

REPUBLIC OF SOUTH AFRICA

STATE ATTORNEY AMENDMENT BILL

*(As amended by the Portfolio Committee on Justice and Constitutional Development
(National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 52B—2013]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the State Attorney Act, 1957, so as to provide for the establishment of offices of State Attorney; to provide for the appointment of a Solicitor-General and State Attorneys; to provide for the powers of the Minister relating to the functions of the offices of State Attorney; to provide for the powers and functions of the Solicitor-General; and to provide for matters connected therewith.

Parliament of the Republic of South Africa enacts as follows:—

Substitution of section 1 of Act 56 of 1957

1. The following section is hereby substituted for section 1 of the State Attorney Act, 1957 (hereinafter referred to as the principal Act): 5

“Establishment of offices of State Attorney

1. (1) The Minister of Justice and Constitutional Development may establish offices of State Attorney in order to promote the efficient and effective performance of the functions provided for in section 3.
(2) The office of the State Attorney established in Pretoria and the branches thereof, existing at the commencement of the State Attorney Amendment Act, 2014, are deemed to have been established as offices of State Attorney under this section.” 10

Substitution of section 2 of Act 56 of 1957, as amended by section 1 of Act 7 of 1966

2. The following section is hereby substituted for section 2 of the principal Act: 15

“Appointment of Solicitor-General, State Attorneys and other persons in offices of State Attorney and termination of appointment

2. (1) The Minister of Justice and Constitutional Development may, subject to the laws governing the public service, appoint as Solicitor-General, a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned— 20

- (a) who is admitted as an attorney in any division of the High Court of South Africa; or
- (b) who—
- (i) is admitted as an advocate in any division of the High Court of South Africa;
 - (ii) was previously admitted as an attorney in any division of the High Court of South Africa and practised as such;
 - (iii) has not been struck off the Roll of attorneys or Roll of advocates, as the case may be; and
 - (iv) is eligible to be re-admitted as an attorney,
- and who shall, with due regard to the ethical norms and standards in the attorneys' profession, be subject to the direction and supervision of the Minister.
- (2) The Solicitor-General is appointed for a term of five years, which may be extended by the Minister of Justice and Constitutional Development for any further period or periods of not more than five years at a time.
- (3) The Minister of Justice and Constitutional Development may, subject to the laws governing the public service and after consultation with the Solicitor-General, appoint—
- (a) as State Attorneys, fit and proper persons who are admitted and entitled to practise as attorneys in any division of the High Court of South Africa, and who shall be the heads of offices of State Attorney established or deemed to have been established in terms of section 1;
 - (b) as many persons, who are fit and proper, and who are admitted and entitled to practise as attorneys in any division of the High Court of South Africa, as may be necessary for the proper performance of the business of an office of State Attorney; and
 - (c) such other persons as may be necessary for the proper performance of the business of an office of State Attorney.
- (4) (a) The appointment of a Solicitor-General in terms of this section shall, subject to the laws governing the public service, and after following due process, terminate—
- (i) if a division of the High Court of South Africa orders that—
 - (aa) his or her name be struck off the Roll of attorneys or Roll of advocates, as the case may be; or
 - (bb) he or she be suspended from practice as a sanction arising out of disciplinary processes instituted by the relevant professional governing body in the legal profession; or
 - (ii) in terms of any ground provided for in section 17 of the Public Service Act, 1994 (Proclamation No. 103 of 1994).
- (b) The appointment of a State Attorney or attorney in terms of this section shall, subject to the laws governing the public service, and after following due process, terminate—
- (i) if a division of the High Court of South Africa orders that—
 - (aa) his or her name be struck off the Roll of attorneys; or
 - (bb) he or she be suspended from practice as a sanction arising out of disciplinary processes instituted by the relevant professional governing body in the legal profession; or
 - (ii) in terms of any ground provided for in section 17 of the Public Service Act, 1994.
- (5) (a) Whenever the post of Solicitor-General is vacant or if the Solicitor-General is for any reason absent or unable to exercise his or her powers or to perform his or her functions in terms of this Act, the Minister of Justice and Constitutional Development may appoint any person who meets the criteria for appointment referred to in subsection (1), to act in that post.
- (b) Whenever a post of state attorney is vacant or if a state attorney is for any reason absent or unable to perform his or her functions in terms of this Act, the Minister of Justice and Constitutional Development may, after consultation with the Solicitor-General, appoint any person who meets the criteria for appointment referred to in subsection (3), to act in that post.
- (6) The Minister of Justice and Constitutional Development may delegate any power conferred on him or her under this section to the Solicitor-General.

(7) The creation, grading and classification of the post of Solicitor-General and all posts on the establishment of all offices of State Attorney and the remuneration and conditions of service of all persons occupying such posts, are determined by the laws governing the public service.

(8) (a) The person holding office as State Attorney in charge of the office of the State Attorney in Pretoria and any person in charge of any branch of that office at the commencement of the State Attorney Amendment Act, 2014, is deemed to have been appointed as a State Attorney under this section.

(b) Any other person holding an appointment in the office of the State Attorney in Pretoria and any branch thereof at the commencement of the State Attorney Amendment Act, 2014, is deemed to have been appointed under this section.

(9) The Minister of Justice and Constitutional Development may require any person appointed in terms of subsection (3) or deemed to have been appointed under subsection (8), to exercise such powers and perform such functions as the Minister may determine, in addition to the exercise of their powers and performance of their functions in terms of this Act.

(10) Despite anything to the contrary in any law, practice or custom in force or prevailing in any part of the Republic, the Solicitor-General and any person holding an appointment in an office of State Attorney may, notwithstanding that he or she is an attorney, notary or conveyancer, receive a salary in respect of all services rendered or to be rendered by him or her under his or her appointment.”.

Substitution of section 3 of Act 56 of 1957, as amended by section 35 of Act 93 of 1962, section 2 of Act 7 of 1966 and section 1 of Act 49 of 1966

3. The following section is hereby substituted for section 3 of the principal Act:

“Functions of [State Attorney’s office] offices of State Attorney

3. (1) The functions of the **[office of the State Attorney and of its branches] offices of State Attorney** shall be the performance in any court or in any part of the Republic of such work on behalf of the Government of the Republic as is by law, practice or custom performed by attorneys, notaries and conveyancers **[or by parliamentary agents: Provided that the functions in regard to his or her duties as parliamentary agent shall be subject to the Standing Rules of the respective Houses of Parliament].**

(2) There may also be performed at the **[State Attorney’s office or at any of its branches] offices of State Attorney** like functions for or on behalf of the administration of any province, **[and the South African Railways and Harbours Administration,]** subject to such terms and conditions as may be arranged between the Minister of Justice and Constitutional Development and the **[Administration] administration** concerned.

(3) Unless the Minister of Justice and Constitutional Development otherwise directs, there may also be performed at the **[State Attorney’s office or at any of its branches] offices of State Attorney** like functions in or in connection with any matter in which the Government or such an administration as aforesaid, though not a party, is interested or concerned in, or in connection with any matter where, in the opinion of **[the] a** State Attorney or of any person acting under his or her authority, it is in the public interest that such functions be performed at the said **[office or at one of its branches] offices.**

(4) The Minister of Justice and Constitutional Development shall after consultation with the Solicitor-General, who must consult with the State Attorneys, determine policy relating to the functions of the offices of State Attorney as set out in section 3, which must include the following:

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

- (d) initiating, defending and opposing of matters; and
 - (e) implementing alternative dispute resolution mechanisms in the resolution of litigation against the State,
- which must be observed by all persons appointed in the offices of State Attorney.

(5) The policy relating to the functions of the offices of State Attorney referred to in subsection (4) and any amendments thereto must be—

- (a) approved by Cabinet; and
- (b) tabled in Parliament by the Minister of Justice and Constitutional Development.”.

Insertion of section 3A in Act 56 of 1957

4. The following section is hereby inserted in the principal Act after section 3:

“Powers and functions of Solicitor-General

3A. (1) The Solicitor-General shall—

- (a) be the executive officer of all offices of State Attorney;
- (b) exercise control, direction and supervision over all offices of State Attorney; and
- (c) in implementing the policy referred to in section 3(4), issue directives and standards regarding the functions referred to in that section, which standards and directives must be observed by all persons appointed in the offices of State Attorney.

(2) The Solicitor-General shall—

- (a) exercise the powers and perform the functions as determined in terms of this Act or any other law; and
- (b) perform any other function that may be required of him or her by the Minister of Justice and Constitutional Development.

(3) The directives and standards referred to in subsection (1)(c) and any amendments thereto must be tabled in Parliament by the Minister of Justice and Constitutional Development.

(4) (a) The Solicitor-General may, subject to paragraphs (b) and (c) and any conditions he or she may determine, delegate in writing, any power conferred on him or her under this Act to any person appointed by the Minister of Justice and Constitutional Development in terms of section 2(3)(a) and (b).

(b) The Solicitor-General is not divested of any power so delegated and may amend or set aside any decision made in the exercise of that power, subject to any rights that may have accrued to a person as a result of the decision.

(c) The Solicitor-General may not delegate the power to issue directives and standards conferred on him or her in terms of subsection (1)(c).”.

Amendment of section 6 of Act 56 of 1957, as substituted by section 36 of Act 93 of 1962

5. Section 6 of the principal Act is hereby amended by the substitution for subsections (1), (2) and (3) of the following subsections, respectively:

“(1) In every application, motion, action, suit or other legal proceedings of a civil nature in or before any court in or in connection with which [the] a State Attorney, or any person employed in [the State Attorney’s office or a branch thereof] an office of State Attorney and admitted and entitled to practise as aforesaid, has appeared, or in any matter wherein [he] such State Attorney or any such person has acted in the performance of any of the said functions, fees and costs may be taxed and recovered in the same manner as if such functions had been performed by a practitioner in private practice.

(2) Notwithstanding anything to the contrary in any law, such fees and costs shall in the case of any such application, motion, action, suit or other legal proceedings include the amount of any [stamp duty and] fee of office which would have been payable and borne by the Government of the Republic (including any administration referred to in subsection (2) of section three) in respect of any document filed,

lodged, registered or issued by **[the]** a State Attorney or by any person employed in **[the State Attorney's office or any branch thereof]** an office of State Attorney, if such document were not exempt from such **[duty or]** fee under the provisions of any law.

(3) Notwithstanding anything to the contrary in any law but subject to the provisions of subsection (2), any document filed, lodged, registered or issued by **[the]** a State Attorney or by any person employed in **[the State Attorney's office or any branch thereof]** an office of State Attorney shall not be subject to **[stamp duty or]** any fee of office **[payable by means of stamps]**: Provided that any such **[duty or]** fee which would but for this subsection be legally payable and borne otherwise than by the Government of the Republic (including any administration referred to in subsection (2) of section *three*), may be recovered from the person concerned by **[the]** a State Attorney or by any person employed in **[the State Attorney's office or any branch thereof]** an office of State Attorney.”.

Substitution of section 7 of Act 56 of 1957

6. The following section is hereby substituted for section 7 of the principal Act:

“Right to exercise function at places [where no fixed office] other than offices of State Attorney

7. Notwithstanding anything to the contrary in any law, practice or custom, **[the]** a State Attorney and any person employed in his or her office and admitted and entitled to practise as aforesaid and any person nominated by him or her and likewise admitted and entitled to practise may, subject to the provisions of sections *four* and *five*, exercise his or her functions in any court in the Republic even though [he may have no fixed office or branch office] there is no office of State Attorney at the place where such court sits.”.

Amendment of section 8 of Act 56 of 1957, as inserted by section 37 of Act 93 of 1962 and amended by section 11 of Act 129 of 1993

7. Section 8 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection: 30

“(1) **[The State Attorney or the person in charge of a branch of the State Attorney's office]** A State Attorney shall be entitled in the exercise of his or her functions aforesaid to instruct and employ as correspondent any attorney or other qualified person to act in any legal proceedings or matters in any place in the same way and, *mutatis mutandis*, subject to the same rules, terms and conditions as govern attorneys in private practice, and shall be entitled to receive and recover from such correspondent the same allowances as he or she would be entitled to do if he or she were an attorney in private practice.”; and 35

(b) by the substitution for subsection (3) of the following subsection: 40

“(3) (a) **[The State Attorney or the person in charge of a branch of the State Attorney's office]** A State Attorney may delegate any power conferred upon him or her under this section to any person employed in **[the State Attorney's office or branch thereof, as the case may be]** an office of State Attorney.”. 45

(b) A State Attorney is not divested of any power so delegated and may amend or set aside any decision made in the exercise of that power, subject to any rights that may have accrued to a person as a result of the decision.”.

Amendment of section 9 of Act 56 of 1957, as amended by section 5 of Act 7 of 1966 and section 46 of Act 97 of 1986 50

8. Section 9 of the principal Act is hereby amended—

(a) by the substitution for the words preceding paragraph (a) of the following words:

- “The Minister of Justice and Constitutional Development may make regulations, not inconsistent with this Act—”;
- (b) by the substitution for paragraphs (b) and (c) of the following paragraphs, respectively:
- “(b) prescribing the places within the Republic at which **[branches of the office of the State Attorney]** offices of State Attorney shall be established and the number of persons who may be employed at **[any such branch]** such offices;
- (c) as to the instruction and employment of attorneys, notaries and conveyancers, by or on behalf of **[the]** a State Attorney;”;
- (c) by the substitution in paragraph (d) for subparagraphs (i) and (ii) of the following subparagraphs, respectively:
- “(i) a minimum period for which a person who has completed his or her service under articles to **[the]** a State Attorney or a professional assistant in **[the office, or a branch of the office, of the State Attorney]** an office of State Attorney, shall serve the State in such office **[or in any branch of such office]**, which period may vary according to the period of service under such articles;
- (ii) an amount (which may vary according to the period served in **[such office or in any such branch]** an office of State Attorney under such articles or after completion of service thereunder) which any person who fails to complete his or her service under articles to **[the]** a State Attorney or **[such]** a professional assistant in an office of State Attorney, or so to serve the State for the period so provided for, may be required to pay to the State; and”.

Substitution of section 9A of Act 56 of 1957, as inserted by section 1 of Act 45 of 1980

9. The following section is hereby substituted for section 9A of the principal Act:

“Performance by [State Attorney’s office] offices of State Attorney of work on behalf of government of foreign state”

9A. If agreed upon between the Government of the Republic and the government of any other state, **[the State Attorney’s office or any branch thereof]** an office of State Attorney may perform such kind of work as is performed under this Act by the said office **[or any such branch]** on behalf of the Government of the Republic, for or on behalf of the government of that other state in any court or in any part of the Republic or in that state, subject to such conditions as may be so agreed upon.”.

Substitution of words and expressions in Act 56 of 1957

10. The principal Act is hereby amended by the substitution for the expression “State Attorney’s office”, wherever it occurs, of the expression “offices of State Attorney”.

Substitution of long title of Act 56 of 1957

11. The following long title is hereby substituted for the long title of the principal Act: **“To consolidate the laws relating to the establishment of [the office of the State Attorney] offices of State Attorney and matters [incidental thereto] connected therewith.”**.

Short title and commencement

12. This Act is called the State Attorney Amendment Act, 2014, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE STATE ATTORNEY AMENDMENT BILL, 2013

1. BACKGROUND

- 1.1 On 21 May 2012 the Minister of Justice and Constitutional Development (Minister) released the Framework for the Transformation of State Legal Services (the Framework).
- 1.2 The fundamental principles that underpin the transformation of State Legal Services include, among others, effective consolidation and coordination of legal services, including litigation services, specialisation and enhanced capacity. One of the immediate interventions required is to appoint a new head in order to ensure that litigation against and on behalf of the State is well managed. In order to give effect to the Framework relating to the above aspects, amendments to the State Attorney Act, 1957 (Act No. 56 of 1957) (the Act), are necessary.
- 1.3 The amendments contained in the State Attorney Amendment Bill, 2014 (the Bill), are an initial step in the implementation of the Framework and are intended to facilitate the appointment of the Solicitor-General (who will ultimately coordinate and manage state litigation) and also determine the powers and functions of the Solicitor-General. The Solicitor-General will be the State's chief legal adviser in all civil litigation, similar to the role of the National Director of Public Prosecutions in criminal matters.

2. OBJECTS OF BILL

The main objects of the Bill are to amend the Act to provide for the appointment of a Solicitor-General and for his or her powers and functions. The Bill also seeks to provide for the establishment by the Minister, of various offices of State Attorney, each with its head, as opposed to the current arrangement of the office of the State Attorney which is located in Pretoria and branches thereof, as envisaged in the Act. The Bill also seeks to confer certain powers upon the Minister relating to the functions of the offices of State Attorney. The Solicitor-General will be the executive head of all the various offices of State Attorney and must exercise control and supervision over these offices.

3. CLAUSE-BY-CLAUSE ANALYSIS

3.1 Clause 1

Clause 1 of the Bill substitutes section 1 of the Act, to replace the "office of the State Attorney" established in Pretoria and the branches of that office with "offices of State Attorney" (all of which will have equal status) that may be established by the Minister. Clause 1 also provides for a transitional arrangement as regards the existing office of the State Attorney established in Pretoria and branches thereof.

3.2 Clause 2

Clause 2 substitutes section 2 of the Act, to provide for the appointment of the Solicitor-General, who is subject to the direction and supervision of the Minister. Clause 2 also provides for the appointment of State Attorneys and other persons necessary for the performance of the business of the offices of State Attorney and provides for a transitional arrangement as regards the existing State Attorneys and persons appointed in the office of the State Attorney and branches thereof. It regulates the termination of these appointments, for instance when the incumbent is no longer entitled to practise as an attorney, and provides for acting appointments.

3.3 Clause 3

Clause 3 of the Bill effects technical amendments in order to refer to the offices of State Attorneys as opposed to the office of the State Attorney and its branches. It also corrects outdated references. Clause 3 adds new subsections (4) and (5) to confer the power upon the Minister to determine policy relating to the functions of the offices of State Attorney, which policy must be approved by Cabinet and tabled in Parliament.

3.4 Clause 4

Clause 4 of the Bill sets out the powers and functions of the Solicitor-General in a proposed new section 3A. This clause provides that the Solicitor-General shall exercise control over all the offices of State Attorney. This is to ensure centralised control. The clause also empowers the Solicitor-General, in implementing the policy determined by the Minister as provided for in clause 3, to issue directives and standards relating to the functions of the offices of State Attorney. This is important because it will ensure uniformity and provision of quality and cost effective legal services. The directives and standards and any amendments must be tabled in Parliament by the Minister.

3.5 Clauses 5, 6, 7, 8, 9 and 10

Clauses 5, 6, 7, 8, 9 and 10 of the Bill contain consequential technical amendments to the Act and correct outdated references, for instance the clauses seek to amend the Act in order to provide for offices of State Attorney, as opposed to the current arrangement of the office of the State Attorney in Pretoria and its branches.

3.6 Clause 11

Clause 11 of the Bill amends the long title of the Act.

3.7 Clause 12

Clause 12 provides for the short title and commencement.

4. CONSULTATION

The Framework was widely consulted. The following stakeholders have been consulted on the contents of the Bill:

- The Offices of the State Attorney; and
- Chief Litigation Officer.

5. FINANCIAL IMPLICATIONS

None.

6. PARLIAMENTARY PROCEDURE

- 6.1 The Joint Tagging Mechanism of Parliament was of the view that the Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution since the Bill addresses the terms and conditions of employment of the posts of Solicitor-General, State Attorneys and other staff employed in the State Attorneys' offices in the public service.
- 6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

