

Office of the Public Solicitor

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Introduction

Legal aid, just like health and education, is one important service that the Government is required to provide to its people. It is a unique form of service because it extends to rendering assistance to individuals in cases against the Government itself. To a large extent, this can be an exception to the aphorism “Do not bite the hand that feeds you!”

But how can a governmental body or State Service provide legal assistance to the public against itself as a government? Can it master the art of exercising restraint when confronted with conflict of interest between itself and the person it represents? From another analogy, how can the Office of the Public Solicitor represent a person who is suing the Public Solicitor for professional negligence concerning a previous case which got dismissed whilst being represented by the Public Solicitor’s Office?

Even in a case where a judicial officer is taken to task to establish his neutrality in a case of perceived biasness, it is not so much whether the judge can maintain impartiality; rather, the public perception when becoming aware of the prevailing facts relating to the conflict at hand. It is for this very reason that a special and peculiar arrangement needed to be made so that whilst attending to its obligation to provide a vital service, the Government remains at bay, allowing for justice to be served in its uncompromised state.

This is where the Public Solicitor was identified and elevated to hold an office created by the *Constitution*. Whilst the Office enjoys a constitutional status, the mandate of legal aid is also a constitutional function. The same *Constitution* also guarantees the independence of the Public Solicitor in the discharge of his duties.

As such, the Public Solicitor and his Office must remain separate from the Government. This is to ensure integrity in the dispensation of legal aid to individual persons seeking justice. It is important to understand these introductory remarks before reviewing the decision of the Supreme Court in *SCR 3 of 2018; Special Reference by Public Solicitor of the Jurisdiction of PSC., Section 19(1), In re [2019] SC1871* (13 November 2019) which clarified the status and position of the Public Solicitor in the public service.

The Public Solicitor and the Office of Public Solicitor

The two-word phrase “*Public Solicitor*” appears 20 times in the *Constitution*. All those provisions deal with the function, responsibilities, appointment, removal, and office of the Public Solicitor. The Public Solicitor is the person who occupies the office created by the *Constitution* called the Office of the Public Solicitor. In fact, he is one of a few prescribed persons who hold constitutional institutions as stipulated in section 221 of the *Constitution*. These constitutional office-holders include:

1. A Judge
2. The Public Prosecutor
3. The Public Solicitor
4. The Chief Magistrate

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5. A member of the Ombudsman Commission
6. A member of the Electoral Commission
7. The Clerk of the Parliament
8. A member of the Public Services Commission
9. The Auditor General

The Office of the Public Solicitor is a constitutional institution established by section 176(1) of the *Constitution*. The Public Solicitor is appointed by the Judicial and Legal Services Commission (JLSC) for a period of 6 years. The JLSC is a constitutional office established by the *Constitution* and is chaired by the Minister for Justice. The Commission includes the Chief Justice, the Deputy Chief Justice, the Chief Ombudsman and a Member of Parliament.

The two primary functions of the Public Solicitor are spelt out in section 177(2) of the *Constitution*. These are:

1. To provide legal aid, advice and assistance for persons in need of help by him, and in particular to provide legal assistance to a person in need of help by him who has been charged with an offence punishable by imprisonment for more than two years; and
2. To provide legal aid, advice and assistance to any person when directed to do so by the Supreme Court or the National Court;

The Public Solicitor is one of three Law Officers of PNG, the other two being the Attorney General and the Public Prosecutor. The significance of being a Law Officer can be seen from the provisions of the *Constitution*. Firstly, the Public Solicitor plays an important role as part of the National Justice Administration of the nation as specified by section 154 of the *Constitution*.

Secondly, being a Law Officer, the Public Solicitor is part of an exclusive group of individuals and entities identified in section 19 of the *Constitution*, who enjoy standing to seek the Supreme Court's opinion on constitutional provisions and the constitutionality of enactments.

Thirdly, as a Law Officer, the Public Solicitor is specially called upon under section 57 of the *Constitution* to take interest in the protection and enforcement of human rights of citizens. Fourthly, the Public Solicitor, being a Law Officer, is covered by the express injunction of section 155(6) of the *Constitution* which states that:

Subject to any right of appeal or power of review of a decision, it is the duty of all persons (including the Law Officers of Papua New Guinea and other public officers in their respective official capacities), and of all bodies and institutions, to comply with and, so far as is within their respective lawful powers, to put into effect all decisions of the National Judicial System.

From these provisions, one can clearly appreciate that the Public Solicitor plays an even greater role than merely the provision of legal aid, advice and assistance to persons in need of his help. The Public Solicitor stands equal in matters of national interest and development agendas of Papua New Guinea. In fact, our founding fathers and mothers clearly envisaged additional roles and functions to be performed by the Public Solicitor. This is clearly set out in section 177(6) of the *Constitution*:

An Act of the Parliament may confer, or may provide for the conferring of, additional functions, not inconsistent with the performance of the functions conferred by Subsections (1) and (2), on the Public Prosecutor or the Public Solicitor.

The exercise of the powers and functions of the Public Solicitor highlighted above were questioned and clarified by the Supreme Court in two cases which are discussed below. These two decisions have empowered the Public Solicitor to confidently perform his role as a Law Officer of the country.

SCR 1 of 1978; Re Ombudsman Commission Investigations of the Public Solicitor [1978] PNGLR 345

This was a special reference that centered on the more conventional functions of an Ombudsman Commission, that is, the investigation of, and reporting on, maladministration by government and government officials. Two questions were referred to the Supreme Court:

1. Does the Ombudsman Commission have jurisdiction (a) on its own initiative or (b) on complaint by a person affected, to investigate any conduct of the Public Solicitor or an officer or employee of the Public Solicitor's Office?
2. Can the Ombudsman Commission require the Public Solicitor to produce to the Ombudsman Commission any documents, relating to any matter being investigated by the Ombudsman Commission that are in the possession or control of the Public Solicitor.

In answering these questions, the court had to first, review the roles and functions of the Ombudsman Commission.

The Ombudsman Commission is established by section 217 of the *Constitution*. The Commission comprises the Chief Ombudsman and two Ombudsmen. The purposes of the Ombudsman are: (a) to ensure that all governmental bodies are responsive to the needs and aspirations of the people; (b) to help in the improvement of the work of governmental bodies and the elimination of unfairness and discrimination by them; (c) to help in the elimination of unfair or otherwise defective legislation and practices affecting or administered by governmental bodies; and (d) to supervise the enforcement of the Leadership Code.

The Ombudsman Commission is empowered under section 219 of the *Constitution*, to investigate, on its own initiative or on complaint by a person affected, any conduct on the part of:

1. Any State Service or provincial service, or a member of any such service.
2. Any other governmental body, or an officer or employee of a governmental body.
3. Any local government body or an officer or employee of any such body.
4. Any other body set up by statute appointed by the National Executive or an officer or employee of any such body.
5. Any member of the personal staff of the Governor-General, a Minister or the Leader or Deputy Leader of the Opposition.

In answering the questions, the Supreme Court, by majority (Prentice CJ, Wilson J) held that:

- The Public Solicitor is not a State Service whose conduct the Ombudsman Commission has jurisdiction to investigate by reason of section 219(1)(a)(f) of the *Constitution*.
- The Public Solicitor does not fall within the description "other governmental body" whose conduct the Ombudsman Commission has jurisdiction to investigate by reason of section 219(1)(a)(iii) of the *Constitution*.
- The powers of investigation of the Ombudsman Commission to investigate conduct under section 219 of the *Constitution* are limited to investigation of conduct of an administrative kind.
- The Ombudsman Commission does not have jurisdiction under section 219 of the *Constitution*, (other than in relationship to a *Leadership Code* matter involving the Public Solicitor's personal conduct) to investigate any conduct of the Public Solicitor or an officer or employee of the Public Solicitor's Office, on its own initiative or on complaint by a person affected.
- The Ombudsman Commission cannot require the Public Solicitor to produce to the Ombudsman Commission any document, relating to any matter being an investigation of the conduct of the Public Solicitor or an officer or employee of the Public Solicitors Office,

whether on its own initiative or on complaint by a person affected, that are in the possession or control of the Public Solicitor.

A closer examination of the decision of Prentice CJ highlights the following important attributes of the Public Solicitor and his Office:

- The Public Solicitor is not an arm of government.
- The Public Solicitor, by Section 176(1), is a creature of the people not of Parliament.
- The Public Solicitor is appointed by the Judicial and Legal Services Commission, a creature of the people and not of the Parliament.¹
- The Public Solicitor is not subject to direction or control by any person or authority, in the performance of his functions under the *Constitution*.²

Wilson J noted section 188 of the *Constitution* (which establishes four State Services, that is: (a) the National Public Service; (b) Police; (c) Defence Force; and (d) Parliamentary Service) and made this significant observation:

It is to be noted immediately that the Public Solicitor is not included as one of the State Services thereby established, and no Act of the Parliament has made provision for or in respect of the Public Solicitor as a State Service. The Public Solicitor could hardly be said to be a member of the National Public Service and therefore a member of a State Service (see s. 188 (1)(a)). It is to be noted that his office is established by, the manner of his appointment is laid down in, his functions are set out in, and the circumstances of his removal from office, are specified in s. 176 to s. 178 of the *Constitution*. It would have been unnecessary to have spelt out such matters if the Public Solicitor was a public servant, because such matters are covered in the legislation appertaining to public servants.

The status of the Office of the Public Solicitor and the power and functions of the Public Solicitor remained unchallenged for almost 30 years, until 2018, when the Supreme Court was again asked to review the role of the Public Solicitor.

SCR 3 of 2018; Special Reference by Public Solicitor re Jurisdiction of PSC (2019) SC1871

This reference was filed by the Public Solicitor following a review by the Public Service Commission (PSC) on a personnel matter involving a senior legal officer of the Public Solicitor's Office who was disciplined and dismissed from the office. The PSC reviewed the decision of the Public Solicitor and set aside the dismissal and ordered reinstatement and back-dated payment of salaries and allowances for the officer. The Public Solicitor contended that the jurisdiction of the PSC did not extend to bodies falling outside the National Public Service including his Office. This view was based on the Supreme Court decision in *SCR 1 of 1978; Reference by Ombudsman Commission re review powers of the Ombudsman over the Public Solicitor*.

The Public Solicitor referred the following question to the Supreme Court:

Does the Public Services Commission have jurisdiction under Sections 191 and 194 of the *Constitution* to review any decision of the Public Solicitor or an officer or employee of the Public Solicitor's office?

As it did in 1978, the Supreme Court began by reviewing the role of the PSC. It noted that the PSC is established by section 190 of the *Constitution*. The PSC, like the Ombudsman Commission, consists of three members appointed by the Head of State on the advice of the Public Services Commission Appointments Committee. According to Section 191 of the *Constitution*, the PSC has three primary functions:

¹ See section 183 of the *Constitution*.

² See section 176(5) of the *Constitution*.

1. The review of personnel matters connected with the National Public Service.
2. The continuous review of the State Services (other than the Defence Force), and the services of other governmental bodies, and advising the National Executive Council and other responsible authorities on organizational matters.
3. Providing recommendations and views through a process of consultation regarding decisions on appointments, revocation of appointments and suspension from office of some senior public office-holders, including Departmental Heads, the Commissioner of Police and the Commander of the Defence Force.

As mentioned above, the *Constitution* establishes four State Services under section 188. These are:

1. The National Public Service.
2. The Police Force.
3. The Papua New Guinea Defence Force.
4. The Parliamentary Service.

The PSC's jurisdiction to review personnel decisions is confined to those connected with the National Public Service. The *Constitution* does not define "National Public Service". The *Public Services (Management) Act* 1995 fills this void. This legislation is aimed at implementing section 195 of the *Constitution* and to govern the operation of the National Public Service. Section 20 of the legislation is pertinent. It states that:

- (1) There shall be-
 - (a) a Department of the Prime Minister and National Executive Council; and
 - (b) a Department of Personnel Management; and
 - © such other Departments and Offices deemed as Departments as are established under Subsection (2).
- (2) The Head of State, acting on advice, may, by notice in the National Gazette-
 - (a) establish a Department or an Office deemed as a Department; or
 - (b) abolish a Department or deemed Department; or
 - (c) alter the name of a Department or deemed Department other than the Department of Prime Minister and National Executive Council and the Department of Personnel Management.

The National Public Service therefore consists of:

1. The Department of the Prime Minister and National Executive Council.
2. The Department of Personnel Management.
3. Such other Departments and offices deemed as Departments as are established under the *Public Services (Management) Act*.

So, the key question is: Does the PSC have jurisdiction over the Public Solicitor and his Office? The Supreme Court (*Salika CJ, Kandakasi DCJ, Kirriwom J, Cannings J, Yagi J*), in a unanimous decision held that the PSC does not have jurisdiction under sections 191 and 194 of the *Constitution* to review any decision of the Public Solicitor or an officer or employee of the Public Solicitor's Office.

The court ruled that the Office of Public Solicitor is neither a Department nor a deemed Department. Therefore, it is not part of the National Public Service. Furthermore, officers and employees of the Office of Public Solicitor are not members of the National Public Service. Labelling lawyers and other officers and employees in the Office of Public Solicitor as "public servants" does not assist in determining the jurisdiction of the PSC. The term "public servant" is not a legal term. It is a colloquialism. It can refer to any person employed by a public body.

It is therefore, only proper that the terms and conditions of employment of officers and employees of the Office of Public Solicitor are set by the Public Solicitor at his discretion. As emphasised by

the Court, the Public Solicitor is under no legal or administrative obligation to adopt the terms and conditions applying in the National Public Service.

Conclusion

The Office of Public Solicitor is not a “governmental body” and stands outside the investigative jurisdiction of the Ombudsman Commission under Section 219(1) of the *Constitution* and the *Organic Law on the Ombudsman Commission*, as well as the review jurisdiction of the PSC.

The Public Solicitor, as Wilson J pointed out in *SCR 1 of 1978; Reference by Ombudsman Commission re review powers of the Ombudsman over the Public Solicitor*, is also a Law Officer of PNG (see s.156 of the *Constitution*) and a constitutional office-holder. The Office of the Public Solicitor is neither a State Service nor a member of any State Service; it is not a member of the national public service nor is it required to be.³ The Office is not a governmental body.

This decision is very significant and accords the Public Solicitor and his Office the real nature and true position it ought to maintain. The Public Solicitor is an important figure in the National Administration of Justice in PNG. The Office of the Public Solicitor plays an even equal role to that of the Ombudsman Commission. It holds government and its various agents and instruments to account to the law and its people. As pointed out by Cannings J:

The Public Solicitor is a constitutional office-holder. He is one of the three Law Officers...He has an inherent and constitutionally recognized interest in the protection and enforcement of human rights. He is an integral part of the National Justice Administration. He has a great measure of independence.⁴

A passage from the CPC Report is apt and gives some relevant background to the position taken by the Supreme Court in both cases.

We do not consider that private practitioners will be able to provide legal services on the scale and of the nature required by our people in the future, nor do we think they can be expected to do so. We are convinced that the Office of the Public Solicitor is the best institution to provide legal assistance to the great majority of our people.

No-one should be denied legal assistance by reason of his financial circumstances or the fact that he or she is unable to establish contact with persons of authority or influence. Law courts we believe should be available to all persons, not just to persons who have money.

We have found public opinion throughout the country to be in favour of making the Public Solicitor's Office constitutionally independent of the executive government. We ourselves believe that this independence is essential in order to provide legal services to the majority of our people and to protect the rights of individuals and small groups.⁵

The decisions of the Supreme Court bolster the independence of the Public Solicitor in the conduct of his office and functions. It now paves the way for the Public Solicitor and his management to take steps to put in place the appropriate machinery to reflect its constitutional status.

However, while the clarity provided by the Supreme Court on the character of the Office of the Public Solicitor and the Public Solicitor is a victory for the Public Solicitor, it is also imperative to heed the caution by Brunton AJ:

The Public Solicitor's Office is, nonetheless, part of the National Government in a broad sense. Accordingly, the Independent State of Papua New Guinea is vicariously liable for the negligence of lawyers in the course of their employment with the Public Solicitor.⁶

³ See *Organic Law on Certain Constitutional Office-holders* and section 223 of the *Constitution*.

⁴ *Enforcement of Basic Rights* (2014) N5512.

⁵ Constitutional Planning Committee, *Final Report of the Constitutional Planning Committee* (Port Moresby: Government Printer, Konedobu, 1974) 108-110.

⁶ *Martha Limitopa v The State* [1988-89] PNGLR 364.

As pointed out in the introduction, legal aid is one crucial service any government ought to provide to its people. In PNG, this service is provided by the Government through the Public Solicitor. Hence, funding for legal aid service comes from the Government. Equally so is any payment of damages for negligence on the part of the lawyers in the employ of the Public Solicitor.