all South Africans, building better communities, transforming South Africa and redressing past imbalances. It also presents an opportunity to guide the state’s legal processes and interventions relating to complex legal issues, such as land claims cases, competition cases, Constitutional Court cases and matters of public interest, and to assist government to initiate litigation whenever it is necessary to do so.

Practitioners in private practice will continue to play a critical role in the provisioning of state legal services.

Not only do practitioners in private practice provide capacity in the overburdened state legal services, but they also provide skills and expertise built over a long period in private practice, which are needed in the advancement of our jurisprudence. While this policy framework is a paradigm shift from desk-bound legal professionals towards court-bound public sector legal professionals, the contribution of private legal practitioners to the state legal services will remain vital. The policy framework therefore gives guidance on how the relationship between state legal practitioners and practitioners in private practice will be managed.

The policy framework will be implemented in phases.

The first phase aims to lay a foundation for the provisioning of better legal services and embraces a need to consolidate state legal services on an urgent basis. The consolidation will take place under the direct guidance of the Minister of Justice and Constitutional Development. This consolidation will apply to essential units within the Department that provide legal services to the state and its entities.

As part of the immediate interventions, the policy framework envisages the following steps to give effect to the alignment and integration of state legal services:

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

It is envisaged to functionally realign the Office of the Chief Litigation Officer, the Office of the State Attorney and the Chief State Law Adviser, as well as elements from Legislative Development, International Affairs and Family Advocate Services, and integrate them under the Solicitor-General. Incumbents of the different legal posts in the different branches and units will be attached to one or more of the abovementioned work streams, based on their areas of service, as well as experience and expertise. The alignment and mainstreaming of posts and post designations will be a gradual process that will be informed by consultation on the end state of the process.
The appointment of the Head of State Legal Services will be done shortly to lead the consolidation and coordination envisaged in this policy framework. This will set into motion all the institutional arrangements for the transformation of state legal services, such as ADRM, intergovernmental relations, developing a training and reorientation curriculum for state legal practitioner employees who wish to engage in court work, the development of processes for the allocation of state legal work, the drafting of legislation, etc.

The consolidated legal functions, under the Head of State Legal Services (the Solicitor-General), will assist in the coordination of all state legal services performed in the Department, and will, in the interim, be dealt with through the following functional streams, each with its own coordinator:

- Inter-governmental Coordination;
- Litigation Services, split into Specialist Litigation and General Litigation;
- Litigation and ADRM Services;
- Legislation Certification;
- State Legal Advisory Services; and
- Cooperative Governance/ Corporate Management and Research.

It is envisaged that the coordination of state legal services across national and provincial spheres of government will be dealt with through the Cooperative Governance stream. This aspect will require further research and consultation.

The consolidation, coordination and enhancement of professional efficiency in relation to state legal services should occur both within the Department, as the lead functionary in providing legal services to government, and across the broader government spectrum. This is because the efficient and effective functioning of the Office of the State Attorney is dependent on cooperation and coordination between the State Attorney and the state and its entities, as clients, when the State Attorney is required to provide legal services. Interventions to urgently modernise state legal services within the existing resources are required until new legislation is passed by Parliament to usher in the transformed state legal services. The most immediate emphasis will therefore be to respond to the challenges in the Department’s internal structures that provide legal services to the state and its entities.

In summary

- The aim is to revolutionise the public legal sector to enable it to provide legal services of the highest standard to protect and safeguard the interests of the state and advance access to justice for all our people.
- The envisaged reforms are aimed at addressing some of the shortcomings in the current system that result in government losing court cases it ought not to have lost, or embarking on ill-fated litigation where it ought to have considered alternative forms of redress to litigation, thus resulting in huge costs to the fiscus.
- The intended reforms are also aimed at broadening the pool of legal practitioners who are briefed by the state to ensure a fair representation of black and female practitioners, consistent with the racial, gender and geographic demographics of our society. The scarcity of black and female practitioners in the pool of practitioners who continue to dominate constitutional and other high-profile litigations has a consequential effect on the slow pace of the transformation of the judiciary, as this profession is the main feeder to the judiciary. The empowerment of female practitioners remains a specific focus area.
In this policy framework, unless the context indicates otherwise:

“Accounting Officer” means an accounting officer as defined in the Public Finance Management Act, 1999 (Act No. 1 of 1999).

“Advocate” means an advocate as defined in the Admission of Advocates Act, 1964 (Act No. 74 of 1964) and who has served pupillage in terms of any association requiring pupillage as a condition of admission to that association.

“Attorney” means any person duly admitted to practice as an attorney in any part of the Republic as defined in the Attorney’s Act, 1979 (Act No. 53 of 1979).

“Chief Litigation Officer” means the incumbent of that post as established by the Department of Justice and Constitutional Development, and includes an acting Chief Litigation Officer.

“Client department” means a government body/institution that requires legal services and includes the national and provincial spheres of government.

“Department” means the Department of Justice and Constitutional Development.


“Legal process” means any civil law suit or criminal prosecution instituted for or against an organ of state.

“Legal services” means any form of legal advice, provision of legal opinions, drafting of legal documents, or representation of any person that requires the expertise of a person trained in the practice of law.

“Legal Services Sector Charter” means the charter adopted by the legal profession that recognises and embraces the specific nature of the legal profession and the profession’s responsibility to address not only economic imbalances, but the wider social inequalities that beset our society.

“Litigation” refers to the act or process of bringing or contesting a lawsuit in a civil matter.

“Litigation officer” means a legally qualified person admitted as an attorney or advocate, in the employ of government and responsible for litigation for or against the state.

“Litigation services” means legal representation for or on behalf of government by a legal practitioner (attorney or advocate) in private practice or employed by government.

“Minister” means the Cabinet Minister responsible for the administration of justice.

“NPA” means the single National Prosecuting Authority, as created in Section 179 of the Constitution of the Republic of South Africa, 1996.

“Organ of state” means an organ of state in the national and provincial spheres of government.

“Private practitioner” means an attorney or advocate, who is not in the employ of the state.

“State” means a national department, provincial department, local government or component as defined in the Public Finance Management Act, 1999.

“State attorney” means any person who is an attorney in the Office of the State Attorney, created in terms of the State Attorney Act, 1957 (Act No. 56 of 1957).

“State entity” means a national, provincial or local public entity as defined in the Public Finance Management Act, 1999.

“State litigation” means work performed for and on behalf of organs of state that requires the services of state attorneys, litigation officers, notaries and conveyances.

“Transformation” means the transformation of the administration of justice, which includes the restructuring of state legal services, as part of the broader societal transformation agenda aimed at fundamentally changing institutions of governance and society with a view to aligning all aspects of South African life with South Africa’s post-apartheid Constitution.
CHAPTER 1: INTRODUCTION
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1.1 TRANSFORMATION OF STATE LEGAL SERVICES AS PART OF THE BROADER REFORM OF THE ADMINISTRATION OF JUSTICE

1.1.1 The Constitution of the Republic of South Africa, 1996 ("the Constitution"), lays the basis for institutional and societal transformation in South Africa. The Preamble of the Constitution declares that it seeks to:

“Lay the foundations for a democratic and open society in which the government is based on the will of the people and every citizen is equally protected by law”.

1.1.2 The transformation of the administration of justice, which includes the restructuring of state legal services, forms part of the broader societal transformation agenda aimed at fundamentally changing institutions of governance and society with a view to aligning all aspects of South African life with South Africa's post-apartheid Constitution. The transformation of the judicial and legal services sectors is therefore part of the larger process of nation-building that has been ushered in by the Constitution. At the core of transformation is the restructuring and reorientation of institutions of governance to serve the interests of a constitutional democracy and to effectively contribute to the delivery of a better life for all.

1.1.3 The reform of legal services, within the context of legal services in both the private sector and in government, should thus not be seen or dealt with in isolation, but as part of the broader transformation of the judicial system geared to enhance access to justice and deepen constitutional democracy, underpinned by the Rule of Law. The transformation initiatives take place in the following segments of the administration of justice:

- Transformation of the judiciary and the rationalisation of the courts (which the Department is pursuing through various policy and legislative reforms), which encompasses a policy framework on the transformation of the judicial and court systems and the accompanying Constitution 17th Amendment Bill and the Superior Courts Bill currently before Parliament.
- Transformation of the legal profession (to be implemented through the Legal Practice Bill recently introduced in Parliament).
- Improvement of the criminal justice system (implemented through the Justice, Crime Prevention and Security Cluster programmes geared towards strengthening the efforts to fight crime and corruption).
- Review of the civil justice system (including improving the functioning, and extending the number, of small claims courts) to provide an accessible and affordable civil justice system.

1.2 THE SIGNIFICANCE OF THE LEGAL PROFESSION FOR THE TRANSFORMATION OF THE JUDICIARY

1.2.1 The foundation of the quest to transform the judiciary and the legal services sectors is the need to redress the legacy of the past, which perpetuates the inequality, exclusion and fragmentation that were hallmarks of the policy of segregation of the apartheid government. The aim of the transformation of the judicial system is to align it with the Constitution and ensure that it plays a meaningful role in the realisation of a better life for all.

1.2.2 The legal profession constitutes a pool from which members of the judiciary are sourced. It is also the source of training for professional persons to ascend to other
leadership positions in the broader national and international institutions, including the judiciary. It is therefore necessary for members of the legal profession, in both the private and public sector, to be adequately skilled, and for the advancement of women into leadership positions in society to be promoted, both nationally and internationally.

1.2.3 While it is standard practise for the judiciary to draw its candidature for the Bench from practitioners in private practice, it is necessary to find ways to provide equal opportunities to practitioners in government for appointment to judicial office. This requires that public sector lawyers are empowered to take their place as practitioners that are fully engaged in all areas of the legal profession. This includes doing away with the perception that public sector lawyers are merely bureaucratic state employees. The improvement of the quality of training and exposure to broader areas of experience in the practice of law for members of state legal services will also broaden the pool of candidates to rise to the highest levels of the legal profession, both nationally and internationally. The judiciary, and in particular the heads of court and the Judicial Service Commission, thus needs to be involved in the criteria and processes for appointing judges, acting judges and lower court judicial officers, with the view to reviewing and eliminating any barriers which distinguish between practitioners in private practice and those in government.

1.2.4 It is equally important, as envisaged by the Legal Services Charter, that the legal services sector commits itself to the development of innovative measures to broaden the pool of candidates who are eligible for judicial appointments, particularly with a view to addressing race and gender imbalances. Exposure to the global environment in terms of exchange programmes to draw on international experience will also be pursued vigorously.

1.3 THE TRANSFORMATION OF THE BROAD LEGAL PROFESSION

1.3.1 Similar to the judiciary, the legal profession is characterised by the legacy of the past – of inequality, fragmentation and exclusion – which contributes to the inaccessibility of legal services to the majority of citizens and also the apparent inefficiency of state legal services. Equitable demographic representation and diversity of race, gender and other constitutionally recognised features are important values in the Constitution, especially under sections 7 and 9 of the Bill of Rights in the Constitution.

1.3.2 The legal profession in general, and the judiciary in particular, is, however, still characterised as a profession where the doors to recognition and distinction are largely closed to women. The state and its entities are strategically positioned to transform the legal profession and to work towards the removal of barriers to the advancement of women. This can be achieved through the empowerment of female legal professionals in the state and its entities and by the issuing of briefs to women in the private sector.

1.4 PURPOSE AND SCOPE OF THIS POLICY FRAMEWORK

1.4.1 The transformation of the judiciary and of the legal profession has progressed steadily, and it is now opportune for a structured debate to commence in government and the legal profession on the processes and mechanisms to transform state legal services to bring them in line with the ethos and values of the Constitution. This policy framework therefore seeks to initiate the policy discourse that will culminate in the comprehensive transformation of this important sector of government’s work, while it also provides for some immediate interventions that can be
implemented as part of the broader process of transformation.

1.4.2 Fragmented governance has contributed to the current unsatisfactory state of state legal services and the inability to provide quality legal services. This has also led to a loss of revenue, most often as a result of the poor approach regarding the litigation of certain cases and the absence of a structured and effective alternative non-litigious method to resolve some of the legal disputes involving the state. The number of court rulings made against government, particularly with regard to Constitutional litigation, signals a need for a focused and urgent turnaround intervention regarding state legal services, and in particular regarding constitutional litigation.

1.4.3 In the Department, the current fragmentation of legal services across various departmental branches/units requires repositioning to improve coordination and consolidation and greater efficiency and effectiveness. For example, various branches provide legal advisory services, draft opinions and legislation, and perform other state legal services through functionaries such as the state law advisers, the Chief Litigation Officer, the state attorneys and other legal officers. A key goal will consequently be to improve and enhance – in the Department – the provision of legal services to the state on a timely basis through the consolidation and integration of such services. This will require implementation in a phased manner.

1.4.4 The approach adopted in this policy framework is therefore two-pronged:

(1) Firstly, it seeks to articulate the policy and regulatory framework necessary to transform state legal services to be consistent with the broad reform of the justice system as mandated by the Constitution.

(2) Secondly, it provides for the implementation of immediate interventions for the comprehensive consolidation and coordination of state legal services as part of a broader process of organisational reform to enhance institutional efficiency. This can be implemented within the current legislative framework, and consultations will be confined to the affected branches and functionaries. The immediate interventions, on a trial pilot basis, are intended to commence during the current 2012/13 financial year while appropriate legislation is being drafted.

1.4.5 The policy framework’s main aims are the following:

- To ensure that the public legal sector is able to provide legal services of the highest standard to protect and safeguard the interests of the state and promote access to justice for all South Africans.
- To address some of the shortcomings in the current system that result in government losing court cases it ought not to have lost, or embarking on ill-fated litigation where it ought to have considered alternative forms of redress to litigation, thus resulting in huge costs to the fiscus.
- To broaden the pool of legal practitioners who are briefed by the state to ensure a fair representation of black and female practitioners consistent with the racial, gender and geographic demographics of our society. The scarcity of black and female practitioners in the pool of practitioners who continue to dominate constitutional and other high-profile litigation cases has a consequential effect on the slow pace of the transformation of the judiciary, as this profession is the main feeder to the judiciary. Only 7% of practicing advocates are black females. The Department is committing itself to ensure that the number of briefs to women practitioners over the medium term is increased to 50% in value.
CHAPTER 2:
THE STATE OF LEGAL SERVICES
WITHIN GOVERNMENT AND ITS
IMPACT ON THE IMPLEMENTATION
OF THE STATE’S POLICY AND
OPERATIONS
2.1 DEFINING STATE LEGAL SERVICES

2.1.1 State legal services can be categorised into litigation and non-litigious services that seek to promote the interest of the state. Litigation services can be further categorised into the prosecuting service, which in terms of the Constitution is the mandate of the National Directorate of Public Prosecutions, and civil litigation, which is statutorily assigned to the State Attorney.

2.1.2 Except for the prosecuting service, which is clearly defined in law, state legal services have, over time, crystallised into litigious and non-litigious services performed pursuant to legislation or other forms of regulatory frameworks applicable to the subject matter concerned.

2.1.3 The most common forms of litigation involving the state include the following:
   (i) Diverse types of civil litigation (including appeals) in the Superior Courts and High Courts, the Specialised Courts with the status of a High Court (such as the Land Claims Court, the Labour Court and the Competition Appeals Court) and the Lower Courts (such as the Equality Court sitting at the magistrate’s courts);
   (ii) State defence of officials in various forums in relation to criminal and civil cases and inquests;
   (iii) Labour matters, including the CCMA, and all forms of arbitration, including inter-departmental arbitrations; and
   (iv) Legal services and applications to the High Court in terms of The Hague Convention on International Civil Court Child Abduction.

2.1.4 Non-litigious services performed by state legal services include the following:
   (i) Drafting and/or settling of all types of agreements, both simple and complex, on behalf of various client departments;
   (ii) Rendering of legal opinions to internal and external role-players;
   (iii) Certification of bills in terms of parliamentary rules;
   (iv) Contract administration, which involves the drafting, negotiation, approval, implementation and oversight of contracts; and
   (v) Conveyancing and notarial services.

2.1.5 State legal services are performed either by a legal practitioner in private practice or a legal professional or legal officer employed by the state. Services that may, in law, only be performed by an attorney are performed by the State Attorney appointed in terms of the State Attorney Act, 1957.

2.2 DISTINGUISHING BETWEEN PRIVATE AND PUBLIC SECTOR LEGAL PROFESSIONALS

2.2.1 Legal professionals in the private sector practice either as attorneys or advocates and are regulated by their respective regulatory structures. It should be borne in mind that the Legal Practice Bill could in the long run have an effect on the way in which legal professionals operate and this could influence the policy framework’s approaches and implementation.

- **The attorneys’ profession** is governed by the Attorneys Act, 1979. All attorneys are regulated by the four statutorily mandated law societies, namely the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the
Free State and the Law Society of the Northern Provinces. In terms of the above Act, all admitted attorneys must be members of a law society and be guided by and are subject to the Code of Conduct of the respective law societies.

- **Advocates** are admitted in terms of the Admission of Advocates Act, 1964. Advocates who practise at the Bar are regulated by the General Council of the Bar (GCB), which does not enjoy the statutory recognition of the law societies. Once admitted as an advocate by a High Court, there is no statutory obligation to join the Bar. Advocates are experts in trial advocacy and the rendering of legal opinions. They receive work only when briefed through a practising attorney. Advocates of the Independent Bar are those advocates who are not members of the GCB. There is a vast gap between the regulatory measures imposed upon attorneys, compared to the regulatory measures for advocates. The Legal Practice Bill intends to address this anomaly.

2.2.2 Practising attorneys employed in the public service are appointed in terms of the State Attorney Act, 1957. State attorneys are regulated in terms of the rules of the law societies to which they belong in respect of their professional work, while administratively they function subject to the laws applicable to the public service.

2.2.3 The state and its entities also employ non-practising attorneys and advocates as public servants to provide legal advice and other legal services to the state.

2.2.4 It has become an established practice for the state and its entities to instruct or brief outside attorneys and advocates rather than use in-house lawyers to represent it in litigation. Such litigation comprises mainly cases by or against the state. Briefing advocates in private practice to do state legal work has led to a situation where state litigation has become an established market for many practitioners and law firms. The over-reliance on the part of the State Attorney on private practitioners to do its legal work has resulted in the state losing an opportunity to develop its own body of highly regarded, qualified legal professionals in practice. It is necessary to turn this around, not only to deliver more cost-effective legal services to the state and its entities, but also to make the state legal services sector an employment opportunity of choice by virtue of the wide range of experience and exposure it can offer to legal graduates and legal professionals.

2.2.5 While this policy framework provides a paradigm shift from office-bound legal professionals towards court-bound legal professionals in the public sector, the contribution and involvement of private legal practitioners in state legal services will remain vital. Practitioners in private practice have a critical role to play in the providing of state legal services. Not only are attorneys and advocates in private practice providing capacity to the overburdened state legal services, but they also provide skills and expertise built up over a long period in private practice.

2.3 **LEGAL SERVICES FOR THE STATE AND ITS ENTITIES**

2.3.1 Most 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. Some advise on the handling of litigation against the department in which they are employed, some draft legislation and others do general legal work. It needs to be acknowledged that in the various departments, many departmental lawyers have specialist skills and experience and this will be borne in mind in terms of the repositioning of state legal services. This will in the long term form part of the intergovernmental coordination that is required to improve state legal services in terms of litigation.

2.3.2 It should be acknowledged that the various departments’ and state entities’ preference to employ their own legal personnel and engage attorneys in private practice appears to be driven by a number of considerations, primarily the lack of capacity in the Office of the State Attorney and the departments to provide legal services to the state and its entities, a lack of expertise in the departments and the state, generally speaking, in specialist areas of the law, a lack of confidence in the work and output of state attorneys, and a lack of effective coordination and management of the legal services functions performed by the state and its entities. These challenges, which are elaborated on later, are a reflection of both the need for transformational discourse and institutional deficiencies that this policy framework seeks to address.

2.4 LITIGATION SERVICES FOR GOVERNMENT

2.4.1 Services of the State Attorney

2.4.1.1 The work of the State Attorney entails the representation of national and provincial departments and entities in litigation instituted against these departments and entities. The State Attorney also provides legal advice to the state and its entities through the drafting of legal opinions and the procurement of legal advice from private practitioners.

The functions of the Office of the State Attorney relating to any form of litigation in any court are regulated by Section 3 of the State Attorney Act, 1957, which mandates the State Attorney to act on behalf of the government of the Republic in any court. Section 3 also empowers the State Attorney to act in matters where government, though not a party thereto, has a public interest to do so. The Minister of Justice and Constitutional Development furthermore has the power to direct that the State Attorney should not act in a matter.

2.4.2 Briefing of advocates to represent the state in litigation

2.4.2.1 The State Attorney is empowered in terms of Section 8 of the State Attorney Act, 1957, to instruct or employ as a correspondent any attorney or other qualified person to act in any legal proceedings or matters in any place in the same way and subject to the same rules, terms and conditions that govern attorneys in private practice. This Section empowers the briefing of private practitioners to conduct state litigation.

In briefing private practitioners to conduct state litigation on behalf of the state, state attorneys usually only brief advocates who are members of the GCB and its constituent bars. Some departments and state entities also instruct private practitioners, attorneys and advocates outside the Office of the State Attorney.
CHAPTER 2: THE STATE OF LEGAL SERVICES WITHIN GOVERNMENT AND ITS IMPACT ON THE IMPLEMENTATION OF THE STATE’S POLICY AND OPERATIONS

The state and its entities must ensure that its resources are spent cost-effectively and the briefing of attorneys in private practice where there is no justification other than preference, becomes a questionable practice. Likewise, the briefing of only advocates who are members of the GCB has not proven to be more cost-effective than briefing advocates who are not members of the GCB and its constituent bars. Not using such practitioners has been ascribed by some to the conjecture that the members of the independent Bar are not subject to the same rigorous discipline as members of the GCB.

2.4.2.3 Instructions to attorneys or advocates that are done at national and provincial level outside the mandate or involvement of state attorneys runs contrary to the objective of a unified State Legal Services Office.

2.4.2.4 It is further required that consideration be given to a more transparent briefing system with the aim of ensuring that legal practitioners have a fair opportunity of demonstrating their ability and of gaining knowledge and experience in matters to which they otherwise would not have had access. In this regard, there are at least two essential criteria that should be met in order to ensure fair briefing patterns. Firstly, there must be an even distribution of an adequate volume of work by the state and its entities and, secondly, the complexity and variety of work must be evenly spread. This aspect is dealt with in a separate chapter of this document.

2.5 THE ROLE OF PUBLIC SECTOR LEGAL PRACTITIONERS IN LITIGATION INVOLVING THE STATE

2.5.1 It should be noted that, although in some Offices of the State Attorney persons rarely perform any court work, the attorneys employed in the Office of the State Attorney are equally qualified and admitted to appear in court to represent the state and its entities in court proceedings.

2.5.2 It has unfortunately become an established practice that public sector legal practitioners other than state advocates appointed at the NPA and the practitioners of Legal Aid South Africa are mostly involved with legal administrative functions ancillary to litigation services. This practice deprives the state of an opportunity to create a body of knowledge and expertise to contribute towards the development of jurisprudence in critical areas that present challenges to government sector policy, both locally and internationally.

2.5.3 It is important that government seize the opportunity to develop and nurture skills, especially in areas where there are acute shortages of skills that cannot be adequately sourced from the private sector. Exposure to complex areas of the law, such as reform, mining, aviation, environmental, constitutional and international law, is important. Demand, in the profession, the judiciary and government, presents the opportunity and the edge to create a platform for developing jurisprudence in these fields in government’s line function portfolios across its various departments, nationally and provincially.
CHAPTER 2:
THE STATE OF LEGAL SERVICES
WITHIN GOVERNMENT AND ITS IMPACT
ON THE IMPLEMENTATION OF THE
STATE’S POLICY AND OPERATIONS

This can, however, only be achieved through integrated state legal services that will enhance the widening of the pool from which to draw the required skills and expertise.

2.6 THE GOVERNMENT’S MANDATE IN RELATION TO STATE LEGAL SERVICES

2.6.1 The role of the Minister of Justice and Constitutional Development

2.6.1.1 The Minister is assigned the administration of legislation applicable to legal practice, both in the private and the public sectors. The Attorneys Act, 1979, and the Admission of Advocates Act, 1964, regulate the practitioners in the private sector, while the State Attorney Act, 1957, is the primary legislation that regulates litigation involving government. The State Attorney Act, 1957, sets out the role of the Minister as follows:

(i) Section 1 establishes the Office of State Attorney under the control of the Minister of Justice and Constitutional Development.
(ii) Section 2 (1) empowers the Minister, subject to the laws governing the public service, to appoint as State Attorney a person admitted and entitled to practise as an attorney in any division of the High Court of South Africa, who shall be in charge of the Office of the State Attorney.
(iii) The Minister can also appoint qualified persons to be in charge of any branch office of the State Attorney.
(iv) Section 9 empowers the Minister to make regulations regarding the qualifications, powers, duties and jurisdiction of persons who may be appointed in terms of the State Attorney Act, 1957 and in general for carrying out the objects and purpose of this Act.

2.6.1.2 The State Attorney Act, 1957, is outdated and is deemed to be not in line with the current constitutional dispensation. It also does not address the modern-day challenges of a complex entity delivering legal services to the state. In seeking to transform the legislative framework governing the legal profession, the State Attorney Act, 1957 must give way to appropriate legislation to modernise public sector legal services and bring them in line with the Constitution. In the short term, pending the enactment of new legislation, measures (which may include regulations to be made by the Minister under the State Attorney Act, 1957) are being considered with a view to strengthening the coordination and management of litigation by or against the state to address immediate challenges.

2.6.2 The role of the Department in the coordination of the state legal services

2.6.2.1 Except for legal services in relation to the litigation services that the Department administers in accordance with the State Attorney Act, 1957, the Department also administers forms of legal services that pertain to the Department itself and to other departments. The Department’s mandate in relation to legal services thus has both an internal and an external dimension. In turn, the external mandate has a dual focus, namely facilitating state
legal services in government, and also facilitating legal services to citizens and other end-users who interact with the justice system.

2.6.2.2 While the Department has, to a large extent, through its current organisational configuration, been effective in addressing its own expectations and those of the citizens in promoting access to justice, the same cannot be said of the Department's capacity and capability to coordinate state legal services across national and provincial departments as required. It is thus important to develop mechanisms to improve and measure the impact of the Department's execution of its mandate on the different target groups to satisfy the expectations of the different clients of justice services, including those of government.

2.6.2.3 Broadly, the mandate of the Department encompasses constitutional development, the management and coordination of the courts, the services of the Master of the High Court, state legal services and court services. The NPA, which is a programme under the Department, has prosecuting autonomy, while its administration is attached to the Department. The Department's responsibility relating to the judiciary and the courts is part of the ongoing transformation of the judicial system.

2.6.2.4 While the Branch: Court Services and the Office of the Master provide services that directly impact on access to justice, the functions of the Office of the Chief State Law Adviser, the Legislative Development Branch and the Office of the Chief Litigation Officer relate more directly to government and benefit citizens indirectly. The mandates and responsibilities of these branches overlap to some extent and therefore weaken the efforts to coordinate legal services, both internally and across government.

In view of the above, it is important to reflect on the current position regarding the three branches that provide direct legal services to government: the Office of the Chief State Law Adviser, the Office of the Chief Litigation Officer and Legislative Development.

The Office of the Chief State Law Adviser

The Office of the Chief State Law Adviser consists of state law advisers who perform the following legal functions:

- **Legal opinions**: The Office of the Chief State Law Adviser provides legal opinions to all national government institutions. Legal advice is often also rendered to provinces and municipalities. The Chief State Law Adviser is responsible for furnishing opinions, for example, with regard to guarantees given by the government in connection with the raising of state loans.

- **International agreements**: All international agreements are scrutinised by the Office of the Chief State Law Adviser. These include extradition agreements.

- **Certification of bills**: Scrutiny of draft legislation and ensuring that it complies with the parliamentary legislative process, including constitutional compliance, is also a function of the state law advisers. In terms of Rule 243(1A) of the National Assembly, a bill introduced
CHAPTER 2: THE STATE OF LEGAL SERVICES WITHIN GOVERNMENT AND ITS IMPACT ON THE IMPLEMENTATION OF THE STATE’S POLICY AND OPERATIONS

by a Cabinet minister or deputy minister must be certified by the Chief State Law Adviser or a State Law Adviser designated by him or her, as being consistent with the Constitution; and properly drafted in the form and style that conforms to legislative practice.

The Office of the Chief Litigation Officer

The Office of the Chief Litigation Officer was established in 2004, after the then Minister of Justice and Constitutional Development sought and obtained Cabinet’s approval for the creation of the office. Since then, the Office of the Chief Litigation Officer has operated as a separate branch alongside the Office of the Chief State Law Adviser and the Legislation and Constitutional Development branches, acting as the primary component responsible for overseeing state legal services.

The functions of the Chief Litigation Officer were envisaged as follows:

- The development of strategic business plans that address the needs of the state and its organs for legal advice on litigation matters.
- The coordination of litigation encompassing the Offices of the State Attorney, the Constitutional Litigation Unit and the Department’s internal Chief Directorate: Legal Services, comprising law enforcement and legal process.
- The providing of legal counsel at senior level to the Presidency, Cabinet ministers, directors-general of departments and various parliamentary subcommittees, as required.
- Ensuring the representation of the state in selected high-profile cases, where such cases have the potential of impacting negatively on the public perceptions of government, both nationally and internationally.
- The monitoring of all matters pertaining to constitutional litigation with a view to maintaining the integrity of the Constitution.
- The rendering of communication and liaison functions at a strategic level to assess the performance of the Office of the Chief Litigation Officer’s service delivery to client departments.
- The strategic management of funds allocated to the Office of the State Attorney, the Constitutional Litigation Unit and the Law Enforcement and Legal Process Unit, in accordance with the approved budget and the regulations pertaining to the Public Finance Management Act, 1999, and National Treasury.

At the moment, the Office of the Chief Litigation Officer acts as an umbrella body over the State Attorney and the Chief Directorate: Legal Services in the Department. The Legal Services Chief Directorate manages the claims for and against the Department and also instructs the State Attorney, as any other client department would. The Legal Process Unit deals with requests for pardons to the President and applications for the expungement of criminal records as contemplated in the Criminal Procedure Act, 1977 (Act No. 51 of 1977). The Office of the Chief Litigation Officer has further initiated a State Litigation Management framework in an attempt to improve the management and delivery of the state’s litigation services.
CHAPTER 2: THE STATE OF LEGAL SERVICES WITHIN GOVERNMENT AND ITS IMPACT ON THE IMPLEMENTATION OF THE STATE’S POLICY AND OPERATIONS

Legislative Development

The Legislative Development Branch will require further consideration, as it performs functions that are very specific to the Department and could stand outside the integrated state legal services on the one hand, while on the other hand it also performs more general functions that could be incorporated under integrated state legal services. This branch currently performs the following functions:

- Evaluating and investigating primary and subordinate legislative proposals;
- Preparing primary and subordinate legislation;
- Assisting and advising parliamentary committees;
- Reviewing fees and tariffs;
- Advising the Minister on relevant legal issues;
- Preparing proclamations for commencement of legislation; and
- Preparing proclamations for the referral of matters to the Special Investigating Unit (SIU).

The branch also provides secretarial support services to the South African Law Reform Commission (SALRC) and the Rules Board for Courts of Law.

The South African Law Reform Commission

The SALRC, which was established in terms of the South African Law Reform Commission Act, 1974 (Act No. 19 of 1974), performs the following functions:

- Executing the law reform programme of the commission by conducting legal research into any branch of the law for all departments;
- Developing proposals for law reform;
- Preparing legislative proposals; and
- Assisting parliamentary committees and advising ministers on relevant issues.

In this regard, the SALRC performs legislative drafting and research functions for government. The role of the SALRC somewhat overlaps with legislative drafting functions played by divisions existing in departments. In making its recommendations, the SALRC drafts policy proposals, which is also a role played by policy development divisions in departments. The development of research capacity, policy development and legislative drafting requires critical assessment with regard to output in respect of real growth and development of our developmental discourse. Overlapping roles and responsibilities and a lack of cohesion in these sectors dissipate the state’s endeavours to bring about meaningful transformation.

The Rules Board for Courts of Law

The Rules Board was established by the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), to review the rules of court and to make, amend or repeal rules, subject to the approval of the Minister of Justice and Constitutional Development. Section 9 of the Act provides for the establishment of a Secretariat to provide secretarial and administrative support to the board. The Secretariat also conducts research into the rules of court. The Rules Board furthermore determines tariffs and fees. By virtue of performing the above functions, the Rules Board can have an enormous impact on the practice of law. Outcomes of the decisions made by the
Rules Board impact on legal practitioners, state legal services, the state and its entities and citizens. This board should therefore be strategically positioned to ensure that it serves the interests of a transformed legal profession and state legal services in general.

2.6.2.6 There are other components in the Department that also perform state legal services. These components are assigned responsibility for state legal services outside the three line function branches referred to above. They are the Office of the Chief Family Advocate, the Policy Development and Coordination Unit (both of which are located in the Court Services Branch) and the Chief Directorate: International Legal Relations (which is located in the Office of the Director-General). Their role within integrated state legal services will thus require investigation and further consideration.

The Office of the Chief Family Advocate

Unlike the legal services performed in the other three line function branches mentioned above, the Office of the Chief Family Advocate serves citizens and end-users of the justice system directly. The Office of the Chief Family Advocate was created in terms of a statute, and has a responsibility to protect the best interests of minor and dependent children in civil litigation matters. It derives its mandate from Section 28 of the Bill of Rights in the Constitution, which provides for the protection of the rights of children, and various legislative instruments, including the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), the Children’s Act, 2005 (Act No. 38 of 2005), the Domestic Violence Act, 1998 (Act No. 116 of 1998), and the Maintenance Act, 1998 (Act No. 99 of 1998).

The core functions of the Office of the Chief Family Advocate include the following:

- Monitoring and evaluating relevant court processes to protect the interests of the child;
- Appearing in courts;
- Providing legal information/advice to members of the public in relation to their legislative mandates;
- Conducting mediation;
- Providing professional reports to the courts; and
- Executing the duties of the Central Authority under The Hague Convention on the Civil Aspects of International Child Abduction.

The nature of the legal services described above suggests a stronger link between the Office of the Chief Family Advocate and the envisaged State Legal Services component, rather than with the Court Services Branch.

Policy Development and Coordination Unit

The need for the Department to create adequate capacity to enhance its research capability so as to provide a sound policy basis in the execution of its broad administration of justice and constitutional development mandate has long been identified as a necessity. Not only is policy research necessary to give content to the bills the Department introduces to Parliament, so as to give effect to its
mandate and the administration of the legislation assigned to the Minister, but it is also necessary to respond to external policy initiatives emanating from other institutions within the justice sector, such as the Judicial Service Commission, the Magistrate’s Commission, the SALRC, the Rules Board for Courts of Law and other departments.

The trend in some departments is to locate policy formulation and research in their legal services components, while other departments have argued that it is a function that should be retained in the Office of the Director-General due to its proximity with the policy responsibility of the Minister.

There may therefore be merit in integrating the policy research functions into the State Legal Services portfolio to promote the effective coordination of policy initiatives in the Department.

**Chief Directorate: International Legal Relations**

The Chief Directorate: International Legal Relations is another unit that, like Legislative Development, may require further consideration. Similar to Legislative Development, it performs functions that are very specific to the Department and could stand outside integrated state legal services on the one hand, while on the other hand it also performs more general functions that could be incorporated under an integrated Office of State Legal Services.

This unit is important, as the advent of the new South African democratic government has led to the acceptance of South Africa by the international community under the auspices of the various regional organisations and the UN in particular. In the last decade, South Africa has emerged as an important role-player in the affairs of the African continent and the world in general. Recently, South Africa also found a particular role in relation to peace-keeping missions on the African continent and has become a non-permanent member of the UN Security Council. Peace and justice complement each other and both are interdependent: “There is no peace without justice”.

The Minister is responsible for administering the various pieces of legislation pertaining to cooperation in criminal and civil matters. The Extradition Act, 1962 (Act No. 67 of 1962), relates to cooperation with other governments in criminal matters. This Act is currently being reviewed by the Department in order to ensure that the Republic’s legislation is in line with international trends and the Republic’s obligations, such as those arising from the European Convention on Extradition. Furthermore, this Act is to be extended to include extradition and the surrender of persons to international criminal tribunals. There is also an International Cooperation in Criminal Matters Act, 1996 (Act No. 75 of 1996), which deals with mutual legal assistance in obtaining evidence and the seizure and forfeiture of proceeds of crime.

The Department thus has a critical role, not only in the interpretation and application of International Law in collaboration with the Department of International Relations and Cooperation, but also in creating a platform to contribute to and influence
international law jurisprudence. It is important that the Department assists with the work in this regard and helps shape government's foreign policy on poverty alleviation on the African continent within the context of the New Partnership for Africa’s Development (NEPAD).

Central to the issue of poverty alleviation is the creation of enabling conditions, such as peace, security, democracy and good governance. There is also a role to be played in contributing to the strengthening of the political and administrative framework of participating countries, in line with the principles of democracy, transparency, accountability, integrity, respect for human rights and the promotion of the rule of law. These enabling conditions and principles are central to the mandate of the Department and should be a guide in promoting NEPAD. The pillars of the government’s foreign policy are security, the Rule of Law and national interest. Therefore, any review of the Department’s regional and international mandate must take place within the context of the transformation of state legal services.

1.1.3 The National Prosecuting Authority

The Asset Forfeiture Unit and the Special Investigating Unit

In or closely associated with the NPA are two other important structures, namely the Asset Forfeiture Unit (AFU) and the Special Investigating Unit (SIU). The AFU was created in order to ensure that the powers to seize criminal assets, as stated in chapters 5 and 6 of the Prevention of Organised Crime Act, 1998, would be used to their maximum effect in the fight against crime, and particularly organised crime. The AFU has a number of key strategic objectives, namely to develop the law by taking cases to court and creating the legal precedents that are necessary to allow for the effective use of the law, to build capacity to ensure that asset forfeiture is used as widely as possible to make a real impact in the fight against crime and in particular certain categories of priority crimes, to function nationally, to establish relationships with its key partners, especially the South African Police Service (SAPS), and the South African Revenue Service (SARS), and to build the AFU into a professional and representative organisation.
The SIU is an independent statutory body that is accountable to Parliament and the President. It was established to conduct investigations referred to it by the President, and to report to him on the outcome of the investigations. The SIU functions in a manner similar to a commission of inquiry in that the President refers cases to it by way of proclamations. It may investigate any matter referred to it in terms of Section 2 of the Special Investigating Units and Special Tribunals Act, 1996, regarding, among others, serious maladministration concerning the affairs of any state institution, improper or unlawful conduct by employees of any state institution, and corruption in connection with the affairs of any state institution. The SIU also engages in litigation. It works closely with the AFU in cases where the powers of this unit are more suitable for recovering the proceeds of crime.

Both the AFU and the SIU play critical roles in the justice system and, in carrying out their operations, they more often than not require delicate and complex legal advice and solutions that can be better sourced from an integrated and consolidated Office of State Legal Services.

1.1.4 Cooperative governance and intergovernmental legal services mechanisms

The lack of an intergovernmental legal services mechanism for the coordination and monitoring of legal services across the government spectrum is arguably the most conspicuous consequence of delay in the transformation of the justice system. It is also part of the reason for the inability of the Department to measure the outcomes of legal services government-wide. Legal services relating to litigation and certain aspects pertaining to bills, including the certification of bills, the provision of legal opinions to external functionaries, and constitutional development functions are all intended to benefit government as a whole and not just the narrow focus of the Department.

The intergovernmental legal services arrangements that will promote the coordination of the state legal services across government should be founded on the principles of cooperative governance, as contained in Chapter 3 of the Constitution. The executive authority is vested in the President. This he exercises together with other members of Cabinet, in terms of Section 85 of the Constitution, and in particular through the authority relating to the coordination of state departments and administrations and the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005).

The intergovernmental legal services mechanisms will assist in the development of systems for the coordination and monitoring of legal services across all spheres of government.

2.6.5 Contribution to the development of jurisprudence locally and internationally

The transformation of state legal services is geared towards building a body of expertise that will be in a position to successfully defend legal challenges in critical cases that relate to government policy as well as international legal jurisprudence. The United Nations Charter and the frameworks establishing regional organisations, such as the Non-Aligned Movement, the G77, China and
South-South interaction, and the Brazil, India, China and South Africa (BRICS) groupings, including instruments adopted by these organisations, guide South Africa in pursuit of the renewal of Africa and a better world for all.

The envisaged consolidated Office of State Legal Services will create the opportunity to contribute to the wealth of jurisprudence deriving from the International Criminal Court and other international tribunals, such as the International Court of Justice (ICJ), the Permanent Court of Arbitration (PCA) and the International Tribunal for the Law of the Sea (ITLOS), the latter being a special tribunal for disputes relating to the law of the sea. At a regional level, the African Court of Justice and Human Rights (ACJHR), which is a merger of the newly established African Court of Justice and the existing Africa Court on Human and People’s Rights, and the SADC Tribunal, are the most significant institutions.

Public sector practitioners who render work in the transformed and professional state legal services may become eligible for nomination to serve on the international and regional structures, based on their expertise and professional efficiency.

2.6.6 Alternative dispute resolution as an alternative to litigation

Many cases filed in courts can be resolved without having to proceed to trial. It is common cause that litigation can and does take years to finalise. The absence of structured ADRM as alternatives to the expensive litigious methods not only exacerbates the litigation cost of government, but also inhibits access to justice. Tested ADRM, in particular conciliation and mediation, have been found to lead to a reduction of legal costs, the promotion of restorative justice and the reduction of case backlogs. The parties involved in mediation can also agree on the scope of the dispute or the issues requiring resolution. (In litigation this is done by way of Rule 37 of the High Court Rules and Rule 54 of the Magistrate’s Court Rules. The purpose of the pre-trial conference method is to curtail issues and reach a settlement. In the High Court the process is followed six weeks before trial.)

ADRM are not intended to substitute court litigation, but to supplement it. Should conciliation and mediation not result in a settlement, then each party can proceed to enforce their rights and litigate through the appropriate court procedures. The Civil Justice Reform Project, approved by Cabinet in 2010, encapsulates the institutionalisation of ADRM for the resolution of civil disputes. The development of a framework for the institutionalisation of ADRM, which will largely be by way of rules of courts of law and other forms of regulation, will require of the government to create the required appropriate capacity and expertise in the state legal services to deal with conciliation and mediation beyond those provided for in the current rules of the courts (Rules 37 and 54 of the High Court and Magistrate’s Court Rules, respectively).
CHAPTER 3: THE CONSTITUTIONAL IMPERATIVES UNDERPINNING THE TRANSFORMATION OF STATE LEGAL SERVICES
CHAPTER 3: THE CONSTITUTIONAL IMPERATIVES UNDERPINNING THE TRANSFORMATION OF STATE LEGAL SERVICES

3.1 SETTING A VISION FOR STATE LEGAL SERVICES SUITED TO THE CONSTITUTION

3.1.1 General background relating to the need for a vision for state legal services which are aligned with the Constitution

3.1.1.1 In Section 7 of the Constitution, the Bill of Rights is established as the cornerstone of democracy in South Africa. The state must respect, protect, promote and fulfil the rights in the Bill of Rights. Section 34 of the Bill of Rights recognises everyone’s right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

3.1.1.2 Chapter 10 of the Constitution sets out the basic values and principles governing public administration. Section 195(1)(b) of the Constitution declares the efficient, economic and effective use of resources as one of those basic values and Section 195(1)(c) states that public administration must be development oriented.

3.1.1.3 A democratic developmental state is a state that is geared towards ensuring an accountable government, and an enhanced capacity of the state for growth and development, including an enhanced capacity to provide basic services to all South Africans. It is recognised that institutions in a state determine its capacity to formulate and implement its policy and programmes.

3.1.1.4 Strong state institutions are necessary to realise the rights enshrined in the Bill of Rights. Therefore, democratic development-oriented state institutions go hand in hand with the progressive realisation of rights.

3.1.2 The transformation of state legal services entails the alignment of policy and existing regulatory and institutional frameworks governing state legal services with the Constitution.

3.1.3 To achieve this transformative goal, it is important and necessary to formulate a vision that will be shared and embraced by all departments and state institutions. The shared vision must contribute to access to justice and the sustenance of affordable legal services for the state and the community at large. This vision must also facilitate and promote skills transfer and skills development for legal practitioners, in particular PDIs, so that they can nurture and hone their legal skills for career advancement into private legal practice, the judiciary or other legal work. A strong and well-resourced State Legal Services component will pool resources across the government spectrum to provide the opportunity of access to the legal profession for young practitioners so as to advance the transformation of the legal sector.

3.1.4 It is within the context of the transformation discourse envisaged in the preceding paragraph that the Vision of the State’s Legal Services is formulated as follows:

World-class State Legal Services that enhance equality and access to justice for all through the delivery of legal services.
This is ensured through the Mission of State Legal Services that entails:

The provision of State legal practitioners that will deliver quality legal services to departments in the interest of the public, thereby advancing human rights and contributing towards the social upliftment of indigent communities.

3.1.5 The above vision provides an opportunity for government to do the following:

- Set high quality standards for the providing of legal services to ensure value for money commensurate with the Batho Pele principles;
- Ensure the attainment of transformative goals, including taking progressive strides to enhance opportunities for legal practitioners, particularly PDIs, in the profession;
- Develop and maintain partnerships and cooperation with the private legal profession; and
- Develop systems to enhance the effectiveness and accountability of state legal services.

3.2 CONSTITUTIONAL AND POLICY IMPERATIVES FOR STATE LEGAL SERVICES

3.2.1 The mandate for state legal services is derived from the Constitution and national legislation. The constitutional obligation on the state to respect, promote and fulfil the rights in the Bill of Rights, the application of the Bill of Rights on the state, and the provision in the Constitution that “the Bill of Rights applies to all law and binds the legislature, the Executive, the judiciary and all organs of state”, reflect the overarching constitutional mandate of government to promote a just and fair justice system for all, including the state itself.

3.2.2 Access to justice is an important component of the Rule of Law in terms of the equal ability of persons and the state to access and use legal services, including courts.

3.2.3 The state also has a constitutional, moral and social responsibility to ensure the realisation of the right of every citizen to be treated equally before the law. The Department, in particular, has a constitutional responsibility to ensure that the regulation and delivery of legal services enhances equality and access to justice for all. It also has a responsibility to ensure that the delivery of legal services is in the interest of the public, advances human rights and contributes to the social upliftment of indigent communities.

3.2.4 The legal profession and other providers of legal services have a constitutional obligation to provide legal services in a non-discriminatory manner that respects the rights of clients and users. In addition, the legal profession has a moral and ethical duty to assist in providing legal services to the poor and marginalised members of society.

3.2.5 The Constitution guarantees the right of every citizen to choose his or her trade, occupation and profession freely, but it also mandates government to regulate, by law, any such practice, trade or occupation (Section 22 of the Constitution).

3.2.6 In terms of Section 85 of the Constitution, the President and the Cabinet are vested with Executive Authority. This includes the following:

- Implementing national legislation;
- Developing and coordinating national policy;
- Coordinating the functions of state departments;
- Preparing and initiating legislation; and
Performing any other functions provided for in the Constitution and in national legislation.

3.2.7 It is within this constitutional mandate that the Minister initiates this policy framework to regulate state legal services.

3.3 GUIDING PRINCIPLES FOR THE TRANSFORMATION OF STATE LEGAL SERVICES

The guiding principles for state legal services are professional efficiency, collegiality, accountability and value for money.

3.3.1 Professional efficiency

3.3.1.1 Professional efficiency in the context of state legal services denotes commitment by government to promote developmentally-orientated state legal services that accord with the constitutional imperative of a career-oriented public service. It is through this commitment that government must not only build and nourish expertise in relation to scarce skills and areas that require specialisation, but must contribute to the pursuit of service excellence to advance and promote the interests of government, the state and its citizens.

3.3.1.2 The quest to promote professional efficiency will also help change the mindset within the public service and turn public sector practitioners into lawyers that compete equally with their private sector counterparts.

3.3.2 Collegiality

3.3.2.1 The integration and consolidation of legal services within the Department and across government will broaden intellectual capability, widen the pool of expertise across government and enhance the sharing of information and wisdom among the public sector practitioners.

3.3.2.2 Collegiality between public sector practitioners and their private sector counterparts will contribute to and enhance jurisprudence.

3.3.3 Accountability and value for money

3.3.3.1 At an organisational level, accountability will ensure value for money and promote good governance, while at the institutional level, the quest for an equal society where everyone has the equal protection and benefit of the law will be realised.

3.3.3.2 At the level of practitioners, accountability denotes integrity, honesty, professional restraint and adherence to the ethical standards of the profession.

3.3.3.3 Strong and accountable state institutions are crucial in attaining the vision of a developmental state as it prevents wastage of state resources that must rather be geared towards poverty alleviation and building infrastructure that will support a thriving economy.
CHAPTER 4:
ADDRESSING CHALLENGES IN
THE MANAGEMENT OF
STATE LITIGATION

A FRAMEWORK FOR STATE LITIGATION (BLUEPRINT)

4.1 Introduction

4.1.1 An essential component of the restructuring of state legal services entails a critical look at the strategic positioning and operations of the Office of the State Attorney. The advocacy on the Constitution and Bill of Rights by government, civil society and NGOs is beginning to be felt on the ground. This is evidenced by how people in South Africa are increasingly exercising their rights through the courts. This needs to be celebrated and nourished by ensuring that systems for access to justice are operational within the state environment. It is clear though, that this growth in litigation has not been matched with government’s capacity to respond to the emerging environment. This policy framework intends to reposition the state machinery to be able on the one hand to grant access to justice and on the other hand to advance the interest of the state. The policy framework in addition will address the following:

- Spiralling cost due to the state not optimally using its capacity; and
- Over-reliance on private legal capacity without government having the mechanism to manage the cost.

4.1.2 It has become necessary to do an objective assessment of the performance of state legal services, and in particular the Office of the State Attorney, as this information is required in order to appropriately position the office in terms of both strategic and operational interventions that must be implemented. Part of the assessment will look at key indicators such as the success rate in respect of litigation, the number of PDIs briefed, the costs incurred, the management of contingent liabilities, timeliness of litigation and the management of recoveries. Whilst our information tools to build good trends are still being refined, indicative information drawn from the previous financial year on the area of success rate seems to indicate that of the cases enrolled by the Office of the State Attorney in the past financial year, only an estimated 38% were successfully litigated.

4.1.3 While locating the Office of the State Attorney under the broader state legal services umbrella, specific and localised initiatives are necessary for the effective and efficient functioning of this strategic component. The lack of effective coordination of legal services has led to a number of operational challenges experienced across government, which include the following:

(i) Prescription of claims involving government (as a result of not properly managing diaries);
(ii) Default judgments granted against government for its failure to file papers on time, which have led to attachment of state assets;
(iii) Lack of adequate, proper and timeous instructions by the State has an impact on the ability of attorneys and advocates who represent government to adequately prepare cases for court;
(iv) Inappropriate and costly decisions to litigate in some instances where matters could be resolved through other means;
(v) Lack of a uniform system of
4.1.4 Various challenges in respect of the management of state litigation have been identified, and responses to those challenges have been evolving since 1994. The challenges range from a lack of responsiveness of the State Attorney in providing appropriate legal representation and a lack of skill in dealing with complex matters, to a lack of proper coordination between departments (who are clients of the State Attorney) and the Office of the State Attorney. These challenges can, in part, be attributed to the absence of a formalised framework on the management of state litigation.

4.1.5 The challenges were magnified and highlighted by the groundbreaking Nyathi judgment, where the Constitutional Court declared Section 3 of the State Liability Act, 1957, unconstitutional. (Nyathi v Member of Executive Council for the Department of Health, Gauteng and another 2008 (9) BCLR 865 (CC)). Section 3 of the State Liability Act, 1957, had prohibited the attachment of state property to satisfy a judgment debt against the state. When Mr Nyathi had approached the Department of Health, Gauteng, for an interim payment, this was not done. The court found that there was much “bureaucratic bungling which impedes the delivery of justice”. The failures highlighted by the Nyathi judgment were attributed to the Office of the State Attorney and the legal services component of the Department of Health, Gauteng.

4.1.6 The Nyathi judgment ordered the Minister of Justice and Constitutional Development to, among others, amend Section 3 of the State Liability Act, 1957, which amendments have already been attended to. These amendments have, however, brought with them their own challenges in that state property can now also be attached and sold to satisfy unpaid judgment debts incurred by the state. Government has, however, been given an opportunity to put processes in place to ensure that court orders are satisfied before attachments ensue.

4.1.7 This policy framework is intended to set the standards that regulate the relationship between the Office of the State Attorney and departments as clients. The document is practical and operational, and fulfils the gap required to concretise the relationship between the Office of the State Attorney and departments. The policy framework seeks, through regulations/guidelines, to address, the challenges encountered in the management of state litigation through the following measures:

- Implementing clear guidelines that regulate how state litigation is to be conducted;
- Clarifying the roles and responsibilities of stakeholders in state litigation management;
- Setting out minimum qualifications for persons dealing with litigation in the...
respective departments. It has been recognised that the work of the State Attorney must be complemented by adequate support and instructions from client departments. There is thus a need for the quality of that support to be of a high standard; and

- Setting guidelines for briefing patterns to address government’s transformation imperatives. The guidelines will deal broadly with aspects such as: giving preference to PDIs, especially women; cost aspect to the State; allocation of work and identification of instances where allocation of work needs to be made to the private sector; and enhancing and transferring skills by way of exposure to all areas of legal work.

### 4.2 Elements of the policy framework relating to litigation

#### 4.2.1 While the policy framework aims to set guidelines for the efficient and effective management of state litigation, it is clear that other areas that complement the aforesaid aim also need to be addressed. For example, it recognises that a skills development plan for litigation officers is necessary for the efficient management of state litigation.

#### 4.2.2 The policy framework deals with the role-players who play an essential role in the management of state litigation. This aspect of the policy framework is intended to identify the essential role-players in state litigation, and sets out the norms that regulate their relationship and interaction in the management of state litigation. It also deals with ethical standards that will guide litigation officers and state attorneys.

#### 4.2.3 The policy framework envisages the setting of norms and standards for the state legal services in relation to litigation. The relationship between the client departments and State Legal Services is to be regulated in order to ensure timeliness, clarity of instruction and process pertaining to litigation.

#### 4.2.4 There is a need for a coordinated and strategic risk litigation assessment. It will now be required that every organ of state should track trends in litigation, identify risks and propose steps that can be taken to mitigate such risks. An analysis of risk must also be prepared annually and submitted to Cabinet and Parliament. The assessment of trends in litigation will assist government in planning its limited resources according to such trends, training and developing skills in the areas identified, planning the distribution and possible increases in budget requests, and planning other interventions in the areas identified, other than only using litigation as the best form of resolving disputes between the aggrieved and government and vice versa.

#### 4.2.5 A complaints-handling mechanism is envisaged to deal with complaints against litigation officers and state attorneys. Litigation officers can be disciplined in terms of the procedure determined for the public service, while state attorneys can be disciplined in terms of the processes pertaining to the public service for administrative transgressions or the rules of the law society for professional conduct.
4.3 Transformation imperatives in respect of women

4.3.1 While the state has endeavoured to meet, and has met, targets for the briefing of PDIs, the performance in respect of briefing women leaves much more to be achieved. In the 2010/11 financial year, women received only 31% of the total number of briefs issued. The need to empower women generally, and in this instance in the legal profession, is not merely about developing women for greater roles in the public sphere, but advancing the cause of women in society in general.

4.3.2 The Millennium Development Goals (MDGs) are eight international development goals that all 193 United Nations member states and international organisations have agreed to achieve by the year 2015. One of these goals (Goal 3) relates to the promotion of gender equality and the empowerment of women. In an article published by ActionAid, which deals with the rights of women and the achievement of the Millennium Development Goals, the following is stated:

“The disproportionate impact of poverty on women and girls is not an accident, but the result of systematic discrimination. The implications are clear. Unless the specific barriers that prevent women and girls from escaping poverty are tackled, progress towards the goals cannot be accelerated... Advancing the rights of women and girls is not just the most effective route to achieving the 2015 goals. It is also a moral necessity.”

The level of discrimination referred to above holds true for women in the legal profession, and must be addressed, in part, through a briefing policy.

4.3.3 Having regard to the above, and while noting that broader challenges in South Africa are unique to an extent, the challenges encountered regarding the failure to brief women are not unique to South Africa. Women in Australia have been found to be disadvantaged in comparison to their male counterparts in so far as their growth and development in the legal profession is concerned. Francesca Bartlett notes, in her article in the Melbourne University Law Review (Vol 32), that despite the number of women who graduated with law degrees in 1999 equaling the number of men, more women than men did not go on to practice law and more women than men left the practice of law. The trend is the same in the United States, Canada, England and Wales.

4.3.4 The underrepresentation of women in legal practice is a cause for concern and requires special interventions in briefing patterns by both the state and the private sector. As women are severely underrepresented in the cadre of advocates and attorneys, the department will prioritise briefing patterns to improve this capacity. The scope will be extended to include women attorneys that have the right of appearance in High Courts. Women will for example be encouraged to join the legal fraternity by offering bursaries to women, utilising government’s initiatives such as the Technogirl and appointing women to do articles of clerkship in government. Furthermore, the work allocated to women will be actively monitored, with regular debriefings so as to understand the challenges and find ways to address them.
4.3.5 The reliance on advocates in private practice has enabled the state to address challenges encountered by the State Attorney with regard to increasingly complex cases and the sheer increase in the volume of work that the state attorneys have to contend with. However, there must be greater involvement of private attorneys in the rendering of these services where necessary. It is noted that private attorneys are larger in number than advocates and also equal in experience. They are therefore a useful source of expertise that ought to be tapped into.

4.3.6 It must also be noted that while it takes cognisance of the use of private legal practitioners, the briefing policy should not be viewed as countering the vision of the broader transformation of legal services, which envisages public sector lawyers being empowered to deal with matters themselves without the over-reliance on private legal practitioners.

4.3.7 Briefing patterns by the state have been a contentious issue for some time. In spite of the Department’s commitment, through the Office of the State Attorney, to brief 65% in value to PDIs, and subsequently increasing the target to 70%, much dissatisfaction remains. This dissatisfaction can be expressed in the following terms:

- Briefs are not awarded in an equitable manner.
- Women are not briefed often enough.
- The quality of briefs issued to PDIs are not challenging enough.
- PDIs are not briefed to perform commercial work.
- PDIs are not briefed in constitutional matters, resulting in a select few advocates appearing in the Constitutional Court very often.

- Many young advocates who join the Bar are not given work, which results in their struggling to sustain their practices.
- There are unproven allegations of corruption in the awarding of briefs.

4.3.8 Further, and having noted all of the above, there remains an untapped area in briefing patterns by the state. Many state entities and certain other government entities brief private counsel directly, with some of them even engaging the services of private counsel on a retainer basis. A cause for concern is that the briefing of counsel in this context is not subject to the policy that the Department has committed itself to in terms of equity targets. Furthermore, it is contended that legal experience in commercial law, tax law, environmental law and the like is denied to PDIs.

4.3.9 Apart from the stated intention of attaining equity in briefing patterns, the intention is also to ensure the development of PDIs with a view to preparing them to occupy positions nationally or internationally, including the judiciary. While the former may be argued to have been attained, the latter cannot be so argued, as there is currently no mechanism to measure and assess the development and growth of PDIs.

4.3.10 The following key challenges are encountered by the Office of the State Attorney when briefing advocates:

- Client departments largely decide on whom to brief.
- In certain provinces, there are only a few PDI practitioners at the Bar.
- An established practice of briefing white males to perform certain types of work, such as commercial work, remains.
- Much reliance is placed on the reputation
for success of certain counsel, and this, in turn, creates a pattern of briefing to the exclusion of other competent counsel.

- Transformational goals do not generally feature in the briefing patterns of legal firms or indeed all state entities.

4.3.11 The proposed briefing policy seeks to rectify the above challenges by ensuring the fair distribution of legal work. The role of the State Attorney must be strengthened with regard to work outsourced by the State Attorney. However, where the state briefs private legal firms with whom it conducts business, these firms must show that they are also committed to briefing PDIs and advancing the cause of women in legal practice. This should be a qualifying factor before they are awarded any legal work by the state, including state entities.

4.3.12 The objectives of the briefing policy are to 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.

4.4 Core values

4.4.1 The briefing policy is guided by the core values of transformation, transparency, value for money, accountability for work performed and upholding sound ethics through the declaration of any potential and actual conflict of interest. Transformation in the rendering of legal services in general and state legal services in particular is thus crucial. The state and its entities, as the largest consumer of legal services, bear the responsibility to undo past discriminatory practices in the briefing of private legal practitioners. In transforming briefing patterns, the state will not only undo those patterns, but will also ensure the development of a strong, skilled legal profession that feed into the judiciary and other positions of responsibility in the broader community and internationally.

4.4.2 In expending state resources to procure legal services, there must be proper accounting for how the resources of the state are spent. Value for money in this context includes the reliability and timeliness with which services are rendered. The state and its entities must be held accountable for the state money spent and, as such, mechanisms must be put in place to effect savings for the state.

4.4.3 Conflicts of interest – perceived or real – are a fundamental issue in the delivery of legal services that should be avoided by state practitioners at all costs. In outsourcing legal work, conflicts arise when those making decisions are influenced or appear to be influenced by personal interests in carrying out responsibilities. Potential or actual conflicts of interest must be declared.

4.4.4 As much as it is recognised that private legal practitioners have a role to play in the delivery of legal services for and by the state and its entities, there must be a process in place to determine whether the use of private legal practitioners is warranted. As the state expends millions of rands in maintaining legal divisions within its structures, it also remains responsible for decisions taken to outsource legal work.
4.4.5 Prior to deciding whether to use private legal practitioners, some of the considerations should be to determine the nature of the legal work required to be outsourced and the specific outcomes that are sought. As far as possible, certain legal work must be performed by in-house legal experts. The decision to use private advocates should be taken only after considering whether there are other legal experts that may be able to perform the task. There are also considerations of objectivity on the part of in-house legal experts and whether the use of private legal experts is not warranted in order to give the state the best legal advice possible.

4.4.6 In order to capitalise on opportunities to train and develop the skills of state attorneys, not all work should be outsourced to private practitioners. A distinction must be drawn between legal work that can be performed effectively and efficiently in-house and work that requires specialist and high-level expertise. The creation of in-house expertise is essential for the development of a body of trained and highly skilled public sector lawyers. The state covers vast areas of the law and legal practice, and must therefore move towards becoming an employer of choice through the experience it has on offer to law graduates and legal professionals.

4.4.7 Once the justification for the outsourcing of legal work has been determined and documented, certain core principles must be adhered to in implementing the briefing policy.

4.5 Core principles in giving effect to the briefing policy

4.5.1 A central database of all private law firms and advocates wishing to perform work for the state and its entities must be created and maintained. All legal practitioners wishing to perform work on behalf of the state and its entities will be required to submit details of their qualification/s, years of experience, areas of special interest and notable achievements. This information will form part of a central database from which the choice of counsel in a particular matter can be made.

4.5.2 A mechanism should be created for sourcing legal firms and advocates from the database in order to ensure a fair and even distribution of work. The decision on which counsel to use will be made by using the database and will be on a rotational basis to ensure that general work is spread out as much as possible, while in some areas of specialisation, centres of expertise will be created. These will not be based on a handful of practitioners, but a good number that can be regarded as experts in different areas of law. It is not proposed that the choice of counsel in a particular matter will become a mechanical choice. The system to be created must also include a process for the matching of skills to the nature of the legal challenge that is being mounted against the state. At the same time, this must not be interpreted as meaning that the same counsel with expertise in a particular matter will always be briefed. The idea is to develop skills and hence to provide opportunities to those desiring to gain more experience in specific fields.

4.5.3 In terms of Section 8 of the State Attorney Act, 1957, the State Attorney or the person in charge of a branch of the Office of the State Attorney is entitled, in the exercise of his or her functions, to instruct and employ as a correspondent any attorney or other qualified person to act in any legal
proceedings or matters. It is in terms of this Section that the State Attorney bears the final responsibility for the briefing of counsel in a particular matter, which is sometimes overruled in exceptional circumstances by the Minister and/or accounting officer of a particular department or entity.

4.5.4 A tool should be created to ensure the monitoring and evaluation of legal work performed for the state and its entities by private legal practitioners. There must be interaction between the legal officers working for the state and its entities to regularly monitor progress made on work outsourced and whether the envisaged outcomes will be met. This entails ongoing monitoring. However, at the conclusion of a task, there must be an evaluation of the work that has been concluded by using the following criteria:

- Was the outcome successful for the state or the entity?
- If not, what were the inhibiting factors that led to failure?
- Were the time lines met and, if not, what are the reasons for the delay?
- Were the costs expended on the case justified, given the amount of the claim or the order paid for?

4.5.5 A tool should be developed for measuring the transfer of skills through the outsourcing of legal work. The transfer of skills between skilled practitioners and those who are still at a developmental stage is not only imperative but also beneficial to the state and the country as a whole. In tandem with ensuring the empowerment of historically disadvantaged practitioners, the issuing of briefs shall be aimed at promoting and facilitating the development of skills in multiple disciplines of law, as well as ensuring an increase in the pool of expertise of black legal practitioners from which appointments to the Bench can be made.

4.5.6 The following measures should apply when advocates are briefed to ensure that an exchange of critical skills occurs:

- Where more than one practitioner is briefed, at least one practitioner must be a PDI.
- Briefs to senior and junior counsel should be issued on explicit conditions that junior advocates shall be actively involved in the performance of all activities connected to the delivery on the brief.
- There must be commitment on the part of the practitioner to deliver on the brief to the best of his or her ability. The necessary support from the State Attorney, the legal Advisers from the client government department and the senior counsel, if appointed in a matter, is to be provided to the practitioner being empowered in order to ensure successful delivery on a brief.
- Ensuring regular reporting by the State Attorney and all state entities and private legal firms contracted to perform legal work for the state and its entities, on the number of briefs allocated, their value and outcome of work outsourced.

4.5.7 The State Attorney reports on the allocation of work it outsourced through the Department in its annual report and a report to the Portfolio Committee on Justice and Constitutional Development. This ensures transparency. However, there has to be a similar level and scale of reporting by state entities.
CHAPTER 4: ADDRESSING CHALLENGES IN THE MANAGEMENT OF STATE LITIGATION

4.5.8 The development of the briefing policy will ultimately result in uniformity in practices engaged by the state and its entities in the outsourcing of legal work. Moreover, it will advance the transformation goals of empowering PDIs, particularly women.

4.5.9 The costs of litigation for the state, in relation to both direct and indirect costs, are rapidly rising. Indirect costs refer to awards made against the state, while direct costs refer to costs incurred in the litigation itself, such as the payment of counsel, securing expert evidence etc. These rising costs impact negatively on the economy, as the costs of litigation are borne by state funds. It is a concern that these resources, which could be expended in the delivery of essential government services to the people, are spent on funding litigation. These imperatives signal the need to put mechanisms in place to manage costs for the state and its entities.

4.5.10 Currently, the setting of legal tariffs or fees is regulated to an extent by legislation. The Rules Board for Courts of Law Act, 1985, the Magistrate’s Courts Act, 1944 (Act No. 32 of 1944), and the Supreme Court Act, 1959 (Act No. 59 of 1959), determine the fees that can be charged by attorneys and advocates to a certain extent. The fees charged in terms of these statutes are, however, not the only scale in terms of which fees are levied. In terms of the Attorneys Act, 1979, the law societies may determine fees where no fees are prescribed by statute. The rules of the GCB dictate that fees must be reasonable.

4.5.11 Despite the legislation referred to above and some measure of influence from the legal profession itself, legal fees have risen to exorbitant levels, not only making access to legal services unaffordable to the state. The setting of legal fees has remained largely the domain of the legal profession itself, with little meaningful intervention by the state and consumers of legal services.

4.5.12 Legal fees have consequently been the subject of two separate interventions by the Competition Commission. In terms of the Competition Act, 1998 (Act No. 89 of 1998), items 1 and 2 of Part A of Schedule 1 to the Act provide that a professional association whose rules may contain a restriction that has the effect of substantially preventing or lessening competition may apply for an exemption in terms of the Act. The Competition Commission has had to determine whether to exempt the setting of minimum fees by the law societies and the GCB. As part of the engagement between the law societies and the Competition Commission, where minimum tariffs are recommended, these will not be enforced. Attorneys may charge fees below the minimum tariffs where these are prescribed. The Competition Commission has also expressed similar sentiments with regard to the setting of minimum fees in the advocates’ profession.

4.5.13 Interventions such as these are welcomed, as they seek to restore a balance in the relationship between consumers and service providers. The costs of litigation also encompass monies paid by the state in satisfaction of orders made against it, as well as for court processes. This chapter only deals with the rising direct legal costs actually paid by the state and its entities to private legal practitioners rendering services. A mechanism to deal with cost orders made against the state in matters that are declared opportunistic litigation is
proposed in this regard. The other broader aspects relating to the costs of litigation will form the subject matter of a detailed study still to be conducted. ADRM, as another strategy to reduce litigation costs, is dealt with elsewhere in this discussion document.

4.5.14 Before contemplating strategies to manage legal costs, the fundamental principle that the state does not litigate for profit must be borne in mind. This principle cannot be over-emphasised. When the state is burdened with high costs of litigation, these costs are funded by the fiscus. Taxpayers bear the burden of these costs, but even more so, poor communities continue to be denied access to essential services, as the state’s resources are being diverted elsewhere. With this in mind, it is essential to examine critically how litigation costs for the state should be controlled and curbed.

4.5.15 The state and its entities currently pay varying amounts as fees to private legal practitioners. There are, however, no uniform guidelines in the state environment in terms of which advocates are compelled to charge reasonable fees. To compound the problem, the Office of the State Attorney itself, while endeavouring to ensure that fees charged are reasonable, pays differing amounts to private legal practitioners with the same level of experience. There is a need for uniformity and greater cost-effectiveness in state legal services. A consequence of these set tariffs will be greater transparency with regard to the fees paid by the state and its entities. This will render the costs in the conduct of litigation more determinable, thereby enabling proper budgeting processes by the state and its entities.

4.5.16 In developing a tariff, it must be borne in mind that the state is a supplier of work that varies in nature. It is also through state legal work that jurisprudence in our constitutional democracy is developed. It can be noted that fees payable by the state are guaranteed.

4.5.17 In order to avoid a situation where it becomes a lucrative endeavour to sue the state, consideration will be given to setting a cap or setting a tariff where the state has been sued as a party. This relates to cost awards which are regularly made against the state and its entities.

4.5.18 It is not uncommon for certain legal practitioners to tout for cases where certain weaknesses on the part of the state are perceived. While this may be viewed as citizens asserting their rights in courts, this is not always the case, as these cases line the pockets of certain legal practitioners more than asserting the rights of innocent citizens. Some courts have taken a strong stance against such opportunistic litigation by setting up certain processes that must be followed before a court action is instituted. This was, for example, evidenced in the KwaZulu-Natal High Court, where the court ordered that before any applications relating to social grants could be made to the court, the Department of Social Development had to be approached first to resolve the problem. This has considerably decreased the number of applications made against the said department in that province. Similar strategies must be pursued in other areas where opportunistic litigation is rife.

4.5.19 The early settlement of cases where there are no prospects of success, and penalising the party who delays settlement in terms of
costs, should be encouraged. This entails, in other words, the creation of incentives for the early settlement of matters that should not proceed to trial where jurisprudence has already been established.

4.5.20 The rationale for developing a set tariff lies in the problems encountered with current practices in the legal environment.

4.5.21 The charging of excessive fees is one such problem. There are known examples of matters where fees of counsel were reduced by as much as 50% in certain instances, after these fees were questioned by state attorneys.

4.5.22 In some cases there is a perception that matters are dragged out in the court system for unnecessarily long periods to earn the maximum fees in these matters. While it is not suggested that fees were "generated" in the following example, it is worth mentioning the recent decision in Long and the Member of the Executive Committee for Education in the Western Cape versus Jacobs, delivered by the Supreme Court of Appeal (SCA) in March 2012. The case centred around negligence where an educator was assaulted by a learner and whether the conduct of the Appellant, upon gaining knowledge of the death threats made by the learner against the educator, could be regarded as negligent.

The trial judge had awarded an amount of R350,000.00 in damages. In delivering the judgment, the SCA commented that the trial was unnecessarily long and therefore costly. The record ran into 6,000 pages. Cross-examination of the Respondent ran into nine days! The trial took weeks. The court noted that legal practitioners should properly apply themselves to the case at hand and not unnecessarily prolong litigation and the trial judge should ensure that proceedings are limited to that which is necessary. The SCA concluded that "(t)o fail to do so will not only occasion a wholly unnecessary escalation of costs but will lead to the human and other resources of the courts in this country, which are under severe strain, not being optimally used." The cost for the state of counsel alone amounted to R4.8 million.

The comment of the SCA in this matter is welcomed. The legal profession is ethically bound to ensure reasonable fees in matters they are engaged in. What contributes to this criticism is that over time, relationships between attorneys and advocates develop. This camaraderie renders questioning of fees unpleasant. The cure for this ailment is to determine set tariffs that will close the doors to a discretionary charging of fees.

4.5.23 When a brief is issued to counsel, the State Attorney should be fully aware of the merits and legal issues pertaining to a matter. This will enable a proper request to counsel for his or her expert advice.
CHAPTER 5:
HOME-BASED AND INTERNATIONAL PRECEDENTS IN RELATION TO STATE LEGAL SERVICES
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5.1 THE NATIONAL PROSECUTING AUTHORITY

5.1.1 Locally, the NPA, itself a recent creation under the new constitutional dispensation, provides a good practice model for the establishment of a similar functional structure to deal with the civil litigation for and against the state. The NPA is an independent institution that renders prosecutorial services for the state. In other words, its work entails litigation in the criminal environment. The NPA has been very successful in integrating and consolidating the old fragmented Attorney-Generals’ dispensation of the apartheid government. The NPA is supported by structures that enable it to drive its mandate, such as the National Prosecuting Service.

5.1.2 In addition to the NPA, the Auditor-General of South Africa and the Government Communication and Information System, which coordinate services that cut across departments, provide good precedents for the envisaged consolidated state legal services.

5.2 AUDITOR-GENERAL OF SOUTH AFRICA

5.2.1 Chapter 9 of the Constitution establishes the Auditor-General of South Africa and the other state institutions that support constitutional democracy. The Constitution recognises the importance and independence of the Auditor-General, stating that the Auditor-General must be impartial and must exercise its powers and perform its functions without fear, favour or prejudice. Section 181(1) states further that the Auditor-General is subject only to the Constitution and the law. The Auditor-General is accountable to the National Assembly and must report at least once a year on its activities and performance. The Auditor-General is the supreme audit institution of the Republic of South Africa.

5.2.2 The functions of the Auditor-General are provided for in Section 188 of the Constitution and are further regulated in terms of the Public Audit Act, 2004 (Act No. 25 of 2004). This Act mandates the Auditor-General to perform constitutional and other functions in compliance with the broader mandate of government.

5.2.3 Section 4 of the Public Audit Act, 2004, states that the Auditor-General must audit and report on the accounts, financial statements and financial management of all national and provincial state departments and administrations, all constitutional institutions, the administration of Parliament and each provincial legislature, all municipalities and municipal entities, and any other institution or accounting entity required by other national or provincial legislation to be audited by the Auditor-General.

5.2.4 The Auditor-General provides the most comprehensive and complete mandate for the coordination of audit services across all three spheres of government and all state institutions. While it is the long-term vision of the state legal services to cover the same scope, it will be necessary for the reform initiatives to be confined to the national and provincial government over the medium term, while the consideration of including local government and municipalities is part of the longer term vision.

5.3 GOVERNMENT COMMUNICATION AND INFORMATION SYSTEM

5.3.1 The Government Communication and Information System (GCIS) was formally established in terms of Section 7(2) and (3) of the Public Service Act, 1994, and launched in 1998 as a strategic unit located in the Presidency. This unit came about as a result of an investigation into government communications by a Communications
Task Team. The mandate of the GCIS is to coordinate, guide and advise on government communication, including media liaison, and the development of communication and marketing.

5.3.2 The core vision has been to achieve integrated, coordinated and clear communication between government and South African citizens to enable them to be involved in the country's transformation. The GCIS comprises the following ten divisions: Policy and Research, Media Engagement, Marketing and Distribution, Content and Writing, Human Resources, Information Management and Technology, Finance, Supply Chain and Auxiliary Services, Strategic Planning and Programme Management, Provincial and Local Liaison, Training and Development, and Property and Facilities Management.

5.3.3 The GCIS model provides valuable lessons for an integrated communication service for government at national level, guided by Cabinet.

5.4 INTERNATIONAL BEST PRACTICES

5.4.1 Australia

5.4.1.1 The Australian Department of Justice in Victoria supports the Executive, and brings together governmental activities concerned with reform, administration and the enforcement of the law, including the following:
- All police and prosecution functions;
- Administration of the court system;
- Provisioning of the prison system;
- Administration of various tribunals and programmes to protect citizens' rights;
- Provisioning of emergency services;
- Regulation of gaming, racing, liquor licensing and trade measurement;
- Drafting of legislation; and
- Provisioning of legal advice to government.

The Australian system provides for an Attorney-General's department that serves the people of Australia by providing essential expert support to the government in the maintenance and improvement of Australia's system of law and justice, and its national security and emergency management systems. The department is the central policy coordinating element of the Attorney-General.

The Solicitor-General, together with the Director of Public Prosecutions, the Commission for Victims’ Rights, the Public Advocate, the Guardianship Board, the Ombudsman, the Commission for Equal Opportunity, the Police Complaints Authority and other units, is subordinate to the Attorney-General. The Solicitor-General provides legal services to the government and is appointed in terms of Section 4 of the South Australia Solicitor-General Act, 1972.

The Solicitor-General’s Office offers a wide selection of services, such as the following:
- Administration and Environment: This section conducts a broad litigious practice, providing legal advice and representation to ministers, government and statutory authorities. The members of this section appear regularly in courts, tribunals and boards, addressing the following matters: summary prosecutions, police matters, child protection, guardianship and mental health, environmental and planning law, and professional and occupational disciplinary proceedings.
- Advising: This section provides
CHAPTER 5:
HOME-BASED AND INTERNATIONAL PRECEDENTS IN RELATION TO STATE LEGAL SERVICES

advice to ministers and agencies on administration and constitutional law, employment law, statutory interpretation and public law generally. It also provides support to the Solicitor-General in relation to constitutional and other significant High Court litigation.

- **Civil Litigation**: This section advises on a number of large-scale and complex litigation matters arising from allegations of medical negligence, misrepresentation, breach of contract, breach of duty of care, occupiers and employer’s liability for dust disease claims, defamation and the interpretation of the Civil Litigation Act, 1936.

- **Commercial**: This section provides legal services to government in relation to contracting and commercial activities in government agencies. It also undertakes legal negotiation and documentation for major government commercial projects. The areas of practice for which the section is responsible include information technology and telecommunications contracts, commercial property projects, consultancies, the supply of goods and services to government, infrastructure projects, leases of government land or of land for government use, sale of surplus government land and purchasing of land for government use, financial securities, tendering and probity, loan and grant agreements, licensing agreements, research and development agreements, intellectual property, and building and construction contracts.

- **Commercial Counsel**: This section is responsible for the most complex, sensitive and significant commercial legal work undertaken by the Solicitor-General’s office. It is responsible for, among others, overseeing major commercial legal work, providing strategic commercial legal advice to the government, assisting and liaising with lawyers posted out and undertaking commercial legal work, especially in significant matters where experienced legal guidance is required, and lastly providing oversight and assistance in the development and maintenance of commercial legal precedents.

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

5.4.1.5

5.4.2 Ireland

5.4.2.1 In Ireland, the Attorney-General is described in Article 30 of the Ireland Constitution as “the Adviser of the government in matters of law and legal opinion”. The functions, powers and duties of the Attorney-General are to be found in the Constitution and legislation. The Attorney-General advises the government 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.

5.4.2.2 The Attorney-General further represents the state in all legal proceedings involving the state. The Attorney-General’s Office is headed by a Director-General. The Office of the Attorney-General is the legal adviser to each government department.
and certain public bodies. The Attorney-General 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 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 consists of the Office of the Parliamentary Counsel and the Chief State Solicitor’s Office. This office comprises the following units: Advisory Counsel (the provision of legal advice), Parliamentary Counsel (legislative drafting), the Chief State Solicitor’s Office (provision of litigation, conveyancing and other transactional services) and Statute Law Revision (statute law revision and consolidation).

5.4.2.3 Ireland is an example of a system where the prosecution, civil litigation and state advisory services are kept separate, and this appears to be a good model for South Africa.

5.4.3 Malawi

5.4.3.1 The Ministry of Justice and Constitutional Affairs is headed by an Attorney-General who is appointed by the President in terms of Section 98(1) of the Malawian Constitution. The Attorney-General is responsible for advising the government on all legal matters, and conducts civil litigation for and on behalf of the government. In addition, the Ministry oversees the Solicitor-General’s Chambers (supervising and monitoring the conduct of civil litigation, the drafting of legislation and the negotiation of loan agreements and other legal instruments for and on behalf of the government) and the Public Prosecutions Office (headed by the Director of Public Prosecutions, also appointed by the President).

5.4.3.2 Similar to the Irish system, the Malawian jurisdiction provides for a clear distinction between the role of the Office of the Director of Public Prosecution and the Office of State Legal Services. The responsibility for instituting public prosecutions lies with the Director of Public Prosecutions. Legislation drafting is allocated to the Drafting section, which is headed by the Chief Parliamentary Draftsman (appointed by the President), who is responsible for the drafting of principal and subsidiary legislation on behalf of government. The Legal Aid department is headed by the Chief Legal Aid Advocate, and is responsible for providing legal aid to eligible and deserving persons who cannot afford the cost of private legal representation. The Administrator-General department is headed by the Administrator-General, and is responsible for the administration of deceased estates and the collection of estate duty. The Registrar-General department is headed by the Registrar-General, and is responsible for the registration of companies, businesses, names, births and deaths, political parties, trusts, patents, industrial designs and trademarks.

5.4.4 India

5.4.4.1 In India, the Attorney-General is the chief legal Adviser of the Indian government. The Attorney-General is appointed by the President and is responsible for giving advice to the government on such legal matters and to perform other duties of a legal character as may be referred or assigned to him or her by the President. The Attorney-General has the right to participate in the proceedings of Parliament, but cannot vote.

5.4.4.2 The Attorney-General is to be consulted in matters of real importance and only
after the Ministry of Law has been consulted. The Attorney-General is assisted by the Solicitor-General and four additional solicitors. The Attorney-General cannot defend an accused in criminal proceedings. The Indian system is notable as the Attorney-General is the only entity to represent the Indian government.

5.4.5 Canada

5.4.5.1 The positions of the Minister of Justice and the Attorney-General are combined into one Cabinet position. The Attorney-General is the chief law officer. The Minister of Justice is concerned with questions of policy and their relationship with the justice system. The department provides legal services to government on a “portfolio” basis. Six portfolios encompass the entire range of federal departments and agencies. The six portfolios are as follows: Government-at-large and Justice, Aboriginal Affairs, Business and Regulatory Law, Central Agencies, Public Safety, Defence and Immigration, and Tax Law. The department delivers services through a mix of co-located departmental legal services units, specialised branches located in the Department of Justice and a network of six regional offices located across the country.

5.4.5.2 The department also maintains a policy and programme development capacity to fulfil core departmental responsibilities associated with the administration of justice in Canada and to support the government’s policy and programme priorities related to safety and security. To these ends, the department develops and maintains strong working relationships with policy and programme partners across the federal government, as well as with counterparts in the provinces and territories, and partners in non-governmental organisations and international institutions and organisations.

5.4.5.3 The responsibilities of the Minister and the Attorney-General are set out in the Department of Justice Act and 47 other acts of Parliament. The Department of Justice fulfils the following three distinctive roles:

- It is a policy department, with broad responsibilities for overseeing all matters relating to the administration of justice that fall within the federal domain.
- It provides a range of legal advisory, litigation and legislative services to government departments and agencies.
- It is the central agency responsible for supporting the Minister in advising Cabinet on all legal matters, including the constitutionality of government initiatives and activities.

5.4.5.4 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 establishing portfolios. Portfolios are established based on the different areas of specialisation that need to be addressed holistically by state legal services. In the South African situation, the areas of specialty would include the following areas of the law: trade and industry, mining and mineral law, environmental law, property rights, human rights, commercial law and land rights.
CHAPTER 6:
INTERIM MEASURES TO IMPROVE
STATE LEGAL SERVICES
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6.1 KEY POLICY AND LEGISLATIVE MANDATES

6.1.1 The provisioning of state legal services is based on the principles and values espoused in the following pieces of legislation, among others:
- Constitution of the Republic of South Africa, 1996;
- Public Service Act, 1994 (Act No. 103 of 1994);
- Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);
- Broad-based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);
- Admission of Advocates Act, 1964 (Act No. 74 of 1964);
- Attorney’s Act, 1979 (Act No. 53 of 1979);
- State Attorney Act, 1957 (Act No. 56 of 1957);
- Public Finance Management Act, 1999 (Act No. 1 of 1999);
- Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005);
- State Liability Act, 1957 (Act No. 20 of 1957).

6.1.2 The State Attorney Act, 1957 in particular, which regulates litigation on behalf of and against the state, is an antiquated statute which does not meet the needs of the modern developmental state. This Act must be realigned to current realities. Therefore, there is an urgent need to consolidate and integrate State Legal Services into a single, well-staffed Office of State Legal Services, to strengthen the governance and management framework for this important state function.

6.1.3 As indicated above, the consolidation, integration and enhancement of professional efficiency may occur both in the Department, as the lead functionary in the provisioning of state legal services, and across the government spectrum.

6.2 FUNCTIONAL ALIGNMENT OF STATE LEGAL SERVICES

6.2.1 The following steps are necessary to give effect to the alignment and integration of state legal services into the envisaged Office of the State Legal Services:
- Consolidation of all state legal services performed in different branches and units of the Department under the Office of State Legal Services. The consolidation will firstly focus on government-wide services that are currently dealt in by the Department.
- Integration of the legislation certification function into the Department’s Office of State Legal Services, which will scrutinise the legislation it receives from all the departments’ legislative units for compliance with the Constitution and other relevant legislation. This certification unit basically has an overview function over all legislation and will be responsible for the certification or not of the bills submitted to it. The proposed certification unit’s function requires independence and it will serve the entire government. It will also be responsible for quality control of all legislation. Therefore, there will not be any duplication of functions.
- In considering the functioning of state legal services and in setting up structures to deal with these, a distinction must necessarily always be drawn between department-specific functions of units,
as opposed to the type of unit which services the whole of government.

- Regarding the integrated and consolidated legal functions in the Department, specific work streams are envisaged as set out in paragraph 6.3 below, although further consultation will continue and some changes may be effected.

- The Head of State Legal Services will oversee and coordinate all the work performed in relation to the Office of State Legal Services.

- An intergovernmental coordination stream will coordinate legal services across the national and provincial spheres of government. The coordination of legal services at local level with all state institutions will form part of the envisaged outcome of the long-term reform process.

- Each of the work streams in the Office of State Legal Services will work under a coordinator/unit head, who will report to the Head of State Legal Services. Work of different streams may be merged where this would enhance efficiency.

- Some of the incumbents of the different branches and units who perform legal services would be attached to the stream relevant to their line function, with a view to creating the required capacity in the stream. New posts will be created and filled where necessary.

6.2.2 The alignment and mainstreaming of posts and post designations would be a gradual process that will be informed by consultations during the first and the second phases.

6.3 FUNCTIONS OF THE STATE LEGAL SERVICES AND THE DIFFERENT FUNCTIONAL WORK STREAMS

6.3.1 It is envisaged to functionally realign the Office of the Chief Litigation Officer, the Office of the State Attorney, the Office of the Chief State Law Adviser, and the Family Advocate Services, and integrate them under one office, namely the Office of State Legal Services.

6.3.2 The main functions of the Office of State Legal Services relate to, among others, the following aspects:

- Managing state legal services for departments and their officials on civil matters;
- Establishing competitive and professional state legal services;
- Facilitating the alignment of state legal services to government policy;
- Strengthening in-house capacity for government litigation;
- Tracking litigation and interacting with Constitutional Development on aspects arising from constitutional litigation;
- Providing strategic advice to the Legal Services Office in the Department;
- Providing constitutional litigation advice and guidance to and on behalf of the state and its organs;
- Developing strategies for public interest litigation;
- Conducting litigation risk analysis; and
- Developing, drafting and performing certification of legislation.

6.3.3 The functions of the different streams will be as follows:

6.3.3.1 Intergovernmental Coordination/Relations
CHAPTER 6: INTERIM MEASURES TO IMPROVE STATE LEGAL SERVICES

This work stream will be responsible for the coordination of legal services across the various spheres of government in accordance with constitutional and legislative imperatives. It will be responsible for the following functions, among others:

- Setting norms and standards for the performance of legal services across government; and
- Monitoring and evaluation to ensure legal services of high standards.

6.3.3.2 Specialist Litigation

The functions of this stream will include the following, amongst others:

- Representing the state and its officials in constitutional matters;
- Handling highly specialised litigation that has an impact on government and society as a whole;
- Handling constitutional litigation matters on behalf of the state at all spheres of government;
- Developing broad-based constitutional litigation expertise; and
- Developing in-house expertise on specialist areas of litigation, including constitutional litigation.

6.3.3.3 General Litigation

This function entails the handling of litigation of a general nature and includes the following, among others:

- Representing the state and its officials in litigation matters, excluding constitutional and other specialist litigation;
- Dealing with diverse types of civil litigation in the high courts and the magistrate’s courts, as well as appeals from these courts, including appeals to the Supreme Court of Appeal;
- Civil litigation relating to labour matters, including litigation in the CCMA and the Labour Courts;
- Civil litigation relating to land claims, including litigation in Land Claims Courts;
- Appearance in various forums, including inquests; and
- Drafting and/or settling all types of contracts and agreements, both simple and complex, on behalf of various departments, and conveyancing and notarial services on behalf of government.

6.3.3.4 Alternative Dispute Resolution Mechanism/Mediation Services (ADRM)

This stream will be responsible for developing a policy framework for the institutionalisation of ADRM for handling disputes that involve the state at all levels of operation. These will include the following:

- Coordinating conciliation, mediation and arbitration of disputes involving the state;
- Developing guidelines for the mediation of disputes involving the state, pursuant to the prevailing regulatory framework; and
- Screening and evaluating alternative forms of redress to litigation in deserving cases.

6.3.3.5 State Legal Advisory Services

The functions of this work stream will be the following, among others:

- Legal opinions: the rendering of opinions to departments;
- International agreements: all
international agreements, including extradition agreements are to be scrutinised by the state law advisers;

- Scrutinising subordinate legislation; and
- Providing constitutional and legal advice to government.

6.3.3.6 Legislation Certification

The functions of this work stream will include, among others:
- Performing certification of bills;
- Scrutinising draft legislation and ensuring that it complies with the parliamentary legislative process, including constitutional compliance; and
- Translating legislation.

6.3.3.7 Corporate Management and Research

This work stream will manage and facilitate the provision of corporate management services and will provide cooperative governance services and support to the line function streams. The stream will also be responsible for the following functions, among others:
- Setting broad standards for legal services;
- Performing research as required; and
- Monitoring and evaluating performance of line function streams.

6.4 ENVISAGED FUNCTIONAL STRUCTURE OF STATE LEGAL SERVICES

6.4.1 The establishment of an interim consolidated Unit: State Legal Services in the Department of Justice and Constitutional Development is contemplated in terms of Section 7B of the Public Service Act, 1994. The Department is in the process of finalising the development of policy and legislative frameworks that will culminate in the establishment of the Office of State Legal Services as contemplated in Section 7A of the Act as the best option to enhance the intended reforms and efficiency of the office.
This policy framework constitutes a roadmap towards the attainment of the immediate and long term goals. The implementation of the policy framework is two-pronged, namely:

(i) Implementation of immediate solutions which entail the consolidation of functionaries and components within the Department which render legal services, and the coordination of legal services across the national and provincial spheres of government as mandated by the prevailing policy and legislative framework; and

(ii) Implementation of medium to long term solutions which entail the development of a legislative framework that will overhaul the State Attorney Act and put in its place legislation that will establish a seamless institutional framework for effective coordination and consolidation of state legal services across all spheres of government to enhance quality and integrity of legal services provided on behalf of and for the state.

The policy framework also forms the basis for meaningful consultation with departments at national, provincial and local spheres of government, state institutions and other organs of state, and entities representing the legal profession, both statutory and voluntary organisations as well as the judiciary and civil society. Views and comments obtained through the broad consultation process will be taken into consideration in developing a comprehensive implementation programme to realise the objectives indicated in the policy framework.

A programme of action for the envisaged consultations and implementation of the commitments set out in the policy document will be developed by the Director-General and the Head of the State Legal Services upon his or her appointment, who will be assisted by a team of relevant managers. The Head of Legal Services and the management team will be responsible for the implementation of the programme of action.

The Minister will report regularly to the Cabinet on progress made on the implementation of this policy framework.

This policy framework will contribute in the end that we succeed in

“Opening the doors of access to equal and affordable justice for all”
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